

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

**ORDER F2025-R-01
(RECONSIDERATION OF ORDER F2019-19/H2019-01)**

January 15, 2025

ALBERTA HEALTH SERVICES

Case File Number 002373

Office URL: www.oipc.ab.ca

Summary: This Order is a reconsideration of Order F2019-19/H2019-01, which concerned Alberta Health Services' (the Public Body's) response to an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act). On judicial review of that Order, the Court of Queen's Bench quashed the Order in part. The Court directed a reconsideration of one exception to access applied by the Public Body.

In accordance with the Court's direction, this reconsideration addresses the Public Body's application of section 24(1)(b)(i) to specific information in the records.

The Adjudicator found that section 24(1)(b) applies to some, but not all, of the information at issue in the records. The Adjudicator ordered the Public Body to disclose some information to the Applicant, and ordered the Public Body to reconsider its exercise of discretion in applying section 24(1)(b).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 17, 24, 71, 72

Authorities Cited: AB: Decision F2014-D-01, Orders 96-006, 96-012, 99-013, F2004-026, F2007-013, F2007-021, F2010-036, F2012-06, F2015-29, F2019-19/H2019-01, F2022-45, F2024-35, F2024-37

Cases Cited: *Alberta Health Services v. [Applicant]*, 2020 ABQB 281 (CanLII), *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, 1999 CanLII 8293 (FC), [1999] 4 F.C. 245, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII)

I. BACKGROUND

[para 1] On September 17, 2015, the Applicant made an access request to Alberta Health Services (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), which stated in part:

I am seeking the following records containing my personal information pursuant to my access rights under the *Freedom of Information and Protection of Privacy Act*: all records in any form regarding myself related to the care of my mother [...] (now deceased) at the Calgary South Health Campus between the dates of July 2, 2014 to and including July 02, 2015. I believe the following personnel may be in possession of such records [...]

[...]

All records including all personnel assisting in the reduction in the Goals of Care letter authored by Dr. [...] addressed to [the Applicant] dated June 15, 2015 [...]

[para 2] The Applicant provided the names of AHS employees he believed had created or held responsive records. He also provided descriptions of particular categories of records he was seeking from specific employees and assigned item numbers to these categories. He also described an incident in which he had been involved and requested records related to an investigation conducted by AHS regarding the incident. On AHS's "Request to Access Information under the Freedom of Information and Protection of Privacy Act" form, which the Applicant completed, the Applicant indicated he was requesting his personal information.

[para 3] The Public Body provided some records to the Applicant, and withheld information under sections 17(1), 20, 24 and 27 of the FOIP Act. The Applicant requested a review of this response, and subsequently an inquiry.

[para 4] In the course of the inquiry, the adjudicator considered whether the records at issue were governed by the FOIP Act or the *Health Information Act* (HIA).

[para 5] In Order F2019-19/H2019-01, resulting from that inquiry, the adjudicator determined that most of the withheld information in the records at issue was health information under the HIA. Therefore, the information could not be withheld under sections 24 or 27 of the FOIP Act.

[para 6] With respect to the information to which the FOIP Act applied, the adjudicator found that section 24(1) did not apply to the withheld information.

[para 7] The Public Body sought a judicial review of this Order. In *Alberta Health Services v. [Applicant]*, 2020 ABQB 281 (CanLII) (*Alberta Health Services*) the Court concluded the following:

[117] The adjudicator's decision that the records constitute health information is quashed, except for records 15, 25, 37, 68, and part of 78. Section 11(1)(d) does not apply to these records, so they should be disclosed as ordered by the adjudicator.

[118] The remaining Advice redactions are subject to FOIPP. I remit the matter back to an adjudicator to determine whether AHS properly relied on section 24(1)(b)(i) to withhold them from disclosure.

[119] The Privileged redactions are subject to FOIPP and section 27(1)(a) protects them from disclosure.

[para 8] In the Order granted by the Court dated April 23, 2020 and filed on May 13, 2020, the Court specified the information to be remitted to this office:

3. The issue of whether AHS properly relied on section 24(1)(b)(i) of the FOIPP in refusing to disclose the information redacted on that basis in records 6, 7, 20, 29, 36, 39, 40, 45-47, 49-51, 53, 54, 63, 95 (bottom redaction), 96 (top redaction), 102, 103, 110 (bottom redaction), 111, and 120 (bottom redaction) is remitted back to the IPC for determination.

[para 9] This reconsideration will address the Public Body's application of section 24(1)(b) to the records identified in the Court Order set out above.

II. RECORDS AT ISSUE

[para 10] The records at issue consist of pages 6, 7, 20, 29, 36, 39, 40, 45-47, 49-51, 53, 54, 63, 95 (bottom redaction), 96 (top redaction), 102, 103, 110 (bottom redaction), 111, and 120 (bottom redaction).

[para 11] In its initial submission, the Public Body states that the information on page 111 of the records to which it had applied section 24(1)(b) is not information to which that provision applies, as it reflects a decision that had already been made and acted on. The Public Body provided an unredacted copy of that page to the Applicant with its initial submission. Therefore, this page is no longer at issue.

III. ISSUES

[para 12] The Notice of Reconsideration, issued on August 7, 2024, sets out the issue for the reconsideration as follows:

Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?

IV. DISCUSSION OF ISSUES

Preliminary issue – Scope of the inquiry

[para 13] The Applicant argued that he is “legally entitled to receive and understand why decisions were made and find closure including how information was distributed and shared within AHS and outside parties. The right to receive and disclose information involving a patient or Alternative Decision Maker is supported by AHS Policy as follows...”

[para 14] The Applicant cited excerpts he says are from an AHS policy entitled “Consent to treatment/Procedure(s): Adults with impaired Capacity and Adults Who Lack Capacity.” The cited excerpts state what information will be provided to an alternative decision maker regarding proposed treatment and procedures.

[para 15] The Applicant states that he was named as his mother’s representative in her Personal Directive and Enduring Power of Attorney.

[para 16] The Applicant may have had authority to make an access request on behalf of his mother as her representative (during her lifetime) or as executor to her estate. In Order F2019-19/H2019-01, the adjudicator noted that the Applicant had made a different access request as the executor of his mother’s estate. However, the access request relevant to this reconsideration was not made as the executor of the estate; as set out above, the Applicant specified that he was seeking his own personal information.

[para 17] Further, the Applicant is not seeking information as an alternative decision-maker in relation to his mother’s care; the Applicant’s mother had passed away before the Applicant made this access request.

[para 18] The sole issue for this inquiry, as set out by the Court in *Alberta Health Services*, is whether the Public Body properly applied section 24(1)(b) to specific information in the records responsive to the Applicant’s request for his own personal information. Whether the Public Body has policies or obligations regarding providing information to alternative decision-makers in relation to the provision of care to adults who lack capacity is not an issue before me.

[para 19] The Applicant has also raised concerns about how employees of AHS treated him during his mother’s care; specifically, he has alleged that employees inappropriately disclosed information about him and his mother, stating:

Subsequently, I am seeking information within AHS records that are defamatory and false. I am of the firm belief there are records [that] are misleading and contain biased information. As stated in [Section 36 of the FOIP Act] I have the right to review and seek corrections to these records in the custody of AHS.

[para 20] The Applicant has provided excerpts of AHS policies regarding the collection, use and disclosure of health information, and excerpts of news articles regarding privacy breaches involving AHS. None of this is related to the issue for this reconsideration as set out in *Alberta Health Services* and I need not consider it.

[para 21] At various points throughout his submission, the Applicant argued that information in the records is inaccurate and should be corrected in accordance with section

36(1). This is a new issue that falls outside the scope of this reconsideration. The Applicant can request a correction to his personal information as set out in that section of the Act.

Preliminary issue – Section 17(1)

[para 22] The records I have for this reconsideration are the same records that were before the adjudicator in the first inquiry resulting in Order F2019-19/H2019-01. They are also the same records provided to the Court for the judicial review of that Order.

[para 23] In these records, the Public Body applied section 17(1) to some of the same information at issue in this reconsideration, to which section 24(1)(b) was applied. In Order F2019-19/H2019-01, the adjudicator noted that the Public Body was no longer applying section 17(1) to personal information about the Applicant's deceased mother; it continued to apply that provision to personal information of third parties. The adjudicator also found that section 17(1) did not apply to information in the records at issue apart from information on page 10 (which is not at issue here). The Public Body did not object to the adjudicator's findings regarding section 17(1) in the course of the judicial review (see *Alberta Health Services*, at para. 7).

[para 24] For the reasons discussed below, I find that section 24(1)(b) does not apply to all of the information withheld under that provision in the records at issue. In a few instances, the records indicate that section 17(1) was also applied to that same information. However, for the reasons above, I do not need to make my order to disclose information to which I found that section 24(1)(b) does not apply, conditional on any application of section 17(1), given the findings of the adjudicator in Order F2019-19/H2019-01, which were not disputed by the Public Body.

[para 25] This is subject to two exceptions, on pages 36 and 39-40.

[para 26] Page 36 of the records at issue is comprised of an email. The same email appears on pages 39-40. The Public Body withheld one sentence near the top of this email and several sentences near the end of the email, under section 24(1)(b).

[para 27] The first sentence withheld in the email on these pages is blacked out in the copy of records I have. As the records I have for this reconsideration are the same records that were before the adjudicator in the first inquiry resulting in Order F2019-19/H2019-01, I conclude that the adjudicator was unable to review the information that had been blacked out.

[para 28] In its submissions, the Public Body explained that it cannot locate a version of this email in which this information is not blacked out. In its rebuttal submission, the Public Body states:

Legal counsel for the Public Body has searched the related files available to her, and has made follow-up inquiries with various individuals, including but not limited to the author of the email message on page 36 of the Responsive Records, but without success.

[para 29] After receiving the Public Body's submissions, the Registrar of Inquiries located an unredacted copy of this page, located in the mediation file. As I understand, this page was

provided to the Senior Information and Privacy Manager by the Public Body at some point after the other records at issue had been provided. When the other records were returned to the Public Body following the mediation, this page was missed. This paper copy of the email was returned to the Public Body along with a letter dated January 8, 2025.

[para 30] In the unredacted copy of the email provided to this office during the earlier review process, the Public Body applied section 17(1) to the sentence near the top of the email. In the copy of the records provided to the adjudicator for the initial inquiry, this sentence was withheld under both sections 17(1) and 24(1)(b).

[para 31] As noted, the adjudicator in Order F2019-19/H2019-01 found that section 17(1) did not apply to information in the records at issue apart from information on page 10 (which is not at issue here). However, the adjudicator did not have the benefit of reviewing the content of the first withheld sentence in this email in making her determination, as that sentence was blacked out in the records before her.

[para 32] The adjudicator specifically addressed the application of section 17(1) to one sentence on page 36. She said (at para. 90):

The information at issue is about an affiliate of AHS, acting in her personal capacity. However, the information is contained in a statement attributed to the Applicant.

[para 33] From my review of page 36 it is clear that this comment relates to a different sentence that had been withheld under section 17(1) on that page, which was not also withheld under section 24(1)(b). That sentence is not at issue in this reconsideration.

[para 34] The sentence near the top of the email that *is* at issue cannot be characterized as information in a statement attributed to the Applicant.

[para 35] There is no indication in Order F2019-19/H2019-01 that the adjudicator considered the application of section 17(1) to the sentence that was blacked out in the copy of records available to her. The adjudicator also did not address the application of section 17(1) to the same information appearing in pages 39-40.

[para 36] Having an unredacted copy of the email comprising pages 36 and 39-40, I am able to make a determination that the previous adjudicator was unable to make. For the reasons discussed below, I find that section 24(1)(b) does not apply to the information in the sentence withheld near the top of the email on page 36 and repeated on pages 39-40.

[para 37] That said, it appears to be the type of information to which section 17(1) can apply, as it is information about third parties other than the Applicant's mother. Section 17(1) is not an issue that the Court remitted back to this office to decide, and it is therefore not an issue in this reconsideration. However, section 17(1) is a mandatory provision; this means that the Public Body is not permitted to disclose information to which that provision applies.

[para 38] Rather than ordering the Public Body to disclose this sentence to the Applicant for the reason that section 24(1)(b) does not apply, I will order the Public Body to make a new

decision regarding the application of section 17(1). If the Public Body determines that this provision applies to the sentence near the top of the email appearing in pages 36 and 39-40, then the Public Body must continue to withhold that information. If the Public Body determines that section 17(1) does not apply, then the Public Body must disclose the information to the Applicant. The Public Body should inform the Applicant of its decision regarding this information, when it provides a new response to the Applicant as set out at the end of this Order.

Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?

[para 39] Section 24(1)(b) states:

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,*

...

[para 40] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it refused to disclose under section 24.

[para 41] The test for section 24(1)(b), as stated in past Orders, is that the consultations and deliberations (section 24(1)(b)) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action. (See Order 96-006, at p.9)

[para 42] A "consultation" occurs when the views of one or more officers or employees are sought as to the appropriateness of particular proposals or suggested actions; a "deliberation" is a discussion or consideration, by persons described in section 24(1)(b), of the reasons for and/or against an action (Orders 96-006 at p. 10 or para. 48; Order 99-013 at para. 48, F2007-021, at para. 66).

[para 43] In Order F2012-06, the adjudicator stated, citing former Commissioner Clark's interpretation of "consultations and deliberations", that

It is not enough that records record discussions or communications between employees of a public body; rather, a consultation takes place only when the individuals listed in section 24(1)(b) are asked for their views regarding a potential course of action, and a deliberation occurs when

those individuals discuss a decision that they are responsible for, and are in the process of, making.

[para 44] 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 45] Section 24(1)(b) applies only to the records (or parts thereof) that reveal substantive information about which 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 consultations were held on a particular topic (and not the substance of the consultations) cannot generally be withheld under section 24(1)(b) (see Order F2004-026, at para. 71).

[para 46] Bare recitation of facts or summaries of information also cannot be withheld under section 24(1)(b) unless the facts are interwoven with the consultations or deliberations such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48). As well, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at para. 31).

[para 47] Given these limits on the application of section 24(1), even where it applies to information on a page, it is often the case that portions of a page will be disclosed with discrete items of information withheld (i.e. more often than not, entire pages cannot be withheld under this provision). Public bodies must therefore conduct a line-by-line review of each page in order to apply section 24(1) appropriately.

[para 48] The first step in determining whether section 24(1)(b) was properly applied is to consider whether a record would reveal consultations or deliberations between specified individuals.

Parties' arguments

[para 49] The Public Body states that the information withheld under section 24(1)(b)

constitutes information being shared among a group of employees of the Public Body who, together, are doing so in the context of consulting with each other as to the appropriateness of potential decisions and courses of action, and deliberating as to the decisions they are responsible for, and are in the process of, making vis-à-vis the Applicant.

[para 50] The Public Body argues that several employees of the Public Body were involved in consultations and deliberations regarding the Applicant, including “managers at various levels, executive directors, a site director, a senior operating officer, a protective services manager and legal counsel (including general counsel)” due to the challenging nature of dealing with the Applicant in the context of his mothers’ care.

[para 51] The Public Body further argues that the consultations and deliberations were directed at taking action or making decisions, specifically with respect to addressing issues involving the Applicant and Public Body employees.

[para 52] The Applicant argues that the Public Body’s submissions represent a biased view of the circumstances involving his mother’s care; specifically as they relate to challenges posed by the Applicant to Public Body employees.

[para 53] The Public Body and Applicant also provided arguments specific to the information withheld on each page; I will discuss these arguments in my analysis, below.

Analysis

[para 54] Most of the records at issue consist of emails between various employees of the Public Body. In each case it is clear that the employees involved are in a position to be giving or obtaining advice, or making a decision on the relevant topic. The primary determination before me with respect to the information at issue is whether the information is directed toward taking an action, and whether it reveals the substance of consultations or deliberations, such that section 24(1)(b) can apply.

[para 55] Pages 6 and 7 both consist of email chains. The second half of the paragraph comprising the second email on page 6 was withheld under section 24(1)(b); the same information was withheld in a copy of that email on page 7. The Public Body argues that the partially redacted email was sent by a Public Body employee to a unit manager; the disclosed portion of the employee’s email indicates that the employee was proposing a strategy to deal with the Applicant. The withheld portion of the email relates to details or factors related to the proposal. The first email on both pages 6 and 7 show that managers involved in the matter intended to discuss the employee’s proposal. I agree that the withheld portion of the employee’s email, which details factors relating to the proposal, are the subject of a consultation or deliberation within the terms of section 24(1)(b).

[para 56] The information withheld under section 24(1)(b) on page 20 is information in an email from a unit manager to their employee. The Public Body states that the withheld information consists of advice from the manager to their employee, in response to the

employee's request for advice in the email comprising the bottom of page 20 and all of page 21. It states:

It is the responsibility of a unit manager to guide and give advice to his staff, which he is doing here. In the context of this consultation, the unit manager directs the staff member as to what actions would be prudent for her to take.

[para 57] In Order F2012-06, the adjudicator concluded that section 24(1) does not apply to instructions or directions to employees, as they do not fall within the scope of sections 24(1)(a) or (b) as set out in past Orders.

[para 58] As stated above, section 24(1)(b)(i) applies where an employee of a public body solicits the type of information set out in section 24(1)(a) – advice, recommendations, analyses etc. – regarding an action or decision they are responsible for. The advice, recommendations, analyses etc. must be “developed by or for a public body or a member of the Executive Council.” Section 24(1)(b) protects the deliberations regarding the possible action or decision, including the request for advice or views on the matter, and discussions about that advice.

[para 59] In other words, section 24(1)(b) applies where the deliberations relate to an action or decision that an employee is taking (or considering) on behalf of the public body, in their role with the public body.

[para 60] In *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3, the Supreme Court of Canada adopted the purpose set out in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, 1999 CanLII 8293 (FC), [1999] 4 F.C. 245 for exceptions in access-to-information legislation relating to advice given by public servants:

To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies.

It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. ...

[para 61] From this, it is clear that exceptions to access relating to advice and deliberations are intended to protect full and frank discussions about possible decisions or actions to be taken by or on behalf of the public body.

[para 62] Although the matter discussed in page 20 relates indirectly to the employee's role with the Public Body, the records indicate that the employee is not in a position to be making a decision or determining a course of action on behalf of the Public Body. The withheld information is better characterized as something akin to career advice from a manager to an employee. This is not the sort of information to which section 24(1)(b) applies.

[para 63] Further, the emails on page 20 do not discuss reasons for or against an action or decision, or considerations in making a decision. I find that section 24(1)(b) does not apply to the information withheld under that provision on page 20.

[para 64] The information withheld on page 29 is contained in an email from a unit manager to an HR employee. The Public Body states that it is clear from the record that the unit manager is determining how to proceed on a particular matter and sought input from the HR employee. From the email it is clear that the unit manager is contemplating an HR-related matter such that it is reasonable to seek input from the HR employee. I agree that the sentence withheld on page 29 reveals a consultation within the terms of section 24(1)(b).

[para 65] Page 36 is comprised of an email from a manager to an executive director of the Public Body. Most of the email has been disclosed to the Applicant, with one sentence near the top and several sentences near the bottom withheld under section 24(1)(b). The same email appears in pages 39-40.

[para 66] The sentence near the top of the email relays a decision that was already made. Therefore, section 24(1)(b) does not apply to this information. As discussed above, I will order the Public Body to determine whether section 17(1) applies to this information before disclosing it to the Applicant.

[para 67] Regarding the paragraph redacted near the end of the email, the Public Body states that the email is a response to a request from the executive director for an update on the outcome of an investigation into a complaint made by the Applicant to the Public Body. This email appears in page 35 of the records, and was disclosed to the Applicant.

[para 68] The email appearing in pages 36 and 39-40 is a response to the request, drafted by a manager. The Public Body states that the executive director requested the update so that another employee could draft a response to a letter from the Applicant. The Public Body states that most of the email relays events that have already occurred and was therefore disclosed to the Applicant. However, the Public Body states that the paragraph withheld near the end of the email relates to new developments. It further states:

This Information at Issue forms part of communications among senior management at the site who are consulting in respect of the action to be taken, being the letter (and the contents thereof) that the senior operating officer wishes to send to the Applicant in response to his letter to her. The consultation between the manager and the executive director in order to inform the senior operating officer is part of their responsibilities, and is for the benefit of the senior operating officer whose responsibility it is to respond to the letter she received from the Applicant.

[para 69] The executive director requested an update on an investigation, which the manager provided in her email on pages 36 and 39-40. The purpose of the request was to inform another employee (the senior operating officer), who was drafting a response to a letter from the Applicant. On its face, this request for information does not appear to be initiating a consultation or deliberation. I agree with the Public Body that most of the information in the manager's email consists of a recitation of events that occurred. However, in the paragraph that was partially withheld, the manager provides additional information that is not an update on the investigation.

[para 70] I have located the Applicant's letter in the records at issue, to which the senior operating officer is intending to respond. This additional information from the manager is related

to the issues set out in the Applicant's letter. It appears that the manager included this additional information in her email as additional concerns the senior operating officer might consider in drafting a response to the Applicant. I agree with the Public Body that the manager is in a position to provide advice or consult on these matters. I find that section 24(1)(b) applies to the information withheld in the paragraph near the end of the email on pages 36 and 39-40.

[para 71] The Public Body has withheld discrete sentences from email chains appearing in pages 45-47. The emails involve a site director, a manager, and the executive director. The Public Body states that the information withheld in the emails "relates to observations about the impact that past decisions seem to have had and new steps and a new plan under consideration." I agree that some, but not all, of the withheld information reveals consultations between these Public Body employees.

[para 72] The information withheld on page 45 reveals the executive director's opinion on a matter being discussed, with reasons for that opinion. I find that section 24(1)(b) applies.

[para 73] Some but not all of the information withheld on page 46 (in the second email on that page) reveals the substance of consultations or deliberations. There are four paragraphs in the second email on page 46. The information withheld in the first paragraph reveals factors considered in relation to a proposed plan. I agree that section 24(1)(b) applies to this information.

[para 74] In the second paragraph (starting with "There are...") the first item of information withheld reveals only the topic of an upcoming discussion. This information cannot be withheld under section 24(1)(b). However, the remainder of the information in that paragraph relays the writer's opinion on a proposed plan, with reasons for that opinion. I agree that section 24(1)(b) applies to this information. The third paragraph also reveals the reasons for the writer's opinion and section 24(1)(b) applies to that information as well. The item of information withheld in the fourth paragraph reveals a proposed plan, such that section 24(1)(b) applies to that information.

[para 75] The Public Body withheld one sentence in the email on page 47 under section 24(1)(b). This sentence reveals only the topic of a matter that will be discussed, rather than the substance of any consultation or deliberation. I find that section 24(1)(b) does not apply to that information.

[para 76] Page 49 consists of an email from a unit manager to another manager, continuing a discussion set out in the emails at pages 45-47. The sentence in this email withheld under section 24(1)(b) relays an approach proposed by the writer relevant to the ongoing consultation or deliberation. I find that section 24(1)(b) applies.

[para 77] Pages 50-51 are comprised of a draft letter that was attached to the email at page 49. From the email it is clear that this draft was provided to the email recipients for their review and consideration.

[para 78] Section 24(1)(b) applies to information in draft documents where consultations took place regarding the content of the draft; in other words, section 24(1)(b) can apply where the

draft document is the subject of the consultation or deliberations (See Orders F2022-45 at para. 85, F2024-37, at para. 40).

[para 79] In previous Orders, section 24(1) has been found not to apply drafts where the author provided a draft for the recipient to complete, and where there is no indication of any consultation or deliberation regarding the draft or its contents (see Orders F2012-06, at para. 140, F2024-35 at para. 38). In this case, the author of the draft has been involved in ongoing consultations and deliberations regarding the matter to which the draft relates. I find that section 24(1)(b) applies to the draft at pages 50-51.

[para 80] Pages 53-54 also consist of a draft letter that was circulated for discussion. For the same reasons as above, I find that section 24(1)(b) applies.

[para 81] Page 63 is comprised of two emails relating to a consult that was to take place. The sentence withheld in the second email reveals only the topic of the consult. The Public Body argues that this sentence “contains details of a request for consultation and actioning that request.” At most this sentence reveals decisions that have been made regarding next steps, but it does not reveal the substance of any consultation or deliberation. I find that section 24(1)(b) does not apply. In contrast, the sentence withheld in the top email reveals factors that were considered in determining the scope of the consult. In my view, this information reveals the *reasons* for proceeding in a particular manner such that section 24(1)(b) applies.

[para 82] Pages 95-96 are comprised of email chains. The only information at issue in these pages is a long sentence in an email on the bottom of page 95 and the top of page 96. This same information is repeated on page 110. The Public Body states that the email is from the acting facility medical director to legal counsel and others, and that the withheld information consists of suggestions for a possible course of action relating to an ongoing consultation. I agree that there was an ongoing consultation within the terms of section 24(1)(b), and that the information withheld on pages 95-96 and 110 reveals a proposed course of action and therefore the substance the consultation. Section 24(1)(b) therefore applies to this information.

[para 83] Page 102 also consists of email chains. The Public Body withheld one sentence in one of the emails on this page. The Public Body argues that the author of the email was contributing to a discussion regarding possible approaches to a particular meeting that was to take place. The Public Body states that “[i]t appears that the manager [to whom the email was sent] requested a consultation from the team of whom the writer is a member to decide if a particular action was required.” I agree that the manager to whom the email was sent was seeking input on a particular course of action, and that the author was providing input regarding that course of action, such that section 24(1)(b) applies.

[para 84] Page 103 is a continuation of the email chain discussed above. The information withheld on this page is in an email from a member of the same team as the email author on page 102. The author of the email on page 103 is also providing input on the proposed course of action, such that section 24(1)(b) applies. This same information was withheld on page 120, and section 24(1)(b) applies there as well.

Exercise of discretion

[para 85] Section 24(1) is a discretionary exception to disclosure. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a public body's exercise of discretion.

[para 86] 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. The Court also considered the following factors to be relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

[para 87] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded (at para. 104):

In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*.

[para 88] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), the Court provided detailed instructions for public bodies exercising discretion to withhold information under the FOIP Act. The Court said (at para. 416):

What *Ontario Public Safety and Security* requires is the weighing of considerations "for and against disclosure, including the public interest in disclosure:" at para 46. The relevant interests supported by non-disclosure and disclosure must be identified, and the effects of the particular proposed disclosure must be assessed. Disclosure or non-disclosure may support, enhance, or promote some interests but not support, enhance, or promote other interests. Not only the "quantitative" effects of disclosure or non-disclosure need be assessed (how much good or ill would be caused) but the relative importance of interests should be assessed (significant promotion of a lesser interest may be outweighed by moderate promotion of a more important interest). There may be no issue of "harm" in the sense of damage caused by disclosure or non-disclosure, although disclosure or non-disclosure may have greater or lesser benefits. A reason for not disclosing, for example, would be that the benefit for an important interest would exceed any benefit for other interests. That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

[para 89] It further explained the weighing of factors at paragraph 419:

...If disclosure would enhance or improve the public body's interests, there would be no reason not to disclose. If non-disclosure would benefit the public body's interests beyond any benefits of disclosure, the public body should not disclose. If disclosure would neither enhance nor degrade

the public body's interests, given the "encouragement" of disclosure, disclosure should occur. Information should not be disclosed only if it would run counter to, or degrade, or impair, that is, if it would "harm" identified interests of the public body.

[para 90] Lastly, the Court described burden of showing that discretion was properly exercised (at para. 421):

I accept that a public body is "in the best position" to identify its interests at stake, and to identify how disclosure would "potentially affect the operations of the public body" or third parties that work with the public body: EPS Brief at para 199. But that does not mean that its decision is necessarily reasonable, only that it has access to the best evidence (there's a difference between having all the evidence and making an appropriate decision on the evidence). The Adjudicator was right that the burden of showing the appropriate exercise of discretion lies on the public body. It is obligated to show that it has properly refrained from disclosure. Its reasons are subject to review by the IPC. The public body's exercise of discretion must be established; the exercise of discretion is not presumptively valid. The public body must establish proper non-disclosure. The IPC does not have the burden of showing improper non-disclosure.

[para 91] The Applicant's submissions on this point primarily address the Public Body's policies regarding patient care, and providing information to family members as part of patient care. The Applicant notes that the relationship between him and the Public Body is strained, as is evident from the records themselves, and questions the Public Body's objectivity in withholding information.

[para 92] The Applicant also argues that the passage of time since the creation of the records is a relevant consideration. He states that "[t]here is a lack of transparency after a decade surrounding this hospitalization and any documentation on the Applicant. The family and myself are entitled to closure on this matter although AHS remains steadfast on restricting disclosure."

[para 93] The Applicant states that throughout the circumstances to which the records relate, the Public Body failed to follow its own policies regarding patient care and communicating with patients and family members. The Applicant refers to the Public Body's argument that disclosing the withheld information would have a chilling effect on the consultations and deliberations, and states that disclosure would provide a learning opportunity for those involved, rather than perpetuating what he believes was inappropriate conduct.

[para 94] The Applicant also argued that the Public Body failed to comply with "a Queens Bench Order, Court File 1603 11259 which was pronounced June 27, 2016 pursuant to Section 3(2) of the Fatal Accidents Act, R.S.A 2000 by Justice Donald J. Manderscheid". I do not know how this order under the *Fatal Accidents Act* is relevant to the Public Body's application of section 24(1)(b) to the information at issue.

[para 95] With its initial submission, the Public Body provided an affidavit sworn by the Director of FOIP & Privacy Business Advisory with the Public Body. The Director was not with the Public Body at the time the Applicant's access request was processed. She states that no one involved in processing the Applicant's request is currently with the Public Body to provide direct evidence regarding the exercise of discretion. The Director states that her current role includes

training staff on the appropriate exercise of discretion in applying exceptions to access under the FOIP Act.

[para 96] The Director states that she reviewed the Applicant's access request, his request for review and request for inquiry, and the records at issue. She states that had she processed the Applicant's request, she would have applied section 24(1)(b) to the information in the same manner as was done, with the exception of page 111, which the Public Body provided to the Applicant with its initial submission.

[para 97] The Director states that having reviewed the redactions, she concludes that:

- a) The Information at Issue could reasonably be expected to reveal consultations and/or deliberations of officers or employees of AHS who were engaged to consider possible next steps, make decisions and take actions in relation to the Applicant and who then acted on those decisions and implemented such actions; and
- b) In applying the discretionary exception to disclosure under section 24(1)(b) of the FOIP Act to the Information at Issue, AHS considered and weighed all relevant factors, including most importantly both the objects and purposes of the FOIP Act, and specifically the Applicant's right to access his personal information subject only to limited exceptions, as well as the chilling effect that release of information of this nature would have on its staff's deliberations and consultations in relation to the Applicant and in future similar circumstances.

[para 98] The Director further states that there is no indication that discretion was exercised in bad faith, that irrelevant factors were considered, or that relevant factors were not considered. She concludes that "... AHS exercised its discretion for a proper, relevant and very important purpose, having regard to the positive and deleterious effects of disclosure and non-disclosure, the ensuing benefits and harms of disclosure and non-disclosure, and public and private interests."

[para 99] In its initial submission, the Public Body further states that

41. Despite its best efforts to deliver the highest quality of health services, the Public Body sometimes finds itself in a position where patients or their family members are dissatisfied with the care they are receiving, leading to tensions and/or conflict. The Public Body submits that a review of the Responsive Records indicates that this was the case with the Applicant regarding his mother's care, and that his conduct could, at times, escalate and was sometimes characterized as challenging and difficult by staff of the Public Body. This appears to have led to a strained relationship between the Applicant and at least some staff, both front line workers and management. The Public Body notes that this is supported by the evident involvement of protective services and legal counsel (including general counsel) in some of the consultations and deliberations.

42. The Public Body further submits that, in a situation such as that faced by the Public Body vis-à-vis the Applicant, the Public Body tries to identify the best path forward without exacerbating the situation. Public Body employees in various positions as well as, sometimes, officers, embark on frank and open consultations and deliberations to seek and give advice and to

make decisions about the best course of action. The Public Body encourages a delicate, fair and unbiased approach that favours a candid and detailed exchange of information to foster a thorough understanding of the dynamics at play.

43. In the context of a challenging and ongoing relationship such as that of the Public Body and the Applicant during the timeframe of the Responsive Records, the need for candor in consultations and deliberations, sometimes among a broad spectrum of internal partners, is critical. The Public Body respectfully submits that the possibility of a subsequent release of the content and details would have a chilling effect on those consultations and deliberations – both in relation to the particular individual in question, as well as future consultations and deliberations involving some or all of the same Public Body staff but about other third parties. Further, the harm that would result from participants in such consultations and deliberations limiting the content of their discussions or not engaging in candid exchanges of information and consideration of different possible courses of action would have a deleterious effect not only on the individual in question (in this case, the Applicant), but also potentially on other similarly situated individuals in the future, as well as on the working relationship and effectiveness of staff of the Public Body, since, as examples, input and feedback may not be sought and/or a broader range of possible responses may not be explored. The Public Body submits that, ultimately, this would negatively impact its ability to manage its relationships with patients and family members as well as its staff, which would be very harmful to the Public Body and the public.

44. The Public Body respectfully submits that the harm that would result from disclosure of the Information at Issue, both vis-à-vis the Public Body's interactions with the Applicant specifically and the impact among staff and on their interactions with acrimonious patients and family members more generally moving forward, and the corresponding benefit of non-disclosure, outweigh the public and private interests in favour of disclosure of the Information at Issue and the potential benefits of such disclosure, including the interest in open government. Further, the Public Body respectfully submits that this is a proper and relevant consideration—indeed, the deciding consideration—in the Public Body's exercise of discretion to withhold the Information at Issue from the Applicant.

[para 100] The Public Body also denies that the passage of time diminishes any chilling effect that disclosure may have. This is because disclosure would affect whether, and the extent to which, Public Body employees may be willing to participate in similar types of consultations in the future.

[para 101] I appreciate the points the Public Body has made regarding the sensitivity of the circumstances to which the records relate. From Order F2019-19/H2019-01 and the resulting judicial review decision in *Alberta Health Services*, it is clear that the records relate to health care being provided to an elderly and long-term patient, and that the records related to sensitive topics such as amending the goals of care for the patient. Discussions on such topics are understandably fraught, especially where such amendments are disputed by family members helping to make decisions on behalf of the patient. I understand the Public Body's point regarding the need for Public Body employees to be able to openly discuss all options.

[para 102] Not all of the information at issue relates to such discussions. Other information relates to the interactions between the Applicant and Public Body staff. The Public Body's points about having full and frank discussions when dealing with a challenging individual (or someone perceived as being a challenging individual) are still relevant.

[para 103] However, it seems that other factors that weigh in favour of disclosure may also be relevant. While the Public Body has said that it considered factors weighing in favour of disclosure, it didn't specify what those factors were (or weren't), other than noting that its default is to provide access and that the purpose of the Act promotes access. The Public Body argues that this approach "is evident upon review of the Responsive Records, in terms of both the significant quantity of information that was released to the Applicant in response to the Access Request and the nature of the limited information that was not disclosed to the Applicant."

[para 104] On this latter point, I agree that there is additional information in the records to which section 24(1)(b) might have been applied. I agree that this indicates that the Public Body did not apply a blanket approach to section 24(1)(b); that is, the Public Body appears not to have applied that provision to any and all of the information to which that provision might have applied. I agree that the Public Body's apparent decision to disclose information to which section 24(1)(b) could have been applied indicates that the Public Body balanced factors weighing in favour of disclosure with factors weighing against.

[para 105] Nevertheless, the fact that the Public Body opted to disclose some information to which section 24(1)(b) might have applied does not necessarily lead to the conclusion that the Public Body properly exercised its discretion wherever it *did* apply section 24(1)(b).

[para 106] It is clear from the Applicant's submissions that he is seeking information about how the Public Body chose to approach dealing with him and his mother's care. It may be the case that some of the withheld information could help the Applicant understand actions taken by the Public Body. Possibly the Public Body has considered this factor but it hasn't said as much in its submissions.

[para 107] It's not merely the Applicant's interests in the information that may weigh in favour of disclosure, though that is clearly a relevant factor. For example, disclosure may be a benefit to the Public Body by providing evidence of proper decision-making, or by providing educational opportunities. Again, the Public Body may have considered this factor but it hasn't said so.

[para 108] Further, the Public Body has applied section 24(1)(b) to draft letters, when it is apparent from the records that the letter was intended for the Applicant. In at least one instance, the draft appears to be nearly identical to what the Applicant ultimately received. It is unclear what full and frank discussion is being protected by withholding such a draft. The Public Body should consider whether the drafts withheld in the records are similar to information already provided to the Applicant and how that affects its exercise of discretion.

[para 109] From the Public Body's submissions, I am not satisfied that it considered all relevant factors in deciding to withhold information under section 24(1)(b). I will order the Public Body to reconsider its exercise of discretion to withhold information to which I have found section 24(1)(b) can apply, following the guidance above.

V. ORDER

[para 110] I make this Order under section 72 of the Act.

[para 111] I find that section 24(1)(b) applies to the information at issue, except

- the information withheld under that provision on page 20;
- the first item of information withheld under that provision in the second paragraph of the second email on page 46 (as discussed in paragraph 74);
- the information withheld under that provision on page 47; and
- the information withheld in the second email on page 63 (as discussed in paragraph 81).

I order the Public Body to disclose this information to the Applicant.

[para 112] I also find that section 24(1)(b) does not apply to the information withheld under that provision at the top of the email on pages 36 and 39-40. I order the Public Body to consider whether section 17(1) applies to this information as discussed in paragraphs 37-38 of this Order, and withhold or disclose the information to the Applicant accordingly. If the Public Body determines that section 17(1) applies, it is to inform the Applicant of its decision.

[para 113] I order the Public Body to reconsider its exercise of discretion in withholding the information to which I have found section 24(1)(b) applies, following the direction set out at paragraphs 85-109. If the Public Body continues to withhold responsive information under that provision, it is to explain its exercise of discretion to the Applicant.

[para 114] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Amanda Swanek
Adjudicator