ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-29

September 18, 2024

ENERGY AND MINERALS

Case File Number 024694

Office URL: www.oipc.ab.ca

Summary: On December 17, 2020, the Applicant made the following access request to Energy and Minerals (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act):

> ABHA [Backcountry Hunters and Anglers (Alberta Chapter)] requests all records relating to Alberta Energy's assessment of the "policy gap risk" and to Alberta Energy's "review of the coal categories," as referenced in Alberta Energy's March 20, 2020 Advice to Minister (AR35437). A copy of this Advice document is attached. The relevant portion is on page 2 of the Advice document, which states:
>
>> Despite existing land use policies, there is a risk that rescission could result in policy gaps because several Integrated Resource Plans that remain active within the Eastern Slopes rely on the coal categories to establish baseline conditions (mostly in the South Saskatchewan Region, but also a portion of the Upper Athabasca Region).
>>
>> The full extent of the policy gap risk will not be quantified until Alberta Energy completes its review of the coal categories with input from Environment and Parks. This work is expected to be complete in summer 2020.
>
> The time period for the records we are requesting is from May 15, 2020 to the date of this records request.

On February 2, 2022, the Public Body provided a response to the request for access. It withheld records under sections 24 (advice from officials), 25 (disclosure harmful to economic and other interests of a public body), and 27 (privileged information).

The Adjudicator found that the Public Body had not demonstrated that it conducted an adequate search for responsive records. The Public Body's explanation of its decisions regarding the responsiveness of records revealed that it had adopted an overly narrow interpretation of the access request. As the Applicant had requested records relating to the policy gap analysis and the Public Body indicated that only records created in the course of the analysis or used in the analysis were considered to be responsive, the Adjudicator determined that the Public Body had not conducted an adequate search for responsive records.

The Adjudicator found that section 24(1)(a) applied to a portion of page 54, but found that section 24(1) did not apply to any other records to which the Public Body had applied this provision. The Adjudicator directed the Public Body to reconsider its decision to withhold the information on page 54 from the Applicant, as the Public Body's submissions did not support finding that it had made the decision to withhold information based on relevant considerations.

The Adjudicator found that section 25 did not authorize the Public Body to sever information.

The Adjudicator found that the Public Body had not established the records to which it had applied section 27(1)(a) were subject to solicitor-client privilege. The Adjudicator directed the Public Body to provide adequate evidence and submissions supporting its claim of privilege or to disclose the records to which it had applied section 27(1)(a) to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25, ss. 10, 24, 25, 27, 29, 72

Authorities Cited: AB: Orders 96-017, F2004-026, F2007-029, F2013-18, F2015-29, F2022-28, F2022-62; F2024-17 **ON:** Order P-763

Cases Cited: *Alberta Energy v Alberta (Information and Privacy Commissioner)*, 2024 ABKB 198 (CanLII); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821); *Trillium v. Cassels Brock & Blackwell et al,* 2013 ONSC 1789 (CanLII); *TransAlta Corporation v Alberta (Environment and Parks),* 2024 ABCA 127 (CanLII)

I. BACKGROUND

[para 1] On December 17, 2020, the Applicant made the following access request to Energy and Minerals (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act):

> ABHA [Backcountry Hunters and Anglers (Alberta Chapter)] requests all records relating to Alberta Energy's assessment of the "policy gap risk" and to Alberta Energy's "review of the coal categories," as referenced in Alberta Energy's March 20, 2020 Advice to Minister (AR35437). A

> copy of this Advice document is attached. The relevant portion is on page 2 of the Advice document, which states:
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>> Despite existing land use policies, there is a risk that rescission could result in policy gaps because several Integrated Resource Plans that remain active within the Eastern Slopes rely on the coal categories to establish baseline conditions (mostly in the South Saskatchewan Region, but also a portion of the Upper Athabasca Region).
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>> The full extent of the policy gap risk will not be quantified until Alberta Energy completes its review of the coal categories with input from Environment and Parks. This work is expected to be complete in summer 2020.
>
> The time period for the records we are requesting is from May 15, 2020 to the date of this records request.

[para 2] On February 2, 2022, the Public Body provided a response to the request for access. It withheld records under sections 24 (advice from officials), 25 (disclosure harmful to economic and other interests of a public body), 27 (privileged information), and 29 (information that is or will be available to the public) of the FOIP Act. In addition, some records were marked as “non-responsive”.

[para 3] The Applicant obtained the information to which the Public Body applied section 29. The Applicant made another request for access to the Public Body for the records that had been withheld on the basis of being non-responsive (Case file #026672). The Applicant asked the Commissioner to review the Public Body’s redactions under sections 24, 25, and 27, and its search for responsive records in relation to case file #024694.

[para 4] The Commissioner agreed to conduct an inquiry and delegated the authority to conduct it to me.

[para 5] This order addresses the issues arising from the Applicant’s request for review in relation to case file #024694.

II. ISSUES

ISSUE A: Did the Public Body meet its duty to assist the Applicant as provided by section 10(1) of the Act (duty to assist)?

ISSUE B: Is the Public Body authorized by section 24(1) of the Act (advice from officials) to withhold information from the Applicant?

ISSUE C: Is the Public Body authorized by section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to withhold information from the Applicant?

ISSUE D: Is the Public Body authorized by section 27(1) of the Act (privileged information) to withhold information from the Applicant?

III. DISCUSSION OF ISSUES

ISSUE A: Did the Public Body meet its duty to the Applicant as provided by section 10 (duty to assist) of the FOIP Act?

[para 6] Section 10(1) of the FOIP Act creates a duty to assist applicants. It states:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 7] In Order F2007-029, former Commissioner Work said the following about a public body's duty to assist under section 10(1):

> The Public Body has the onus to establish that it has made every reasonable effort to assist the Applicant, as it is in the best position to explain the steps it has taken to assist the applicant within the meaning of section 10(1).
>
> […]
>
> Previous orders of my office have established that the duty to assist includes the duty to conduct an adequate search for records. In Order 2001-016, I said:
>
>> In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) (now 10(1)) of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) (now 10(1)).
>>
>> Previous orders . . . say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion what has been done.

[para 8] In the same order, former Commissioner Work said that a public body should submit evidence covering the following points regarding its search:

> In general, evidence as to the adequacy of a search should cover the following points:
>
> - The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> - The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> - The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> - Who did the search

> - Why the Public Body believes no more responsive records exist than what has been found or produced […]
>
> If a public body submits evidence on the foregoing points, and the steps its evidence establishes it took are reasonable, the Public Body will have established that it conducted a reasonable search for responsive records.

[para 9] The duty to assist also includes the duty to take steps to clarify the terms of an access request when a public body is uncertain as to the kinds of records an applicant is seeking. Whether the duty to conduct a reasonable search for responsive records is met is, in some cases, dependent on the manner in which a public body interprets an applicant's access request. If a public body adopts an overly narrow interpretation of an access request, the scope of its search may be too narrow with the result that it will fail to locate responsive records. If a public body interprets an access request too broadly, it may expend resources searching for records an applicant does not want.

[para 10] In Order F2013-18, I reviewed cases involving a public body's duty to clarify an access request and said:

> In F2004-026, former Commissioner Work noted that public bodies may have to clarify access requests in some circumstances in order to meet the duty to assist. He said:
>
> > Finally, in its oral submission, the Applicant argued that the Public Body failed in its duty to assist by failing to clarify with the Applicant what it meant by "implementation" in the context of its original request. The Public Body suggested it did not do this because it assumed that it already understood the request. It explained that it thought it would not be reasonable for the Applicant to ask for the numbers of records that would be involved on the other understanding (that the request included all records in 2003 created by the Public Body relative to Bill 27 after the Bill's passage - which the Public Body described as "11 cubic feet of records"). While I have some sympathy with the Public Body's point, I have also been advised by the parties that the Applicant has since clarified this aspect of the request, which suggests that clarification was possible, and that there is indeed some further information relative to this aspect that is being sought. Thus I agree that the Public Body should have asked for clarification as to the part of the request that was ambiguous in its wording, rather than relying on its assumption, and that its failure to take this step was a failure to assist the Applicant.
>
> In Order F2011-016, the Adjudicator considered previous orders of this office commenting on the duties of public bodies to interpret access requests reasonably.
> He said:
>
> > The Applicant submits that the Public Body was too restrictive in its interpretation of the information that he requested and therefore overlooked responsive records. Previous Orders of this Office have said that a record is responsive if it is reasonably related to an applicant's access request and that, in determining responsiveness, a public body is determining what records are relevant to the request (Order 97-020 at para. 33; Order F2010-001 at para. 26). The Applicant argues that applicants should be given some latitude under the Act when framing their access requests, as they often have no way of knowing what information is actually available. I note Orders of this Office saying that a broad rather than narrow view should be taken by a public body when determining what is responsive to an access request (Order F2004-024 at para. 12, citing Order F2002-011 at para. 18).

> In that order, the Adjudicator found that Alberta Health Services had taken too restrictive an approach in its interpretation of the kinds of information requested by the applicant. As a result, the Public Body had failed to meet its duty to assist the applicant, because it had not searched for the records the applicant had requested.
>
> Because the Public Body took an overly restrictive view of the information that the Applicant was seeking, in view of both the wording of his initial access request and the clarification subsequently provided by him, I find that the Public Body did not adequately search for responsive records and therefore did not meet its duty to assist the Applicant under section 10(1) of the Act. I intend to order it to conduct another search for responsive records, bearing in mind the scope of the information that the Applicant actually requested, as discussed above.
>
> As former Commissioner Work noted, a public body has a duty to clarify ambiguously worded access requests or access requests that are open to more than one interpretation. If more than one interpretation is possible, and different interpretations result in more or less records being located, then the Public Body has a duty to clarify what the Applicant meant. This duty exists because a public body is usually in a better position to know its own processes, what kinds of records it has, where it keeps them, when it creates them, and how its forms are to be interpreted, than is an applicant. Ambiguity can arise in an access request simply because an applicant is unaware of the language used by a public body, the kinds of decisions it makes, and the kinds of processes it has in place and how it documents them.
>
> If a public body has adopted an overly restrictive interpretation of the access request without consulting the applicant, and other interpretations are possible and better reflect the kinds of records the applicant is seeking, then the public body may fail to meet its duty to assist the applicant, by failing to search for responsive records. If it is found that a public body has failed to conduct an adequate search for responsive records because of an overly narrow interpretation of an access request, the public body will be ordered to conduct an adequate search for responsive records that includes the kinds of records sought by the applicant.

"Responsive records" are records falling within the terms of an access request. If a public body fails to include responsive records in its search because it adopted an artificially narrow interpretation of an access request, it will fail to meet its duty to assist the applicant. Among the steps a public body should take prior to initiating a search is to determine the kinds of records for which it will search. In some cases, it will be necessary to consult with the applicant as to the kinds of records being sought.

[para 11] I turn now to the question of whether the Public Body has met the duty to assist the Applicant, by searching for responsive records and informing the Applicant as to what was done.

[para 12] The Public Body states:

> Each of the divisions and areas within Energy have a designated individual, known as a line contact, who is responsible for collecting the responses/estimates of records of their particular division/area. The line contacts know their business areas, are familiar with their records and the appropriate locations to search for potential responsive records and have a solid understanding of their obligations under FOIP and what constitutes a thorough search for records. Each of the line contacts responded to the FOIP office, filling out forms C and D that state either the number of records retrieved from the search, or a "No Records" response.

> The Search and Retrieval (S&R) request consisted of two part and was sent on December 18, 2020 to the following areas:
>
> • Deputy Minister's Office/Minister's Office (DMO/MO); • Communications;
> • Energy Policy Division (EP) including: Resource Stewardship Policy (RSP); Resource Development Policy (RDP); Assistant Deputy Minister's Office (ADMO); Energy Information and Analysis, Generation, Transmission & Markets (EIA); Retail, Distribution and Coal (REC);
> • Strategy and Market Access Division (SAMA) including ADMO, Market Access (MA), Natural Gas Strategy and Engagement (NGSE) and Strategic Initiatives (SI);
> • Energy Operations Division (EO) including: Oil Sands, Coal and Mineral Operations. A revised S&R was sent out on January 5 in which the two parts of the original request was separated into two separate requests at the request of the Applicant. The time frame for this part did not change. As Communications had already responded on December 23, 2020 with a 'no records response' and Energy Operations also had responded on December 22, 2000 with a 'no records response', the revised S&R was sent on January 5, 2021 to the following areas :
> • DMO/MO ;
> • EP including : RSP, RDP, ADMO, EIA, and REC;
> • SAMA including ADMO, MA, NGSE, and SI.
>
> This was a broad search sent to all business areas in relevant Divisions within the Energy Department as it was structured at the time of processing. The S&R stage was completed on January 18, 2021 with only EP providing records responsive to this request.
>
> Search responses were provided by the assigned Line Contacts who support FOIP processes; their responses were based on the business areas' Subject Mater Experts (SMEs).
>
> Each line contact signed a form indicating that a reasonable search had been conducted and that all areas had been searched including record repositories (i.e active, semi-active, inactive, central filing, staff offices, ARTS, Email, SharePoint, Electronic Data Bases, Audio-visual media, maps, note-books). These search forms provide the SMEs with reminders for S&R adequacy and completeness of all relevant records areas / sources, as well.
>
> The FOIP Advisor relies on the Department's SMEs and administrative support staff to complete the searches in their areas as they are the most knowledgeable of their work area (both in subject matter and relevant record repositories). The business areas have specific-assigned FOIP contacts/Line Contacts to handle the FOIP S&R process. The standard FOIP practice is a request for each business area to provide documentation of their searches and summary of their Division / Office. On this file the FOIP Advisor received S&R responses from all business areas that received the S&R.
>
> Due to the above, the Public Body believes an adequate search has been completed and that no more responsive records exist other than what has been found or produced.

[para 13] In the foregoing excerpt from its initial submission, the Public Body explains where it searched for records, but does not explain how it interpreted the access request. To put the point differently, it does not explain what it was searching for. While the Public Body asserts that "Subject Matter Experts" signed forms stating that they had conducted a reasonable search, I am not told how they understood the access request.

[para 14] The Public Body states that it withheld information as "nonresponsive" on the following basis.

> Regarding page 7, there is a reference to the maps; however, this reference was deemed as being non-responsive to the scope because this reference was not a part of the policy gap analysis.

> Instead, it was contextual information provided for another department. The comments provided an interpretation of the coal categories, which was information that pre-existed the policy gap analysis project and did not form a part of the project.

[para 15] From the foregoing I infer that the Public Body interpreted the Applicant's access request as excluding references that were not part of the policy gap analysis. The Public Body also appears to have excluded any information preexisting the policy gap analysis.

[para 16] With regard to the records the Public Body produced, the Applicant states:

> As discussed in part II.B above, BHA requested records relating to Alberta Energy's "review of the coal categories," including its assessment of the "policy gap risk" from rescinding the Coal Policy. The staff's March 20, 2020 briefing note referred to this review and assessment and said they were "expected to be complete in summer 2020."
>
> The few pages of records Alberta Energy fully or partly disclosed make almost no reference to either of these studies. One page is a presentation slide with a timeline noting that, the "charter" for the coal category review study was signed and work on the study began, in 2019. And another slide includes a list item that mentions a briefing note—presumably the March 20, 2020 briefing note—that refers to the policy gaps assessment and coal category review.

[para 17] Cited in the Background, above, and as the Applicant noted in the foregoing excerpt, the Applicant's access request is the following:

> ABHA requests all records *relating to* [my emphasis] Alberta Energy's assessment of the "policy gap risk" and to Alberta Energy's "review of the coal categories," as referenced in Alberta Energy's March 20, 2020 Advice to Minister (AR35437). A copy of this Advice document is attached. The relevant portion is on page 2 of the Advice document, which states:
>
>> Despite existing land use policies, there is a risk that rescission could result in policy gaps because several Integrated Resource Plans that remain active within the Eastern Slopes rely on the coal categories to establish baseline conditions (mostly in the South Saskatchewan Region, but also a portion of the Upper Athabasca Region).
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>> The full extent of the policy gap risk will not be quantified until Alberta Energy completes its review of the coal categories with input from Environment and Parks. This work is expected to be complete in summer 2020.
>
> The time period for the records we are requesting is fromh May 15, 2020 to the date of this records request.

[para 18] The Applicant also argues:

> As noted above, BHA's understanding is that the studies were never completed. If this is correct, then the Release Packages should reasonably be expected to include records showing how much work had been done (up to December 2, 2020) and when and why the government decided not to finish the studies. The apparent absence of any of this information suggests that Alberta Energy has not conducted an adequate search for all records relating to these studies.
>
> The apparent absence of any of this information suggests that Alberta Energy has not conducted an adequate search for all records relating to these studies.

> To satisfy its burden of proving that it conducted an adequate search, Alberta Energy should provide an affidavit with the information listed on page 3 of the Adjudicator's Notice of Inquiry, as well as evidence that the search scope included the files of the Alberta Energy staff who were involved in the two studies.

[para 19] The Applicant did not limit the access request to only records and information actually used or incorporated into the assessment of the policy gap risk analysis, but all records *relating to* any such assessment. Information *relating* to the assessment could include (but would not necessarily be limited to) information referring to the assessment, even if it is provided to or by an entity other than the Public Body, or an employee not involved in the Policy Gap risk analysis or information provided for use in the assessment (whether or not it was used), any information created by employees in the course of the assessment or for the purpose of it, information about meetings to discuss the assessment, and any information initiating, coordinating, or terminating the assessment. As the Applicant notes, information about a decision to cancel the analysis would also be responsive to the access request. Under the Public Body's apparent interpretation of the access request, such information would not be, as such information would not be used in the policy gap analysis or created in the course of it.

[para 20] The phrase "relating to" is far broader in meaning than "part of". Information that is related to a topic need only have a connection to it. It is unclear why the Public Body took the position that only information that was "part of the gap analysis" was within the scope of the access request when it severed the records. If the Public Body searched only for records that were "part of" the gap analysis, it may have conducted a search for records that omitted categories of responsive records that were connected to the analysis but were not used in the gap analysis. The information the Public Body severed from the records as "nonresponsive" is historical information related to or connected to the policy gap risk analysis, even though it may not have ultimately been used in the analysis. Such information falls within the terms of the access request on the basis that it is "related" to it.

[para 21] The Public Body has provided information regarding the areas it searched and listed the areas that produced records. It has provided no information as to how the access request was interpreted, why it was interpreted that way, or the instructions it provided to employees who conducted the searches as to the records that would be responsive.

[para 22] The Public Body has not explained what kinds of records it considered to be responsive, and states that it "deemed" information to be nonresponsive that appears to fall within the terms of the Applicant's access request. It is possible that the Public Body limited its search to records actually used in the policy gap analysis, as opposed to information that merely relates to it. If it did so, then the Public Body conducted a search that omitted categories of responsive records.

[para 23] When the issue is adequacy of search, the Public Body is in the best position to establish that it took the steps necessary to conduct a reasonable search. In this case, the Public Body's evidence and explanation of its search does not establish that it

looked for all the records reasonably related to the Applicant's request. As I am unable to find that the Public Body conducted a reasonable search, I must order it to conduct a search for records that relate to the Public Body's assessment of the Policy Gap risk as those are the records the Applicant requested. The Public Body is not precluded from consulting with the Applicant as to the records in its custody or control that would be responsive to the access request.

ISSUE B: Is the Public Body authorized by section 24(1) of the Act (advice from officials) to withhold information from the Applicant?

[para 24] The Public Body applied sections 24(1)(a) and (g) to sever information from the records.

[para 25] Section 24(1) is a discretionary exception to disclosure. It states, in part:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> > *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
> >
> > *(b) consultations or deliberations involving*
> >
> > > *(i) officers or employees of a public body,*
> > >
> > > *(ii) a member of the Executive Council, or*
> > >
> > > *(iii) the staff of a member of the Executive Council,*
> >
> > *[…]*
> >
> > *(g) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision […]*
> >
> > *[…]*
>
> *(2) This section does not apply to information that*
>
> > *[…]*
> >
> > *(f) is an instruction or guideline issued to the officers or employees of a public body, or*

> *(g) is a substantive rule or statement of policy that has been adopted by a public body for the purpose of interpreting an Act or regulation or administering a program or activity of the public body.*

[para 26] In *Alberta Energy v Alberta (Information and Privacy Commissioner)*, 2024 ABKB 198 (CanLII), Teskey J. said the following regarding the burden of proof in an inquiry:

> Third, the public body must justify each denial on its own merits. No blanket privilege accompanies the statutory exceptions under *FOIPP*. Each decision to withhold specific information must be made individually. Where a public body chooses to apply a heavy hand to redacting records, it is required to justify these redactions line by line. One would hope that this would imbue an attitude of practicality and proportionality into the vetting process.
>
> There is strong public policy justification for these obligations. The requesting party seeking the withheld record must argue for its production without the benefit of the impugned record itself. <u>It is reasonable to expect the public body to put its best foot forward with evidence to support its denials precisely and individually for each part of a record</u>. [My emphasis]
>
> This principle is clearly articulated in the guidance provided to parties on inquiries by the OIPC:
>
> > Parties may not succeed in an inquiry if they do not provide evidence to support their arguments. If the success of an argument depends on underlying facts, providing the argument alone is not sufficient. The underlying facts must be established by evidence. As well, evidence should not be provided in the form of unattributed assertions made in the context of an argument. If a fact is being put forward, it must be shown how this fact is known to be true (e.g., by way of a statement, preferably sworn, of someone who knows the fact, or by other objective evidence, such as documents).
> >
> > It is not sufficient to provide the Commissioner with records and leave it up to the Commissioner to try to draw from the records the facts on which the decisions will be based. The Commissioner requires that persons representing the public body, custodian or organization provide evidence speaking to the contents of the records, for example by explaining how each part of a record for which an exception to disclosure is claimed falls within the exception. If the explanation depends on certain facts being true, the public body, custodian or organization must provide evidence of these facts.

[para 27] In the foregoing case, Teskey J. confirmed that public bodies have the burden in an inquiry of establishing that they properly applied exceptions to disclosure. From the foregoing, I understand that the Public Body must establish the facts necessary to support the application of the exceptions it has applied to the information it has withheld from an applicant.

[para 28] In Order F2015-29, the Director of Adjudication interpreted sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said:

> The intent of section 24(1)(a) is to ensure that internal advice and like information may be developed for the use of a decision maker without interference. So long as the information described in section 24(1)(a) is developed by a public body, or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a).

> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 29] I agree with the analysis in Order F2015-29 as to the purpose and interpretation of section 24(1)(a) and agree that this provision applies to advice, proposals, recommendations, analyses, and policy options intended to assist a decision maker to make a decision. Section 24(1)(a) protects the policy development process, but not the final decision regarding the policy.

[para 30] In Order F2022-62, the Adjudicator reviewed past orders and identified some kinds of information that have been found not to be subject to section 24(1)(a) or (b). She said:

> In addition to the requirements in those tests, sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held on a particular topic (and not the *substance* of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).
>
> Bare recitation of facts or summaries of information also cannot be withheld under sections 24(1)(a) or (b) unless the facts are interwoven with the advice, proposals, recommendations etc. such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48).
>
> As well, section 24(1)(a) does not apply to a decision itself (Order 96-012, at para. 31).
>
> The first step in determining whether section 24(1)(a) was properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (which I will refer to as "advice etc.", section 24(1)(a)); and consultations or deliberations between specified individuals (section 24(1)(b)).

[para 31] In Order F2004-026, former Commissioner Work rejected the argument that the mere topic of advice or deliberations, without more, is information to which section 24(1) can apply. He said:

> In my view, section 24(1) does not generally apply to records or parts of records that in themselves reveal only any of the following: that advice was sought or given, or that consultations or deliberations took place; that particular persons were involved in the seeking or giving of advice, or in consultations or deliberations; that advice was sought or given on a particular topic, or consultations or deliberations on a particular topic took place; that advice was sought or given or consultations or deliberations took place at a particular time. There may be cases where some of the foregoing items reveal the content of the advice. However, that must be demonstrated for every case for which it is claimed.

[para 32] Turning to the case before me, I note that the Public Body withheld copies of maps of Alberta from pages 10 – 14. It withheld a power point presentation from records 15 – 18 and an email from page 54. I will review the Public Body's application of section 24(1) to each category.

The maps

[para 33] The Public Body argues:

> Section 24(1)(a) may be applied to statements of advice, proposals, recommendations, and analyses that aim to examine possible resolutions or options in dealing with an issue or problem, and is intended for the purpose of maintaining candor. This exception can be applied to advisory functions at all levels in the public body and applies to advice and recommendations obtained from outside the public body.
>
> In order to qualify as advice, the information must meet the three-part test developed by the Information and Privacy Commissioner in Order 96-006, in that the information is 1) sought or expected, 2) directed towards taking an action, and 3) made to someone who can implement the action. The information on pages 2-6, 10-18, 20-21, 23, 25-27, 29, 31-49, and 54-77 meet all three of these criteria.
>
> The information found on the pages 2-6, 10-18, 20-21 and 23 was created and requested by members of an Energy/Environment working group to support decisions by Executive Sponsors relating to the coal category review. Consistent with their project charter signed in October 2019, this group was tasked with drafting the Coal Category Review Report, including options, recommendations and implementation.
>
> The information found on pages 2-6, 10-18, 20-21, and 23 was created and requested by the Energy/Environment working group with the intention of specifically supporting the decision-making processing regarding the coal category classifications by an Executive Sponsor.
>
> The information found on pages 2-6, 10-18, 20-21, and 23 was created and requested by Energy/Environment working group to assist in drafting the Coal Category Review, which would then be presented to Executive Sponsors for a decision.
>
> The maps found on pages 2-6 (duplicated on 10-14) consist of technical analysis that was specifically requested from the Resource Mapping and Analysis unit of Energy to support the decision-making process during the Coal Category Review. These maps are not publicly available and to disclose them would provide insight into the deliberations of the Coal Category Review members, including the variables and mapping layers that were reviewed, as well as the policy options they considered.

[para 34] I note that in Order P-763, a decision of the Ontario Office of the Information and Privacy Commissioner, the adjudicator accepted that a map that reveals a recommendation can be categorized as a recommendation. The Adjudicator said:

> The record at issue in this appeal consists of a draft final report entitled the "GAP Analysis and Candidate area Selection For Life Science Representation in Site District 4E-3" as well as two related maps of the site district.
>
> […]

> The Ministry submits that the report falls within the advice and recommendations exemption found in section 13(1) of the Act. This provision states that:
>
> > A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.
>
> It has been established in many previous orders that advice and recommendations for the purpose of section 13(1) must contain more than just information. To qualify as "advice" or "recommendations", the information contained in the record must relate to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process.
>
> The Ministry submits that the entire report falls within the ambit of section 13(1). It points out, in this respect, that the factual components of the study are interwoven with advice or recommendations in such a way that they cannot be reasonably severed from the body of the document. I do not agree. In my view, the report consists of both recommendations and factual components which are capable of being segregated.
>
> Following a careful review of this record, I find that the following parts of the report contain information which qualifies as advice or recommendations under section 13(1):
>
> > (1) The parts of pages ii, iii, 11, 12, 18, 22, 24, 25, 27, 28, 30, 34, 49, 50 and 51 which I have highlighted in yellow.
> >
> > (2) Pages 31 - 33 and 35 - 48 in their entirety.
> >
> > (3) The map entitled "Recommended Protected Areas For Site Region 4E3".
>
> I further find that the remaining parts of this report, which consist of factual materials, discussions of approach and methodology, as well as summaries of earlier and current analysis and certain results, do not constitute advice or recommendations for the purpose of the Act. The same is true for the second map which consists solely of factual data.

[para 35] In the foregoing case, the Adjudicator found that one map, which illustrated a recommended course of action, was subject to Ontario's equivalent provision to section 24(1)(a), but that another map, which contained factual information, was not. Alberta's section 24(1)(a) differs from Ontario's legislation as information such as "analyses" and "policy options" are subject to the exception. The application of the exceptions is similar: if information reveals the substance of information subject to the exception, it will fall within the terms of the exception. The same holds true for maps.

[para 36] The Public Body argues that the maps were created to "support" the review of an "Executive sponsor". The Public Body then argues that the maps reflect policy options under consideration. The Public Body does not explain how policy options are revealed by the maps, or what policy options it believes were under review that could be revealed by the maps. The Public Body is not clear as to what decision was to be made or how it believes the maps could guide or influence that decision. If there is a policy option that could be revealed by the maps, I have not been told what it is or how it is inferable from the maps. From my review, the maps appear to contain purely factual, and in many cases, immutable, information about regions and zones of Alberta.

[para 37] As noted in the foregoing paragraph, Public Body indicates that the maps were intended to "support" the Coal Category Review. It also argues that disclosing the maps would provide "insight into the deliberations" of the Review, if disclosed. Neither description establishes that the maps reveal "advice, proposals, recommendations, analyses or policy options within the terms of section 24(1)(a), or "consultations or deliberations" within the terms of section 24(1)(b).

[para 38] If the maps at issue are reviewed, even with the knowledge that they served a purpose in the Public Body's Review, all that can be determined from them is that the statuses of some areas of the Province of Alberta were to be considered. As discussed by former Commissioner Work in Order F2004-026, the mere topic of deliberations, or the fact that deliberations took place or were to take place, is not information to which section 24(1) applies. Further, the fact that the Public Body intended to conduct a gap analysis in relation to the rescission of the coal policy was made public when it made the briefing note of March 20, 2020 public.

[para 39] The email on page 1, which forwarded the maps, indicates that the maps were provided to document existing restrictions in various regions. If that is so, then the maps contain factual information, rather than policy options as to what the Public Body could decide.

[para 40] I am unable to find that the maps reveal information subject to section 24(1) if the maps are disclosed to the Applicant.

The power point presentation

[para 41] The Public Body severed a power point presentation appearing on pages 15 – 23 in its entirety. The Public Body argues:

> As noted by the subtitle of the presentation "Potential Impacts on footprint planning" found on page 15, the content of the information is focused on providing an analysis of what future events may occur because of the rescission of the Coal Policy. Disclosing this analysis could negatively affect future policies related to footprint planning and responsible resource development. As such, it is imperative the Public Body continue to withhold this information from disclosure.

[para 42] In the foregoing excerpt, the Public Body characterizes the information severed under section 15 – 23 as "focused on providing an analysis on what future events may occur" following the rescission of the coal policy. Elsewhere in its submissions, the Public Body describes the information as "created and requested by members of an Energy/Environment working group to support decisions by Executive Sponsors". I understand the Public Body to argue that the power point presentation contains analyses within the terms of section 24(1)(a) of the FOIP Act.

[para 43] The power point presentation states historical facts and refers to a decision that had been made, as opposed to one that was yet to be made. The presentation does not recommend or advise a particular course of action or indicate that there is a decision to be

made. It does not analyse or assess the merits of any particular course of action or present policy options or proposals. I accept that the power point presentation contains useful information, including to a decision maker, depending on what the decision maker might be tasked with deciding; however, I am unable to find, on the evidence before me that the presentation was intended to guide or influence a course of action or decision.

[para 44] For the reasons above, I find that section 24(1) has not been demonstrated to apply to the power point presentation on pages 15 – 23.

Page 54

[para 45] The Public Body severed three blocks of text from page 54. The Public Body states:

> The information found on page 54 was prepared by Energy staff to include within a briefing note for the Energy Minister to support a decision relating to the cancelling/withdrawing of the posted parcels.

Although the first block of text was withheld under section 24(1)(a) it conveys only the information that the Public Body acknowledges in its submissions – that the information in the following two blocks of text was being provided for inclusion in a briefing note. I find that the first block of test does not contain information subject to section 24(1).

[para 46] I find that the second and third text blocks do contain information subject to section 24(1)(a), as they consist of analysis of different policy options under consideration by the Public Body in order to advise a particular course of action.

[para 47] The Public Body indicates that it initially applied section 24(1)(g) (cited above) of the FOIP Act on the basis that page 54 would reveal a pending policy decision. It states: "Section 24(1)(g) was initially applied to the records on page 54 because they would have revealed a policy decision that was pending when the content was written."

[para 48] I am unable to agree with the Public Body that section 24(1)(g) applies to page 54. Section 24(1)(g) applies to a decision that has been made, but not implemented. The final two blocks of text, which I find are subject to section 24(1)(a), are intended to provide advice to assist a decision maker to decide an issue. If the decision had been made, and was awaiting implementation, there would be no need for the author of the advice on page 54 to provide it. If the Public Body has some reason to believe that the text on page 54 would reveal a policy or budgetary decision that has not been implemented, it has not explained what the decision was, or how the content of page 54 could reveal it.

[para 49] As I find that the second and third blocks of text severed from page 54 are subject to section 24(1)(a), I must now consider whether the Public Body properly exercised its discretion when it decided to withhold the information from the Applicant.

Exercise of discretion

[para 50] Section 24(1)(a) is a discretionary provision – that is, a public body may withhold information under its authority but it need not. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion. The Court noted:

> The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.
>
> In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:
>
>> In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed.
>
> Decisions of the Assistant Commissioner regarding the interpretation and application of the FIPPA are generally subject to review on a standard of reasonableness (see Ontario (Minister of Finance) v. Higgins (1999), 1999 CanLII 1104 (ON CA), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor) (1999), 1999 CanLII 19925 (ON CA), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator) (2002), 2002 CanLII 30891 (ON CA), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).
>
> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).
>
> In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.
>
> The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above.
>
> Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

[para 51] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body.

[para 52] While this case was decided under Ontario's legislation, in my view, it has equal application to Alberta's legislation. Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

> *72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*
>
>> *(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access [...]*

[para 53] In Order 96-017, former Commissioner Clark reviewed the law regarding the Commissioner's authority to review the head of a public body's exercise of discretion and concluded that section 72(2)(b), (then section 68(2)(b)), was the source of that authority. He commented on appropriate applications of discretion and described the evidence necessary to establish that discretion has been applied appropriately:

> A discretionary decision must be exercised for a reason rationally connected to the purpose for which it's granted. The court in *Rubin* stated that "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act..."
>
> The court rejected the notion that if a record falls squarely within an exception to access, the applicant's right to disclosure becomes solely subject to the public body's discretion to disclose it. The court stated that such a conclusion fails to have regard to the objects and purposes of the legislation: (i) that government information should be available to the public, and (ii) that exceptions to the right of access should be limited and specific.
>
> In the court's view, the discretion given by the legislation to a public body is not unfettered, but must be exercised in a manner that conforms with the principles mentioned above. The court concluded that a public body exercises its discretion properly when its decision promotes the policy and objects of the legislation.
>
> The Information and Privacy Commissioners in both British Columbia and Ontario have also considered the issue of a public body's proper exercise of discretion, both in the context of the solicitor-client exception and otherwise. In British Columbia, the Commissioner has stated that the fundamental goal of the information and privacy legislation, which is to promote the accountability of public bodies to the public by creating a more open society, should be supported whenever possible, especially if the head is applying a discretionary exception (see Order No. 5-1994, [1994] B.C.I.P.C.D. No. 5).
>
> […]

> In Ontario Order 58, [1989] O.I.P.C. No. 22, the Commissioner stated that a head's exercise of discretion must be made in full appreciation of the facts of the case and upon proper application of the applicable principles of law. In Ontario Order P-344, [1992] O.I.P.C. No. 109, the Assistant Commissioner has further stated that a "blanket" approach to the application of an exception in all cases involving a particular type of record would represent an improper exercise of discretion.
>
> I have considered all the foregoing cases which discuss the limits on how a public body may exercise its discretion. In this case, I accept that a public body must consider the objects and purposes of the Act when exercising its discretion to refuse disclosure of information. It follows that a public body must provide evidence about what it considered.

[para 54] In that case, the Commissioner found that the Public Body had not made any representations or provided any evidence in relation to its exercise of discretion. Further, he determined that the head must consider the purpose of the exception in the context of the public interest in disclosing information when exercising discretion. As the head of the public body had not provided any explanation for withholding information, the Commissioner ordered the head to reconsider its exercise of discretion to withhold information under a discretionary exception.

[para 55] In Order F2004-026, former Commissioner Work said:

> In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case. I find support for this position in orders of the British Columbia Information and Privacy Commissioner. Orders 325-1999 and 02-38 include a list of factors relevant to the exercise of discretion by a public body. In addition to "the general purposes of the legislation (of making information available to the public) the list includes "the wording of the discretionary exception and the interests which the section attempts to balance". It strikes me as a sound approach that the public body must have regard to why the exception was included, and whether withholding the information in a given case would meet that goal.

[para 56] Section 12(1) of the FOIP Act requires the Public Body to communicate its reasons for withholding information from the Applicant. It states:

> *12(1) In a response under section 11, the applicant must be told*
>
> *(a) whether access to the record or part of it is granted or refused,*
>
> *(b) if access to the record or part of it is granted, where, when and how access will be given, and*
>
> *(c) if access to the record or to part of it is refused,*
>
> *(i) the reasons for the refusal and the provision of this Act on which the refusal is based,*

> *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
>
> *(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.*

[para 57] Once it is determined that a discretionary exception to disclosure applies, a public body must determine whether it will withhold the information or release it to the applicant. In making this decision, the public body will weigh any applicable public and private interests, including the purpose of the provision, in withholding or disclosing the information.

[para 58] The Commissioner will review the public body's reasons for exercising discretion to withhold information from an applicant. If the Commissioner determines that the public body failed to consider a relevant factor or took into consideration irrelevant factors, or did not provide adequate reasons for withholding information, the Commissioner will direct the public body to reconsider its exercise of discretion.

[para 59] In its response to the Applicant of February 2, 2022, the Public Body said the following:

> Energy has decided to grant you access to part of the records you requested. The records contain some information that was withheld from disclosure in accordance with sections 24 (advice to officials), 25 (harm to economic and other interests of the Government of Alberta), 27 (information subject to legal privilege), and 29 (information available to the public) of the FOIP Act.
>
> We have removed the information that is withheld from disclosure and/or that is non-responsive in order to provide you with access to the remainder of the records (attached). Information on pages 50-53 is accessible to the public at https://thetyee.ca/ Documents /2020 /12/07 […]

The Public Body did not provide reasons for redacting information from the records, save for naming the exceptions it considered to provide the authority to redact.

[para 60] In its submissions, the Public Body states the following regarding record 54:

> […] Disclosure of this information would reveal the Government of Alberta's (GoA) position on the amendment of policies and practices when addressing policy gaps and the review of coal categories following rescission of the 1976 Coal Policy; therefore, it is exempt from disclosure under section 24(1)(a).
>
> Section 24(1)(b)(i) allows a public body to withhold information where disclosure could reveal consultations and deliberation between officers and employees of the GoA. […]
>
> Section 24(1)(g) was initially applied to the records on page 54 because they would have revealed a policy decision that was pending when the content was written.

The purpose of section 24(1)(a) is to protect a public body's decision making processes from interference, not its "position" regarding various topics. The Public Body takes the position that information may be withheld under section 24(1)(a) if it reveals the "Government of Alberta's position on the amendment of policies and practices when addressing policy gaps and the review of the coal categories". As discussed above, section 24(1)(a) does not protect the decision, but the advice, proposals, recommendations, analyses, and policy options that were provided to a decision maker in order to arrive at the decision. A public body's "position on the amendment of policies and practices" is a decision as to what it has decided to do regarding amendment of policies and practices. Such information cannot be withheld under section 24(1)(a) or (b).

[para 61] In any event, I am also unable to agree with the Public Body that the two blocks of text on page 54 could reveal the Public Body's position regarding the amendment of policies and practices in relation to the review of coal categories. Rather, it contains advice and analysis of policy options intended to assist a decision maker to make a decision. It may be the case that the information on page 54 was persuasive to the extent that it subsequently came to reflect the Public Body's position, but that is unclear from the text on page 54 of the evidence of the Public Body that that was the case.

[para 62] The Public Body exercised its discretion to withhold information under section 24(1)(a), for a purpose that is not contemplated by section 24(1)(a) or (b) – that it would reveal a public body's position. As the Public Body made its decision to withhold information from the Applicant based on a consideration that is irrelevant to section 24(1)(a), I must direct it to make a new decision regarding access.

[para 63] To summarize I find that section 24(1)(a) applies to the final two blocks of text on page 54, but not to any other information to which the Public Body applied section 24(1). I also find that the Public Body relied on irrelevant considerations when it decided to withhold the information on page 54.

ISSUE C: Is the Public Body authorized by section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to withhold information from the Applicant?

[para 64] The Public Body applied section 25(1)(c) to withhold information from page 54 of the records from the Applicant. Section 25 of the FOIP authorizes a public body to withhold information that could harm the economic interests of the Government of Alberta or a public body. It states, in part:

> *25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:*
>
> *(a) trade secrets of a public body or the Government of Alberta;*

(b) financial, commercial, scientific, technical or other information in which a public body or the Government of Alberta has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value;

(c) information the disclosure of which could reasonably be expected to

(i) result in financial loss to,

(ii) prejudice the competitive position of, or

(iii) interfere with contractual or other negotiations of,

the Government of Alberta or a public body [...]

[...]

[para 65] In Order 96-016, former Commissioner Clark considered the meaning of section 25(1)(c), [then section 24(1)(c)]. He said:

> The public body claims that section [25(1)] should be interpreted so that the harm to a public body does not have to result directly from disclosing the specific information, but can be "harm at large" or "indirect harm" (my interpretation of the public body's claim). The essence of the public body's argument is this: The information in the record was produced under a contract between a division of a public body and an organization independent of government. There was a confidentiality clause in that contract, which restricts publication of the information. Releasing this information under the Act, contrary to the confidentiality clause, will affect AEC's and, consequently, ARC's contracts with this and other organizations, thereby causing harm to both AEC and ARC. Harm will result from cancelled contracts, and from other organizations bypassing AEC and ARC, knowing they are subject to the Act. That harm is quantifiable.
>
> However reasonable the public body's argument sounds, I do not think that section [25(1)] can or should be interpreted as the public body claims. Section [25(1)] focuses on the harm resulting from the disclosure of *that specific information* (my emphasis). The wording of section [25(1)] implies that it is the specific information itself that must be capable of causing the harm, if that information is disclosed. When I look at the kinds of information listed in section [25(1)(a)-(d)], two things are clear to me: (i) the legislature had very specific kinds of information in mind when it was contemplating what information had the potential to cause harm if disclosed; and (ii) there must be a direct link between disclosure of that specific information and the harm resulting from disclosure; in other words, there must be something in the information itself capable of causing the harm.

[para 66] Section 25 recognizes that there is a public interest in withholding information that could reasonably be expected to harm the economic interests of the Government of Alberta or a public body or the Government of Alberta's ability to manage the economy. Sections 25(1)(a) – (d) contain a non-exhaustive list of information, the disclosure of which could be reasonably expected to result in harm of this kind. As set out in Order 96-016, the harm that section 25 contemplates arises from disclosure of the information falling within the terms of section 25 and not from tangential or external factors.

[para 67] The phrase "could reasonably be expected to", which appears in section 25(1), has been interpreted by the Supreme Court of Canada. In n *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Court stated:

> Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; *Merck Frosst*, at para. 195:
>
> > I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(c) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. <u>Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes.</u> [Emphasis added.]
>
> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[para 68] In Order F2024-17, the Adjudicator reviewed the foregoing decision and said:

> The Supreme Court of Canada has made it clear that there is one evidentiary standard to be used wherever the phrase "could reasonably be expected to" appears in access-to-information legislation. There must be a reasonable expectation of probable harm, and the Public Body must provide sufficient evidence to show that the likelihood of any of the above scenarios is "considerably above" a mere possibility.

[para 69] A public body seeking to withhold information under section 25(1) must establish a link between the disclosure of information and a reasonable expectation of probable harm to the Government of Alberta's or a public body's economic interests.

[para 70] The Public Body argues:

> Section 25 is a discretionary exception that the head of a public body may apply in order to protect the economic and other interests of a public body or the GoA, or the ability of the GoA to manage the economy.
>
> Section 25(1)(b) permits the GoA or a public body to refuse to disclose financial, commercial,

scientific, technical or other information in which a public body or the GoA has a proprietary interest or a right of use, and that has, or is reasonably likely to have, monetary value. Section 25(1)(b) was initially applied to the records on page 54 as the disclosure of the information is reasonably expected to impact industrial investment in Alberta, positively or negatively depending on the perspective of individual investors, either of which has a monetary value.

Section 25(1)(c) permits the GoA or a public body to withhold information if the disclosure of that information could: (i) result in financial loss to; (ii) prejudice the competitive position of, or (iii) interfere with contractual or other negotiations of the GoA or a public body with any stakeholders.

Page 54 further contains detailed information regarding policy options considered with respect to the review of the current coal policy, specifically if, when and how cancellation of agreements post-sale or withdrawal of posted parcels should be carried out. The coal policy is still under review; therefore, disclosure of this information could reasonably result in:

(i) a significant financial loss to the GoA, specifically refunds and/or anticipated income payments from one or more leases, and any balance owing at closure of sale no longer being received [section 25(1)(c)(i)];

(ii) prejudice to the GoA's competitive position with the mineral owners regarding the use of coal on the land parcels [section 25(1)(c)(ii)]; and

(iii) interference with contractual or other negotiations between the GoA and potential purchasers, lease holders and other stakeholders.

[para 71] The Public Body has submitted no evidence as to how disclosure of page 54 could result in any of the harmful outcomes it projects, other than to say that the review is ongoing. It has not pointed to any information in the records that could be said to have the effect it projects, if disclosed. The Public Body simply asserts that the harms contemplated by section 25(1) will be realized if information on page 54 is disclosed. I have not been provided with a basis to support this conclusion. The fact that the Public Body is conducting an ongoing review does not mean that disclosing the information on record 54, which relates to the review, could reasonably be expected to result in harm to the economic interests of the Government of Alberta.

[para 72] To conclude, the Public Body has not established that section 25(1) authorizes it to withhold the information on page 54 from the Applicant.

ISSUE D: Is the Public Body authorized by section 27(1) of the Act (privileged information) to withhold information from the Applicant?

[para 73] Section 27(1) of the FOIP Act states, in part:

27(1) The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege […]

[para 74] The Public Body asserts that the records to which it has applied section 27(1)(a) are subject to solicitor-client privilege. Solicitor-client privilege applies to confidential communications between a solicitor and a client in relation to the giving or seeking of legal advice. (*Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821).

[para 75] The Public Body argues the following:

> Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information/record(s)?
>
>> If "solicitor-client privilege" or "litigation privilege" is asserted over any one or more of the records at issue please refer to the "Privilege Practice Note" attached to this Notice and also available on our Office's web site at www.oipc.ab.ca
>
> Under Section 27(1) a public body may withhold information that is subject to legal privilege, or relates to the provision of legal services or the provision of advice or other services by the Minister of Justice and Solicitor General or a lawyer. Section 27(1)(a) gives public bodies the discretion to refuse to disclose information that is subject to any type of legal privilege.
>
> The FOIP Advisor was notified by the OIPC on November 15, 2022, via email, that the Privilege Practice Note had superseded the Solicitor-Client Privilege Adjudication Protocol. Please find attached the affidavit completed by Legal Services, which demonstrates how the records satisfy the "Solosky Test."

[para 76] The affidavit the Public Body provided in support of its application of section 27 states the following:

> I, […] of Edmonton, Alberta, make oath and say:
>
> I am employed as an Executive Director for Alberta Energy.
>
> The Applicant made an access to information request to the Public Body that is now the subject of this Inquiry ("Applicant's Request").
>
> As part of my employment, I assisted in the responding to the Applicant's Request *Freedom of Information and Protection of Privacy Act* (the "FOIP Act").
>
> The head of the Public Body has exercised their discretion to withhold the Records from disclosure to the Applicant. One of the exceptions relied upon by the head of the Public Body is section 27(1)(a) of the FOIP Act on the grounds that the Records are subject to solicitor-client privilege.
>
> Attached as Schedule 1 to this Affidavit is a list of several records that I believe are responsive to the request over which we have claimed legal privilege (the "Records"). As described in greater detail in Schedule 1 to this Affidavit:
>
>> a) selected Records relate to a confidential request for legal advice made by the Public Body to its corporate and litigation counsel through email correspondence.
>
> I have reviewed the Records and believe that they meet the criteria required to claim solicitor-client privilege.

> All of the Records described in paragraph 6(a) of this Affidavit consist of communications
>
> a) between a lawyer and their client, the Public Body;
>
> b) made in confidence;
>
> c) and in the course of seeking or providing legal advice
>
> or
>
> d) communications made within the framework of the solicitor-client relationship and forming part of the continuum of communication in the provision of legal advice, that were intended to be confidential;
>
> e) or records reflecting internal discussions about legal advice that were intended to be confidential.
>
> I believe that the lawyers referenced were acting in their capacity as legal advisors in relation to creation of the Records.
>
> I believe that the advice from the lawyers contained in the Records was given in the context of the solicitor-client relationship and is not business, policy or other non-legal advice.
>
> I believe that none of the Records have been made public.
>
> I believe that the Records have only been shared with those within the Public Body who require the Records in order to perform their employment responsibilities.
>
> I do not believe that the solicitor-client privilege claimed over the Records has been waived by the Public Body.
>
> I believe that none of the Records were made to further any unlawful conduct.

[para 77] The Privilege Practice Note, to which the Public Body referred in its submissions, states:

> In *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 809, the SCC determined that more evidence to support the application of solicitor-client privilege is required when advice sought from or given by an in-house or government lawyer is at issue. This is because such lawyers may be called upon to give policy advice, which is not legal advice. The Court said:
>
> > Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.
>
> Therefore, a Respondent that is claiming solicitor-client privilege over the advice of an in-house or government lawyer must provide sufficient information about the relationship between the lawyer and the Respondent and about the circumstances in which the advice is being requested and provided, to establish that the subject matter is legal advice rather than policy or other advice.
>
> […]

> For claims of solicitor-client privilege, the Respondent should provide:
>
> - Information about the relationship between the Respondent and the lawyer in the context of the relevant communication
> - Information about the circumstances to establish that the record was created in the course of requesting or providing legal advice or is a record revealing such a request or advice
> - Information about the confidentiality of the communication

[para 78] The Applicant states:

> To meet its burden of proving that a record is protected by the solicitor-client privilege, the public body must meet the standard in civil litigation for proving that privilege. This standard requires that the public body provide an affidavit sufficiently showing that the redacted information meets the test noted above.
>
> The Commissioner cannot compel a public body to submit the redacted text for the OIPC's review, but the Commissioner can compel the public body to provide other evidence supporting its assertion of the privilege where there is evidence and argument suggesting the public body is falsely claiming the privilege.
>
> Alberta Energy must at least provide a "sufficient description" of the redacted text to assist the OIPC and BHA "in assessing the validity of the claimed privilege." To meet this test, the description must explain the "nature of the relationship" between the correspondents, the "subject matter of the [legal] advice, and the circumstances in which … [the purported client] sought advice".[108] Thus far, Alberta Energy has provided no such description.

[para 79] I agree with the Applicant that the Public Body has not provided sufficient evidence to support finding that the records to which it has applied section 27(1)(a) are subject to this exception. The Public Body has not provided adequate information regarding the relationship between the lawyer and the privilege holder, including their identities. In addition, the Public Body has not provided any evidence to establish the circumstances in which legal advice was requested or provided. Finally, the Public Body has not given evidence to support the affiant's view that the information is confidential, such as by indicating which units have handled the information and the procedures in place in those units to ensure they keep information confidential.

[para 80] The Public Body describes the communications to which it has applied section 27(1)(a) as containing legal advice and legal opinions from "litigation counsel" and some communications are described as "relating to" legal advice provided by "litigation counsel'. I accept that the Public Body's affiant believes the content of the affidavit to be true and the descriptions of the records to be accurate. The difficulty I have with the Public Body's affidavit is that I do not know whether the affiant's assessment is correct. The descriptions are vague and it is unclear why the Public Body's affiant believes the records to which section 27(1)(a) has been applied are subject to solicitor-client privilege. The Public Body does not explain what it considers "legal advice" to be. It is unknown how the determination that the records contain legal advice and not policy or other kinds of advice was made, as the affiant did not provide the criteria applied to distinguish these types of advice.

[para 81] As discussed above, the Applicant's access request is for records containing information relating to Alberta Energy's "review of the coal categories," including its assessment of the "policy gap risk" from rescinding the Coal Policy. The Applicant is seeking information relating to a policy review – not information that would necessarily entail the giving and receiving of legal advice or entering a solicitor-client relationship. It appears possible, given the parameters of the access request, that some of the records at issue may contain legal *information* – general information about how the law applies, as opposed to legal *advice*, which advises the course of action a client should take in a particular legal matter.

[para 82] In *Trillium v. Cassels Brock & Blackwell et al,* 2013 ONSC 1789 (CanLII) Belobaba J. distinguished legal information, which is not privileged in and of itself, and legal advice, which is. He said:

> How do I decide whether documents relating to CADA's communications to and from its legal counsel are privileged? I can do no better than to adopt the approach that was put forward by both CADA and CBB. One must differentiate between legal information and legal advice. Legal information consists of providing answers regarding the law generally, the options available, and the relevant legal procedures that might pertain. For example, information provided by CBB to CADA about the federal bankruptcy process and the CCAA and how it would affect the dealers is legal information, not legal advice.
>
> Legal advice, on the other hand, is advice that is given with respect to the client's legal rights and duties and is given on the understanding that it may well be followed. It depends on the individual circumstances of the recipient and consists of a much more personalized opinion on the way the law would apply in a particular case or about the particular decision that should be made in the circumstances. Legal advice involves the interpretation of legal principles "to guide future conduct or to assess past conduct." In short, legal advice is particularized advice that is directed to the client's legal rights or duties and in essence says "here is what I think you should do" as opposed to "here is some information about the CCAA and the federal bankruptcy process."

[para 83] In *TransAlta Corporation v Alberta (Environment and Parks),* 2024 ABCA 127 (CanLII) the Alberta Court of Appeal said the following regarding legal advice:

> In order to be protected by solicitor-client privilege, a document must meet the following criteria: (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties: *Solosky v The Queen,* 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at 837, 105 DLR (3d) 745.
>
> Adam [Dodek] describes the scope of "legal advice" in his text at §3.67-3.68:
>
>> There is an important distinction between "legal information" and "legal advice". Only the latter will attract the protection of the privilege. "Legal information consists of providing answers regarding the law generally, the options available, and the relevant legal procedures that might pertain." For example, providing information about how the federal bankruptcy process works and how it would affect specific parties is legal information, not legal advice. Emailing a client or a potential client a decision that may be of interest to them is passing along legal information, not providing legal advice.

> However, when a lawyer evaluates the options available to a client or recommends a course of action, the line is then crossed from legal information to legal advice: "Legal advice … is advice that is given with respect to a client's legal rights and duties and is given on the understanding that it may well be followed. It depends on the individual circumstances of the recipient and consists of a much more personalized opinion on the way the law would apply in a particular case or about the particular decision that should be made in the circumstances. Legal advice involves the interpretation of legal principles "to guide future conduct or to assess past conduct". In short, legal advice is particularized advice that is directed to the client's legal rights or duties and in essence says "here is what I think you should do" as opposed to "here is some information about the [federal *Bankruptcy Act*] and the federal bankruptcy process". It is not required for the lawyer to explicitly say "I think you do X" in order to qualify as legal advice…

The scope of solicitor-client privilege is interpreted broadly and extends to a "continuum of communication", as explained by the Federal Court of Appeal in *Samson Indian Nation and Band v Canada (C.A.)*, 1995 CanLII 3602 (FCA), [1995] 2 FC 762, 125 DLR (4th) 294 (FCA):

> The legal advice privilege protects all communications, written or oral, between a solicitor and a client that are directly related to the seeking, formulating or giving of legal advice; it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context.

See also Dodek at §3.70-3.71; *Blood Tribe* at para 26, citing *Balabel v Air India*, [1988] Ch 317, [1988] 2 All ER 246 at 254 (CA); *British Columbia Teachers' Federation.*

We conclude the case management judge erred when he found documents ABJP0000222 and ABJP0000220 were not protected by solicitor-client privilege. The affidavit of Mr. Davis establishes these two documents represent legal advice and are therefore protected.

[…]

We are not satisfied the case management judge erred in finding the Crown had not established a claim of solicitor-client privilege on the remaining documents. In the case authorities that speak to the notion of a "continuum of communication" there was evidence respecting the continuum of communications between the lawyer and the client. That type of evidentiary record was not before the case management judge. For example, there is no evidence document ABJP0000144 was prepared for legal counsel or in conjunction with legal counsel, in response to questions from legal counsel, or were part of a transaction involving dealings between legal counsel and the client department, here AEP. Accordingly, we find no error in the case management judge concluding documents ABJP0000144, ABJP0000218, ABJP0000143, ABJP0001197 and ABJP0000216 are not protected by solicitor-client privilege.

[para 84] I understand from the foregoing cases that legal information may be subject to privilege if it is provided in the course of giving and receiving legal advice regarding a client's rights and duties, or falls on the continuum of communications by which a client seeks legal advice from a lawyer regarding rights and duties. There is no evidence before me that the information the Public Body asserts is subject to solicitor-client privilege is associated with a particular matter for which it sought legal advice. It is unclear on the evidence and argument before me, that advice or information regarding gaps in the application of policy would be anything other than policy advice, even if provided by a lawyer. The affidavit submitted by the Public Body does not provide

sufficient detail to establish that the Minister or a delegate sought legal advice regarding a matter involving rights or duties.

[para 85] In discussing the distinction between "legal information" and "legal advice" I do not mean to suggest that I find that the information to which the Public Body has applied section 27(1)(a) is legal information, or that lawyers provide either legal information or legal advice. I raise the distinction to illustrate the point that not all communications by a lawyer may be characterized as legal advice.

[para 86] A further difficulty with the Public Body's evidence is that it refers to itself as a client and to "litigation counsel" as providing it with advice. The Public Body does not explain how the Public Body is a "client", as opposed to the Minister, or why it required "litigation counsel". In the case of a government entity, such as the Public Body, the privilege holder is typically a person who may be viewed as having the authority to determine the Crown's interest in a matter, such as the Minister[1]. It is unclear that the information to which section 27 has been applied arose from a relationship between the Public Body as client and litigation counsel as its lawyer.

[para 87] On the evidence before me, I am unable to determine whether the records are subject to section 27(1)(a). I can make no findings as to whether the information consists of legal advice or not, or whether the Public Body entered a solicitor-client relationship, or not, as I have not been provided sufficient evidence to do so. Under section 72 of the FOIP Act, if I consider a public body has not demonstrated that it is authorized to withhold information from an applicant under an exception, I must order the Public Body to give access to the records at issue.

[para 88] In Order F2022-28, I discussed the process that is now followed when an adjudicator is unable to find that records are subject to solicitor-client privilege based on the evidence provided by a public body:

> In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555 the Supreme Court of Canada quashed a notice to produce issued by this office for records to which the University of Calgary had applied section 27(1)(a), as it determined that the Commissioner lacks the power to demand records from a public body when the public body decides the records are subject to solicitor-client privilege and applies section 27(1)(a) for that reason. The Court held that the Commissioner has the power under section 56 to demand records subject to privileges of the law of evidence, but not records over which a public body claims solicitor-client privilege, as the Court reasoned that the phrase "privilege of the law of evidence" was not sufficiently clear to enable the Court to interpret the phrase as encompassing solicitor-client privilege, given the importance of this privilege.
>
> The Court held that because solicitor-client privilege is important, the phrase "privilege of the law of evidence" does not necessarily encompass it. The Court said:
>
>> Solicitor-client privilege is clearly a "legal privilege" under s. 27(1), but not clearly a "privilege of the law of evidence" under s. 56(3). As discussed, the expression "privilege of the law of evidence" is not sufficiently precise to capture the broader substantive

[1] See Adam Dodek, Solicitor-Client Privilege, (Markham; Lexis Nexis Canada, 2014) p. 183

> importance of solicitor-client privilege. Therefore, the head of a public body may refuse to disclose such information pursuant to s. 27(1), and the Commissioner cannot compel its disclosure for review under s. 56(3). This simply means that the Commissioner will not be able to review documents over which solicitor-client privilege is claimed. This result is consistent with the nature of solicitor-client privilege as a highly protected privilege.

Following the Supreme Court of Canada's decision, the Commissioner has issued orders in relation to solicitor-client privilege without requiring records from public bodies. If the evidence of public bodies is sufficient to establish that the information severed by the public body is subject to section 27(1)(a) on the basis of solicitor-client privilege, then the Commissioner confirms the public body's decision. If the public body's evidence is not persuasive, then the Commissioner will order disclosure, as section 72 requires the Commissioner to order disclosure when a public body's evidence does not establish that an exception to disclosure applies under section 71.

In *Calgary (Police Service) v Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114 the Alberta Court of Appeal determined that the Court of Queen's Bench has the power to demand records from public bodies when hearing judicial review applications regarding a public body's claim of solicitor-client privilege, even though the records were not in evidence before the Commissioner. The Court held that it had jurisdiction to demand records from public bodies in the course of judicial review proceedings, stating:

> We are satisfied that on a judicial review application where the dispute centres on whether the documents in question are subject to solicitor client privilege, those documents should be put before the reviewing Court. It is this simple. The issue—whether solicitor client privilege exists with respect to the disputed documents—cannot be properly determined in these circumstances without examining the documents themselves. This approach is consistent with the supervisory role of the Court.

[para 89] When a public body seeks judicial review of the Commissioner's decision as to whether it is authorized to withhold information on the basis of solicitor-client privilege, the Court will seek the records from the public body, if it is unable to decide the issue of solicitor-client privilege without them, and make the decision as to whether the records are privileged in the course of the judicial review.

[para 90] In Order F2022-28, I noted that the Courts have held that public bodies have the right to seek judicial review in order for the Court to adjudicate their claims of solicitor-client privilege:

> To summarize, a public body has obligations in relation to records in its custody or under its control imposed by the statutes under which the public body operates; however, it is not free to dispose of them as it will, as would a private citizen or business, but may be required to preserve them, produce them to a Minister, or to the Commissioner, or to treat them in accordance with legislative schemes such as the FOIP Act. At the same time, as noted above, the Courts have determined that public bodies have the right to have section 27(1)(a) adjudicated by the Courts when they believe solicitor-client privilege applies to records, and that right must be respected in this inquiry.
>
> I have a duty under section 72 of the FOIP Act to issue an order in relation to the records the Public Body has withheld from the Applicant on the basis of section 27(1)(a). I must carry out this duty even though the Public Body may seek judicial review of my decision and seek costs against the Commissioner. The evidence of the Public Body fails to provide a basis for its application of section 27(1)(a) to the records and I must order the Public Body to give the Applicant access to the records.

> Given the termination of the Applicant's employment and the commencement of legal proceedings, I anticipate that at least some of the records, if not many of them, contain privileged communications. On the descriptions provided by the Public Body, I am unable to determine which records are privileged or to which privilege they may be subject. Ordering disclosure because the Public Body has not met its case might harm the Public Body's position in litigation, which would not necessarily serve the public interest. On the other hand, it may be that the Public Body prefers to have the issue of the application of section 27(1)(a) adjudicated by the Court of Queen's Bench, in which case, an order under section 72 will be necessary.
>
> A difficulty with the approach above, is the fact, discussed above, that the Public Body asserts that much of the information in the records was sent by, or sent to, the Applicant. If so, then litigation privilege and solicitor-client privilege cannot apply to that information. I find that such information remains within my jurisdiction to demand under section 56, as the only privilege that could apply is settlement privilege, which is a privilege of the law of evidence.
>
> I note, too, that judicial review results in the expenditure of judicial resources and also requires the expenditure of public resources provided by the Legislature to both the Public Body and the Commissioner to carry out their statutory duties, such as administering the FOIP Act.
>
> I have decided to order the Public Body to give the Applicant access to the records to which it applied section 27(1)(a) as this will enable it to seek judicial review; however, I will also give it the option of providing better submissions to make its case and to provide the records sent to or by the Applicant for my review.
>
> I draw support for the requirement that the Public Body provide better evidence and submissions, and provide records that appear not to be privileged from *Edmonton Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 207 (CanLII). In that case, Renke J. confirmed that the Commissioner has the authority to question claims of privilege where, as here, the standards in *Canadian Natural Resources Limited v ShawCor Ltd*., 2014 ABCA 289 (CanLII) are not met. He said:
>
>> Does this approach mean that the IPC must simply accept a public body's claims of privilege? Is the IPC left with just "trust me" or with "taking the word" of public bodies? Does this approach involve a sort of improper delegation of the IPC's authority to public bodies or their counsel?
>>
>> In part, the response is that the IPC is not left with just "trust me." The IPC has the detail respecting a privilege claim that would suffice for a court. If the ***CNRL v ShawCor*** standards are not followed, the IPC (like a court) would be justified in demanding more information. And again, if there is evidence that the privilege claim is not founded, the IPC could require further information.
>
> As noted above, I find that the reference to the Applicant as being the author or recipient of many of the records is evidence that solicitor-client privilege or litigation privilege does not apply to them. In such circumstances, the foregoing case contemplates that the Commissioner may require further information.

[para 91] In the foregoing case, I ordered the public body either to disclose the records to the Applicant or to provide better evidence and submissions. I gave the public body the option to provide evidence in order to avoid the delay and expenditure of public money that would result from a judicial review application.

[para 92] In this case, the Public Body has not established that the records to which it has applied section 27(1)(a) contain legal advice, or contain communications made for the purpose of giving or receiving legal advice, or communications relating to the giving or seeking of legal advice. It has asserted by way of affidavit that the records meet the requirements for privilege but beyond this it has provided no descriptions or information that would allow me to independently reach a conclusion that they meet these requirements on a balance of probabilities. In effect, the Public Body is asking me to defer to its own assessment – to "take their word for it" – instead of providing information on which I can base the decision I am tasked with making under the legislation. As the Public Body has not established that section 27(1)(a) applies, I must order the Public Body to give the Applicant access to the records. Doing so will either enable the Applicant to obtain the records, or enable the Public Body to access its right to judicial review. As in Order F2022-28, I recognize that seeking judicial review will result in an expenditure of public funds both by the Public Body and by the Commissioner, in addition to the expenditure of judicial resources. Judicial review may also result in an expenditure of private funds by the Applicant should it choose to participate in the judicial review. I have therefore decided to give the Public Body the option to make adequate submissions and to provide sufficient evidence for the inquiry to support its claim of privilege if it elects not to seek judicial review or to disclose the records.

IV. ORDER

[para 93] I make this Order under section 72 of the Act.

[para 94] I order the Public Body to conduct a new search for responsive records that includes records related to the assessment of the policy gap risk.

[para 95] I order the Public Body to give the Applicant access to all the records at issue except for the bottom two text blocks on page 54.

[para 96] I order the Public Body to make a new decision as to whether it will release or withhold the information in the final two text blocks on page 54. The new decision must be based on relevant considerations.

[para 97] With regard to the information severed from pages 25 – 27, 29 – 49, and 55 – 77 on the basis of section 27(1)(a), the Public Body may, instead of releasing the information to the Applicant, provide evidence and argument to me in support of its claim of solicitor-client privilege within 50 days of receiving this order. On receiving the Public Body's new evidence and argument, I would then reconvene the inquiry and provide the Applicant the opportunity to make submissions regarding any new evidence and argument prior to making a final order in relation to the records over which the Public Body has claimed solicitor-client privilege.

[para 98] I order the Public Body to inform me and the Applicant within 50 days of receiving this order that it has complied with it.

____

Teresa Cunningham
Adjudicator
/ah