ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER FOIP2026-15

April 16, 2026

OFFICE OF THE PREMIER/ALBERTA EXECUTIVE COUNCIL

Case File Number 003999

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Summary: An Applicant made a request to Alberta Executive Council (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for all records related to communications referencing both a named employee and "freedom of information."

The Public Body responded to the Applicant, stating that it located 1760 pages of responsive records. The Public Body provided some records to the Applicant, withholding information under sections 4(1)(d) and (q) (records to which this Act applies), 6(4)(b) (information rights), 17(1) (disclosure harmful to personal privacy), 24(1)(a) and (g) (advice from officials), 27(1) (privileged information) and 29(1) (information that is or will be available to the public) of the Act. The Public Body also withheld some information as non-responsive

The Applicant requested an inquiry into the Public Body's response.

The Adjudicator determined that section 4(1) applies to some of the records; therefore, she did not have jurisdiction to review the Public Body's decisions regarding those records.

The Adjudicator determined that section 6(4) does not apply, and ordered the Public Body to make a new decision regarding access to the relevant information. Similarly, the Adjudicator determined that the Public Body did not properly characterize some information as non-responsive, and ordered the Public Body to make new decisions regarding access to that information.

The Adjudicator found that section 17(1) did not apply to much of the information withheld under that provision. The Adjudicator found that the information to which that provision did apply was properly withheld.

The Adjudicator found that section 24(1) applied to information in the records, but ordered the Public Body to re-exercise its discretion to withhold the information under that exception.

The Adjudicator found that the Public Body properly asserted privilege under section 27(1)(a).

The Adjudicator found that the Public Body did not properly apply section 29(1) in the first instance but had since done so.

Statutes Cited: AB: *Conflicts of Interest Act*, R.S.A. 2000, c. C-23, ss. 25, 44; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss.1, 4, 6, 11, 17, 24, 27, 29, 53, 71, 72

Authorities Cited: AB: Decision F2014-D-01, Orders 96-012, F2004-026, F2007-013, F2009-025, F2010-002, F2010-036, F2012-12, F2013-13, F2015-29, F2017-58, F2018-75, F2019-07, F2021-12, F2021-28, F2023-38, F2024-17, F2024-32, **Ont**: PO-4286

Cases Cited: *Alberta (Municipal Affairs) v. Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274, *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), *Solosky v. The Queen*, 1979 CanLII 9 [1980] 1 S.C.R. 821

I. BACKGROUND

[para 1] An Applicant made a request to Alberta Executive Council (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act or the Act) for all records "related to any communications that reference both [a Public Body employee, J] and freedom of information (or any related iteration of it, including – but not limited to – "FOIP", "FOIP request(s)" etc.)". The Applicant further clarified:

> this request includes – but is not limited to – all related communications to or from [J] regarding freedom of information and / or freedom of information requests.

[para 2] On August 2, 2016, the Public Body responded to the access request. It provided 1760 pages of records, but severed information from them under sections 4(1)(d) and (q) (records to which this Act applies), 6(4)(b) (information rights), 17(1) (disclosure harmful to personal privacy), 24(1)(a) and (g) (advice from officials), 27(1) (privileged information) and 29(1) (information that is or will be available to the public) of the Act. The Public Body also withheld some information as non-responsive

[para 3] The Applicant requested a review of the Public Body's response, including the time taken by the Public Body to respond. Following the review, the Applicant requested an inquiry.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of the information withheld in the 1760 pages of responsive records.

III. ISSUES

[para 5] The issues for this inquiry were set out by the adjudicator previously assigned to this inquiry, in the Notice of Inquiry dated March 5, 2019, as follows:

1. Are the records exempt from the application of the FOIP Act as set out in section 4(1)(d) of the Act?

2. Are the records exempt from the application of the FOIP Act as set out in section 4(1)(q) of the Act?

3. Does section 6(4)(b) (information rights) exempt the records from the right of access?

4. Did the Public Body comply with section 11 of the Act (time limit for responding)?

5. Is the information in the records responsive to the Applicant's access request?

6. Does section 17(1) of the Act (disclosure harmful to personal privacy) require the Public Body to sever information from the records?

7. Did the Public Body properly apply sections 24(1)(a) and (g) (advice from officials) to information in the records?

8. Did the Public Body properly apply section 27(1)(a) (privileged information) to information in the records?

If "solicitor-client privilege" and/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.

9. Did the Public Body properly apply section 29(1) (information that is or will be available to the public) to information in the records?

IV. DISCUSSION OF ISSUES

Preliminary issue – Application of exceptions by other public bodies

[para 6] Some of the responsive records are comprised of records that *other* public bodies processed in responding to access requests made to those public bodies. The Public Body has the copy of those records that had been provided to the applicant with information redacted. In

other words, the copy of these records in the Public Body's custody are the redacted records. Therefore, the redactions that had been previously made by other public bodies in those records are not at issue in this inquiry.

[para 7] The relevant records are identified in the Public Body's index of records at "release packages", at pages 406-628, 636-1014, 1015-1370, and 1371-1373. In a few instances, the Public Body withheld additional items of information in these pages under section 17(1). I will address the Public Body's application of section 17(1) to that information.

Preliminary issue – Public Body's application of section 4(1)(a)

[para 8] In the Public Body's index of records it indicates that it applied section 4(1)(a) to information on page 1750 of the records. The application of this provision is not an issue set out in the Notice of Inquiry and neither party has addressed it. However, as section 4 relates to a matter of my jurisdiction, I must consider it. Section 4(1)(a) states:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> > *(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of King's Bench of Alberta or the Alberta Court of Justice, a record of an applications judge of the Court of King's Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*

[para 9] Page 1750 is part of what the Public Body has characterized as a "FOIP Report", starting at page 1722 and ending at page 1750. This report seems to consist of a brief description of ongoing FOIP requests. Page 1750 has 2 discrete items of information redacted. One item of information is an Action number, possibly relating to a court action. Another item of information is a general statement about a matter in a fatality inquiry. Neither of these items of information is information from a court file. An action number relating to a court proceeding will appear in a court file but that does not mean that any time that action number is recorded, that is thereby "information in a court file". Nothing in this page indicates that the two items of withheld information were taken from a court file.

[para 10] It is not clear that the Public Body meant to apply section 4(1)(a) to this information; if it did, I find that provision does not apply.

[para 11] A different index of records provided by the Public Body indicates that the Public Body applied section 17(1) to the information on page 1750. I will consider that application in the relevant section of this Order.

Preliminary issue – Public Body's application of section 25(1)(b)

[para 12] In its initial submission, the Public Body states that it is withdrawing its application of section 24(1) to information on page 2 of the records, but that it is applying section 25(1)(b)

to the cell phone number of a Government of Alberta (GoA) employee on that page. Regarding this cell phone number, the Public Body states:

> [the cell phone number] is considered to be information in which the Public Body has a proprietary interest or a right of use, likely to have a monetary value, and the disclosure of which could reasonably be expected to harm the economic interest of the Public Body.

[para 13] Section 25(1)(b) had not previously been raised by the Public Body and is not an issue set out in the Notice of Inquiry. The Public Body has not addressed why it should be permitted to apply a new discretionary exception so late in the process.

[para 14] Even if it were appropriate to consider a new discretionary provision this late in the process, the Public Body has not provided sufficient evidence or arguments in support of this application of section 25.

[para 15] Section 25(1) states:

> *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:*
>
> *…*
>
> *(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;*

[para 16] In Orders F2021-28 and F2023-38, the adjudicators also addressed the application of section 25(1) to withhold the cell phone numbers if there is evidence that the Public Body will likely have to expend funds to change the numbers if they become public. In Order F2021-28, the adjudicator discussed the type of evidence that would be required in order to find that section 25(1) is properly applied to a cell phone number. She said (at paras. 49-51):

> Section 25 will apply to the telephone numbers assigned to a public body's employee if it can reasonably be expected that the Public Body will need to change the employee's telephone number once it has been provided to an applicant / made public through an access request. Evidence as to the reasons why a public body restricts access to the number, how it treats the employee's calls, the public body's organizational structure and purpose, and the employee's work duties, will be necessary to establish the application of section 25.
>
> From the records at issue, I understand that the police officers in this case do not provide cell phone numbers to witnesses or complainants to contact them directly regarding active cases, but use either email or the numbers on their business cards. In this way, the Public Body is able to manage, to a certain extent, the kinds of business related calls officers receive, and that they are appropriately documented, and to ensure that police officers do not receive inappropriate calls that could compromise the integrity of investigations, among other kinds of inappropriate calls.
>
> If the Public Body were to release the cell phone numbers or direct lines to applicants, it would have no ability to control further dissemination of the numbers. The phone number could be used by any member of the public, including the Applicant, to contact police officers and Crown

> prosecutor whose numbers are contained in the records, in addition to the Applicant. If so, then it is reasonable to expect that both the Public Body and Alberta Justice and Solicitor General would have to assign new unlisted cell phone and direct line numbers to their employees if they are disclosed.

[para 17] The adjudicator set out the type of information that might support an application of section 25(1). The Public Body did not provide any supporting evidence or arguments as to why the particular phone number(s) withheld on page 2 would likely need to be changed if they are disclosed in the records at issue.

[para 18] Further, section 25(1) permits a public body to refuse access to information where disclosure *could reasonably be expected to* lead to the harm set out in that provision. The Supreme Court of Canada has clearly enunciated the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 21(1)). In *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. 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. [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 19] 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 20] The Public Body has not provided any evidence or arguments to meet this standard. Therefore, the Public Body is not permitted to withhold the cell phone numbers appearing on page 2 under section 25(1).

1. Are the records exempt from the application of the FOIP Act as set out in section 4(1)(d) of the Act?

[para 21] The Public Body withheld pages 29-30 and 286-319 in their entirety, under section 4(1)(d).

[para 22] If section 4(1)(d) applies to the records at issue, I do not have jurisdiction to review the Public Body's decision to withhold them.

[para 23] Section 71(1) of the Act states:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 24] Therefore, the burden of proof lies with the Public Body to prove that section 4(1) of the Act applies to the records at issue.

[para 25] Section 4(1)(d) of the Act states:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *(d) a record that is created by or for or is in the custody or under the control of an officer of the Legislature and relates to the exercise of that officer's functions under an Act of Alberta;*

[para 26] This provision excludes records that were created by or for an Officer of the Legislature, even where copies of those records are under the custody or control of another public body (Orders 97-008 at paras. 23-24, 2001-009, at para. 20).

[para 27] Pages 29-30 are described in the Public Body's index of records as email correspondence. In its submission, the Public Body states that these pages contain correspondence with the Ethics Commissioner's office and that the information "reveals an informal ethics inquiry involving Executive Council soliciting the advice of the Ethics Commissioner". The Public Body did not provide any additional information, such as what the "informal ethics inquiry" related to, or under what authority the Ethics Commissioner was acting.

[para 28] Pages 286-319 are described in the Public Body's index of records as an Investigation Report. The Public Body's submission states that these pages are comprised of "a draft copy of the Commissioner's Investigation Report (F2016-IR-01) on the topic of the alleged improper destruction of records by Alberta Environment and Sustainable Resource Development."

[para 29] The Applicant did not address the Public Body's application of section 4(1)(d).

[para 30] In Order F2012-12, I found that section 4(1)(d) applied to a letter from a public body to the Ombudsman. The letter was created by a public body in response to a recommendation to the public body by the Ombudsman in the course of an investigation by the Ombudsman.

[para 31] In this case, the emails on pages 29-30 comprise what appears to be the end of some back-and-forth between the Public Body and an employee of the Ethics Commissioner's office. From this part of the conversation, it appears that the Ethics Commissioner had provided some instruction or advice to the Public Body relating to a matter within the jurisdiction of the Ethics Commissioner. I can only speak in general terms without revealing the content of the emails. The Ethics Commissioner has authority to provide advice and recommendations under section 44 of the *Conflicts of Interest Act*, R.S.A. 2000, c. C-23, and to conduct investigations under section 25 of that Act. Those provisions state:

> *25(1) On receiving a request under section 24 or where the Ethics Commissioner has reason to believe that an individual has acted or is acting in contravention of advice, recommendations or directions or any conditions of any approval given by the Ethics Commissioner, and on giving reasonable notice to that individual, the Ethics Commissioner may conduct an investigation.*
>
> *44(1) The Ethics Commissioner may give advice and recommendations of general application to Members, former Ministers or former political staff members or a class of Members, former Ministers or former political staff members on matters respecting obligations of Members, former Ministers or former political staff members under this Act, which may be based on the facts set out in the advice and recommendations or on any other considerations the Ethics Commissioner considers appropriate.*

[para 32] From my review of the emails on pages 29-30, I am satisfied that the email exchange related to the exercise of the Ethics Commissioner's authority under the *Conflicts of Interest Act* and that the employee of the Ethics Commissioner involved in the emails was corresponding on behalf of the Ethics Commissioner within the terms of section 4(1)(d). Therefore, I do not have jurisdiction to review the Public Body's decision to withhold these pages.

[para 33] With respect to the Report at pages 286-319, I was able to compare the Report in the records with the final version available on the OIPC website and can confirm that the Report in the records is a draft version. The investigation leading to the report was conducted under section 53(1)(a), which states:

> *53(1) In addition to the Commissioner's powers and duties under Part 5 with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may*
>
> *(a) conduct investigations to ensure compliance with any provision of this Act or compliance with rules relating to the destruction of records*
>
> *(i) set out in any other enactment of Alberta*
>
> *…*

[para 34] I accept that section 4(1)(d) applies to this Report and I do not have jurisdiction to review the Public Body's decision to withhold it.

2. Are the records exempt from the application of the FOIP Act as set out in section 4(1)(q) of the Act?

[para 35] The Public Body applied section 4(1)(q) to pages 385-391 in their entirety. This provision states:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *…*
>
> *(q) a record created by or for*
>
> *(i) a member of the Executive Council*
>
> *(ii) a Member of the Legislative Assembly, or*
>
> *(iii) or a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly*
>
> *…*
>
> *that has been sent or is to be sent to a member of the Executive Council, a Member of the Legislative Assembly or a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly;*

[para 36] Previous Orders have determined that for this provision to apply to a record, the record must be created by or for any of the persons listed in 4(1)(q)(i)-(iii) and must also be sent or intended to be sent to one of those persons (Orders 2000-013 at para. 16, F2008-028 at para. 15 and F2016-21 at para. 13).

[para 37] The Public Body states that these pages consist of a letter sent by the Premier to the Chair of the Standing Committee on Alberta's Economic Future, along with an attachment. The Public Body states that the letter and attachment were a response to the Chair's request for information about the estimates for the Executive Council Office; therefore, the Premier was responding as the head of the Ministry of Executive Council.

[para 38] I agree with the Public Body's characterization of the records and agree that section 4(1)(q) applies such that I do not have jurisdiction to review the Public Body's decision to withhold these pages.

3. Does section 6(4)(b) (information rights) exempt the records from the right of access?

[para 39] The Public Body has withheld pages 25-28, 113-116, 284-285, and 326-329 under section 6(4)(b).

[para 40] Section 6(4) states:

6(4) The right of access does not extend

(a) to a record created solely for the purpose of briefing a member of the Executive Council in respect of assuming responsibility for a ministry, or

(b) to a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the Legislative Assembly.

[para 41] Section 6(6) places a time limit on the application of section 6(4)(b). It states:

6(6) Subsection (4)(b) does not apply to a record described in that clause if 5 years or more has elapsed since the beginning of the sitting in respect of which the record was created.

[para 42] All of the documents withheld under section 6(4)(b) are dated January 2016. It is clear that more than 5 years have passed since the beginning of the relevant sitting.

[para 43] That said, the Public Body responded to the Applicant's access request in August 2016, and its initial submission to this inquiry is dated May 2019. Therefore, the time limit in section 6(6) did not apply at the time the Public Body made its initial decision or at the time it provided its support for that decision to this inquiry.

[para 44] I cannot uphold the application of a provision that clearly no longer applies. However, it is appropriate in the circumstances that the Public Body be granted an opportunity to review those pages, make a new decision regarding access, and provide a response to the Applicant under section 12 of the Act.

4. Did the Public Body comply with section 11 of the Act (time limit for responding)?

[para 45] Section 11 of the Act requires a public body to make every reasonable effort to respond to an access request no later than 30 days after receiving the request. Section 11 states:

11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless

(a) that time limit is extended under section 14, or

(b) the request has been transferred under section 15 to another public body.

(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.

[para 46] The Public Body must make every reasonable effort to respond to an access request in 30 days, subject to time extensions under section 14.

[para 47] In this case, the Applicant's access request is dated February 2, 2016. The Applicant provided copies of correspondence with the Public Body regarding their request; this

correspondence indicates that the Public Body took a 30-day extension under section 14 of the Act.

[para 48] The Public Body responded on August 2, 2016. The Public Body acknowledged that it took 180 days to respond to the Applicant, and therefore did not meet its timelines under section 11.

[para 49] Given the dates associated with the request and response, I agree that the Public Body failed to meet its duty under section 11 of the Act. As the Public Body has provided responsive records, there is nothing for me to order in this regard.

5. Is the information in the records responsive to the Applicant's access request?

[para 50] The Public Body withheld pages 4, 5-10, 12-17, 18-19, 41-109, 118-124, 126-132, 135-139, 145-147, 178-179, 180-194, 195-204, 205-210, 211-251, 258-261, 334-336, 391-394, and 1617-1618 as non-responsive.

[para 51] The Public Body is not required to provide access to records that have not been requested by the Applicant. However, 'non-responsiveness' is not an exception to the right of access created by section 6 of the Act (see Order F2009-025). Where a record is comprised of separate and distinct portions, it may be appropriate to withhold those portions that are not responsive to the applicant's request.

[para 52] Past Orders address how public bodies should properly characterize information in a record as non-responsive. Order F2018-75 states (at paras. 55-58):

> Separate items of information in a record cannot be viewed out of context of the record as a whole when determining if they are separate and distinct from the remaining record…
>
> Information must be considered in the context of the record as a whole, in determining whether it is separate and distinct from the remainder of the record. In the case of a personal information request like the Applicant's, in order to withhold portions of a record as non-responsive, the Public Body must consider whether that portion contains the Applicant's personal information *or* whether that portion provides context to the remainder of the record that *is* the Applicant's personal information.
>
> An example of 'separate and distinct' might be distinct emails in an email chain. Another example relates to police officers' notebooks, which often contain notes on unrelated incidents on a single page. In response to an access request for police records relating to one incident, the part of the notebook page that relates to a different incident might be non-responsive. Another example is where a personal note is added to a work email, such as a note referencing a medical absence, holiday or so on. Where that personal note does not have any relation to the remainder of the email or to the access request, it might be non-responsive.

[para 53] The Public Body acknowledged that "non-responsive" is not an exception to access under the Act, and that only information "wholly unrelated to [J, the employee named in the

Applicant's request] and her involvement with the Public Body's FOIP Office or any GoA FOIP requests were scoped out as non-responsive" (initial submission at page 5).

[para 54] The Applicant reiterated that their access request was for records related to any communications that reference J and freedom of information. The Applicant expressed concern that the Public Body may have removed records that are responsive to this broad request for the reason that they did not relate to a *specific* FOIP office or FOIP request.

[para 55] One paragraph in an email on page 4 was withheld as non-responsive. The withheld paragraph relates to a different topic than the other parts of the email, but not so different so as to consist of a separate and distinct record. Indeed, this paragraph logically flows from the preceding paragraph that the Public Body deemed responsive.

[para 56] The same can be said for information withheld on pages 5-10, 12-17, 139. Pages 5-10 comprise one record, as do pages 12-17. Pages 136-139 consist of emails. In each case, only a portion of each record directly relates to J and FOIP; however, there is nothing that separates that directly related information from the remainder of the record.

[para 57] With respect to pages 18-19, which are comprised of a chain of three emails, the Public Body states these are not responsive because although one email was sent to J and includes the word "FOIP", it does not relate to a specific FOIP request. I agree with the Applicant that this is a unilateral narrowing of the Applicant's request, which was for all records "related to any communications that reference both [J] and freedom of information (or any related iteration of it, including – but not limited to – "FOIP", "FOIP request(s)" etc.)". The first two emails on page 18 are not responsive to this request but the third email on pages 18-19 is responsive.

[para 58] The Public Body had previously applied section 17(1) to pages 18-19 in their entirety but withdrew this application after deciding the pages are non-responsive. As the third email is responsive, I will order the Public Body to provide it to the Applicant. However, section 17(1) is a mandatory exception to access and it clearly applies to the third party personal information in that third email. Therefore, the Public Body must ensure it withholds the names and other identifiers of third parties in this third email before providing it to the Applicant.

[para 59] The following pages either contain no reference to "freedom of information", no reference to J (including where J was either an author or recipient of correspondence or other document) or no reference to either:

118-124, 126-132, 145-147, 178-251, 258-261, 334-336, 392-394

I agree that these pages are not responsive.

[para 60] The Public Body's index of records indicates that it identified pages 1617-1618 as non-responsive; however, the Public Body does not list these pages as non-responsive in its submission. These pages are clearly responsive to the Applicant's request as they reference both J and "freedom of information".

[para 61] Pages 41-109 consist of excerpts of *Hansard* transcripts. The Public Body had also applied section 29(1) to these pages in their entirety, which I will discuss below. For the reasons discussed in that section of this Order, I do not need to consider whether the Public Body properly identified portions of these transcripts as non-responsive.

[para 62] In Order F2024-32, the adjudicator considered when it may be appropriate to permit a public body to review responsive records or portions of responsive records that had been withheld as non-responsive, rather than ordering the public body to disclose those records to the applicant. In that case, the public body had withheld certain columns or rows of information in a spreadsheet that was otherwise responsive. The adjudicator found (at paras. 36-37):

> In cases where a public body has not reviewed records to determine whether exceptions apply, it may be appropriate to allow the public body the opportunity to review the records to determine whether there is a public interest in withholding information they contain. In this case, the Public Body clearly reviewed the information in the records to determine whether exceptions apply to it. Further, its submissions in relation to section 25 include the information it labelled as non-responsive. It has made arguments as to the potential consequences of disclosing the debts and outstanding balances owing to government by industry members. Again, debts owing by industry members is the substance of the information the Public Body labelled as "non-responsive".
>
> I conclude that the Public Body reviewed the records it labelled as "non-responsive" and made submissions regarding them in relation to its application of section 25 of the FOIP Act. It cannot be said in this case that the public interest requires giving the Public Body further opportunity to determine whether an exception to disclosure in the FOIP Act applies. For this reason, I have decided to order disclosure of the information the Public Body argued was nonresponsive.

[para 63] I agree with this approach. In this case, the Public Body withheld many pages in their entirety as non-responsive. In some instances, the Public Body withheld most of a record that was several pages long but disclosed a discrete item of information, such as a single bullet point, that referred to J and freedom of information, along with the header or title of the record (the latter presumably for context). The remaining information was withheld as non-responsive.

[para 64] It appears that the Public Body did not conduct a line-by-line review of these pages but rather only looked for items of information that referred to both J and freedom of information. Given this, I will order the Public Body to review the pages that were withheld as non-responsive but that I have found to be responsive, exercise its discretion to apply exceptions to access, and provide a new response to the Applicant. As stated above, the Public Body must also ensure it applies any mandatory exceptions before disclosing the information to the Applicant.

6. Does section 17(1) of the Act (disclosure harmful to personal privacy) require the Public Body to sever information from the records?

[para 65] The Public Body's index of records indicates that it applied section 17(1) to names and other identifiers of third party individuals in pages 117, 346, 376, 1374, 1385-1387, 1496-1497, 1519-1521, 1606-1609, 1620, 1633-1637, 1725, and 1748-1749.

[para 66] In a second index of records indicating some revisions to the Public Body's application of exceptions, section 17(1) is also listed as having been applied to pages 895, 927, 973, and 977.

[para 67] In its submission, the Public Body states that it applied section 17(1) to information on pages 117, 346, 376, 895, 927, and 977 and provided brief arguments with respect to these applications. It is not clear why the Public Body did not acknowledge its application of section 17(1) to information in the other pages listed above.

[para 68] The records at issue indicate that section 17(1) was applied to all the information identified in the index as well as in the submission. Therefore, I will consider the application to each page listed above.

[para 69] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 70] Section 1(n) defines personal information under the Act:

> *1 In this Act,*
>
> *…*
>
> *(n) "personal information" means recorded information about an identifiable individual, including*
>
> *(i) the individual's name, home or business address or home or business telephone number,*
>
> *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
>
> *(iii) the individual's age, sex, marital status or family status,*
>
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
>
> *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
>
> *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
>
> *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
>
> *(viii) anyone else's opinions about the individual, and*
>
> *(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 71] Past Orders of this Office state that the disclosure of the names, contact information and other information about individuals, that relates only to the individuals acting in their professional capacities, is not an unreasonable invasion of personal privacy under section 17(1) unless that information has a personal dimension in the circumstances (see Orders 2001-013 at

paras. 89-90, F2003-002 at para. 62, F2008-028 at para. 53). In other words, in the absence of a personal dimension, such information cannot be withheld under section 17(1).

[para 72] While the Applicant has the burden of proving that it would not be an unreasonable invasion of privacy to disclose personal information to which section 17(1) applies, the Public Body has the burden of establishing that the information withheld under section 17(1) is personal information to which that provision can apply (Order F2010-002, at para. 9).

[para 73] The Public Body withheld the names, contact information and purchase orders or invoices for payments relating to other access requests. In each case, the applicant was acting in a professional capacity. The Public Body has not addressed this fact in their submission or otherwise indicated why the analyses from past Orders, described above, should not apply in this case. I find that those analyses do apply here such that section 17(1) does not apply to the information withheld under section 17(1) relating to access requests made by individuals acting in a professional capacity. This applies to the information withheld under section 17(1) on pages 376, 1374, 1385-1387, 1496-1497, 1519-1521, 1606-1609, 1620, and 1633-1637.

[para 74] The information on pages 1725 and 1748 relates to a particular police incident but does not contain names or other identifiers of third party individuals. Therefore, section 17(1) does not apply.

[para 75] The Public Body withheld a name on page 1749; however, this is a name given to a particular disclosure process for criminal proceedings, derived from a court decision. In the context in which it appears, this name does not refer to a particular individual and section 17(1) does not apply.

[para 76] Pages 895, 927, 973, and 977 are copies of records provided to an applicant in response to another access request. As discussed earlier in this Order, they contain redactions made by other public bodies, which are not at issue in this inquiry. However, the Public Body applied 17(1) to some additional information on these pages, which I will review.

[para 77] The Public Body applied section 17(1) to the name of a third party individual appearing in the subject line of an email on page 895. I agree that this is information to which section 17(1) can apply.

[para 78] The Public Body applied section 17(1) to a pronoun appearing on page 927. This pronoun does not serve to identify a particular individual and therefore section 17(1) does not apply.

[para 79] The Public Body applied section 17(1) to the name of the author and recipient of two emails on page 973. This individual appears to have been acting in their professional capacity such that section 17(1) does not apply. Similarly, the Public Body applied section 17(1) to the name of an individual appearing in the body of an email on page 977. The name of that individual appears in the context of that individual acting in a professional capacity such that section 17(1) does not apply.

[para 80] The Public Body withheld the name of a third party individual and other details relating to that individual on page 346. Given the information that was disclosed in the

remainder of this page, I agree that the various details withheld under section 17(1) could identify the third party individual even if the name alone were withheld. Therefore, the information withheld under section 17(1) on this page is information to which that provision can apply.

[para 81] The Public Body withheld the personal email address of a public body employee appearing on page 117. The Public Body states that this email address "was used to correspond regarding government business" (initial submission at page 6). The Applicant argues that this individual "has no expectation of privacy when they are using that email in their capacity as an employee of the government." The Applicant also argues that the email directly relates to the individual's work.

[para 82] I agree with the Applicant that where a public body uses a personal email account for work purposes, section 17(1) often cannot apply. However, past Orders have made exceptions to this general principle, where an employee has used their personal email when responding to emergency situations or where a personal email address has been used on a one-off basis. In this case, the employee emailed a work-related document to their personal email and copied it to their work email. Copying the work email indicates that the employee did not intend to use only their personal email for this work purpose. Many emails to and from this employee appear in the records at issue but their personal account appears only once. I accept that this was a one-off situation and agree that section 17(1) can apply to this information.

[para 83] I have found that the email address on page 117, the name and other details relating to a third party individual on page 346, and the name of a third party individual on page 895, is personal information to which section 17(1) can apply.

[para 84] With respect to the remaining information withheld under section 17(1), as I have found that exception does not apply and as the Public Body has not applied any other exception to this information, I will order the Public Body to disclose it to the Applicant.

[para 85] The next step with respect to the application of section 17(1) to that information on pages 117, 346 and 895, is to determine whether disclosing this personal information would be an unreasonable invasion of the third parties' privacy. Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld. In Order F2019-07 the adjudicator described how section 17(1) operates as follows (at paras. 22-23):

> Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant (such as the Applicant in this case) under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.
>
> When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 86] Sections 17(2) and (3) do not apply in this case and so I will not discuss them.

[para 87] The Public Body states that sections 17(4)(a), (g) apply to the name and other details of a third party on page 346; and section 17(4)(g) applies to the third party name on page 895.

[para 88] The Applicant did not address the application of section 17(4) or (5).

[para 89] Sections 17(4)(a) and (g) state:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *…*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*
>
> *…*
>
> *(g) the personal information consists of the third party's name when*
>
> *(i) it appears with other personal information about the third party, or*
>
> *(ii) the disclosure of the name itself would reveal personal information about the third party,*
>
> *…*

[para 90] Section 17(4)(a) creates a presumption against disclosure of information that relates to medical history, diagnoses etc. Section 17(4)(g) creates a presumption against disclosure of information consisting of a third party's name when it appears with other personal information about that third party, or where the name alone would reveal personal information about the third party.

[para 91] The information on page 346 includes information about a third party's medical history. The Public Body has disclosed much of the details but withheld the individual's name and other discrete items of information that may identify that individual. I agree that section 17(4)(a) and (g) both apply.

[para 92] Although the Public Body has not cited this section, section 17(4)(g) also applies to the employee's personal email on page 117 as it appears with the employee's name. This section also applies to the name of the third party on page 895.

[para 93] As stated above, section 17(5) is a non-exhaustive list of factors to consider when determining whether disclosing personal information would be an unreasonable invasion of privacy. The Public Body states that section 17(5)(f) applies to the information withheld on pages 117, 346, and 895. This provision states:

17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

…

(f) the personal information has been supplied in confidence,

…

[para 94] There is no indication that the employee's email address was used or provided in confidence. The same can be said for the name and other details of the third party appearing in pages 346 or 895.

[para 95] The Applicant argues that the employee's personal email appears in the context of the performance of that employee's work duties and therefore section 17(1) should not apply. While I have found that section 17(1) can apply, the context in which the information appears weighs in favour of disclosure.

[para 96] The Applicant did not indicate any factors weighing in favour of disclosing the other personal information in the records and none appear to apply.

Conclusion regarding section 17(1)

[para 97] I found that only the information withheld under section 17(1) appearing in pages 117, 346 and 895 is information to which that section can apply. With respect to that information, at least one presumption against disclosure applies. No factors weighing in favour of disclosing the personal information appearing in pages 346 or 895 apply and I find that the Public Body must continue to withhold that information.

[para 98] With respect to the employee's personal email on page 117, I find that the fact that it appears to have been used in the context of that employee's work duties weighs in favour of disclosure. However, in my view this does not outweigh the presumption against disclosure. This is because the context in which the email appears indicates that the personal email was not being used *in place of* the employee's work email for work-related purposes, and that the personal email was used in a one-off situation. I find that the Public Body must continue to withhold this information under section 17(1).

7. Did the Public Body properly apply sections 24(1)(a) and (g) (advice from officials) to information in the records?

[para 99] The Public Body's index of records shows that it applied sections 24(1)(a) to information on pages 1, 3, 33-35, 110, 320-322, 375; it applied section 24(1)(g) to information on page 110.

[para 100] The Public Body's submission states that it had applied section 24(1)(a) to information on page 2 but it has withdrawn that application. It states that it applied section 25(1)(b) to the cell phone number of a GoA employee; I have discussed this above.

[para 101] Sections 24(1)(a) and (g) state:

> *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,*
>
> *…*
>
> *(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,*
>
> *…*

[para 102] 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 103] The test for sections 24(1)(a) and (b), as stated in past Orders, is that the advice, recommendations etc. 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 created for the benefit of someone who can take or implement the action (see Order F2013-13).

[para 104] 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 105] 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).

[para 106] Bare recitation of facts or summaries of information also cannot be withheld under section 24(1)(a) 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).

[para 107] 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" (section 24(1)(a)).

Parties' arguments

[para 108] The Public Body states that the information withheld on pages 1, 3, 33-35, 320-322 and 375 consists of advice, analysis or recommendations and the information on page 110 consists of a proposed plan. The Public Body did not provide any additional detail.

[para 109] The Applicant did not make submissions on the Public Body's application of section 24(1).

Analysis

[para 110] Pages 1-3 of the records consist of an email chain. The information withheld on page 1 consists of facts about trends relating to FOIP requests received by a department. These facts were provided in response to a request for information appearing on page 2 of the records, which was provided to the Applicant. The email on page 2 asked for a list of FOIP requests received in a given time period and the records released in response to those requests. This request for information is not a request for advice, recommendations or analysis; similarly, the information provided in response that was withheld on page 1 does not contain any advice, recommendations or analysis. Without additional arguments on this point, I cannot find that section 24(1)(a) applies to the information withheld on page 1. The withheld information on page 3 consists of a bullet-point list of information about FOIP requests for a number of public bodies. This list does not appear to contain any advice, recommendations or analysis. Without additional arguments on this point, I cannot find that section 24(1)(a) applies.

[para 111] Pages 32-35 comprise a document titled "Issue and Key Messages". The Public Body disclosed page 32 to the Applicant and withheld most of page 33, all of page 34 and most of page 35. The portion of the record disclosed to the Applicant indicates that this document is a briefing relating to a particular access request made to Alberta Health Services (AHS), the manner in which AHS was responding, and the type of information that was being disclosed. The disclosed portion of the document also indicates the character of the remaining information that has been withheld: information that will be disclosed to the applicant that might "be of

interest" (presumably to the public), and notes relating to that information. I agree that this information consists of advice within the terms of section 24(1)(a).

[para 112] Pages 320-322 consist of one document that was withheld in its entirety. The Public Body's index of records refers to these pages as "Key Messages." This document contains "key messages" on a report that was received by the Public Body; that report is a public document. This "key messages" document appears to have been attached to an email from an issues manager with the Public Body, sent to a number of other employees (page 283 of the records). The body of that email, which was disclosed to the Applicant, indicates that these documents were provided as a "heads up"; it states:

> We anticipate the release of this report tomorrow morning sometime. I've attached:
>
> - Draft message note that includes Q&A and basic background.
> - A copy of the draft report that we received in December. Note that the final version will likely be slightly different.
> - A list of the recommendations along with the current status of each,
>
> Give me a shout if there are questions.

[para 113] One of the attached documents is a briefing note that the Public Body had withheld under section 6(4) (discussed above) and the draft OIPC Investigation Report (withheld under section 4(1)(d).

[para 114] The Public Body has not said for whom the "key messages" document was created. Having reviewed this document, I agree that "a list of the recommendations along with the current status of each" is an accurate characterization of its contents. The recommendations referred to are the recommendations from the public OIPC Investigation Report, and are not recommendations within the terms of section 24(1)(a). It is not clear how the information in this document falls within scope of section 24(1)(a). Without additional arguments on this point, I can only find that it does not.

[para 115] The Public Body applied section 24(1)(a) to one paragraph of an email on appearing on page 375; the remainder of the email was disclosed to the Applicant. The email provides information about how a particular exception under the FOIP Act applies. The disclosed information includes a general explanation of the scope of the provision. The withheld paragraph provides advice about how that provision may or may not apply to particular information responsive to a particular request. I agree that section 24(1)(a) applies to this information.

[para 116] The Public Body applied sections 24(1)(a) and (g) to one sentence from an email on page 110. The email is responding to a request for status update of particular projects that are underway. With respect to the application of section 24(1)(g), I agree that this sentence does discuss a plan that has been proposed and that was underway. However, in order to apply section 24(1)(g), the disclosure of the information must reasonably be expected to disclose a pending policy or budgetary decision. The information withheld on page 110 does not appear to relate to a pending policy or budgetary decision. It also does not appear to relay any advice, recommendations, analysis etc. Given this, I cannot find that section 24(1)(a) or (g) applies.

[para 117] I have found that section 24(1)(a) applies to the information withheld on pages 32-35, and 375. With respect to the information to which I found this provision does not apply, the Public Body has not applied any other provision to the information and so I will order it to disclose this information to the Applicant.

Exercise of discretion

[para 118] 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 119] 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 120] 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 121] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII) (*EPS*), the Court provided detailed instructions for public bodies exercising discretion to withhold information under the 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 122] 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 123] 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 124] The Public Body's submissions said very little about its exercise of discretion. The Public Body has said only (initial submission, at page 8):

> At the discretion of Alberta Health Services, Service Alberta and the Public Body, the records have been protected under sections 24(1)(a) and 24(1)(g). Upon further review of the records, the Public Body maintains its decision in this regard, except for some information in pages 1 to 2.

[para 125] It is not clear what role Alberta Health Services or Service Alberta played in the Public Body's decision to withhold information under section 24(1). The FOIP Act authorizes the *head of the Public Body* to apply section 24(1) to withhold information if that section applies. It is the head of the Public Body (or their authorized delegate) that is to make this decision.

[para 126] In any event, the Public Body did not describe what factors it considered in favour of or against disclosure of the information to which it applied section 24(1). I will order the Public Body to re-exercise its discretion, taking into account the guidance described above.

8. Did the Public Body properly apply section 27(1)(a) (privileged information) to information in the records?

[para 127] The Public Body withheld information on pages 265, 266-267, 268-273, and 278, under section 27(1)(a). These records were not provided for my review.

[para 128] Section 27(1) states:

> *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,*
>
> *(b) information prepared by or for*
>
> *(i) the Minister of Justice and Solicitor General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services,*
>
> *(c) information in correspondence between*
>
> *(i) the Minister of Justice and Solicitor General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer.*

[para 129] Section 71(1) of the Act states:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 130] The Public Body claims solicitor-client privilege applies to the withheld information.

[para 131] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Solosky v. The Queen*, 1979 CanLII 9 [1980] 1 S.C.R. 821. The Court said:

> … privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(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.

[para 132] The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 133] The Court in *Alberta (Municipal Affairs) v. Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274 found (at paras. 17-18):

> There are emails in "chains" that are not directly between lawyer and client, or lawyer and lawyer, but have been sent by and received from members of the client group or department. Communications in this category request and give information, make inquiries, answer questions and otherwise relate topically to those in which legal counsel are directly involved.
>
> Those emails form part of a discrete body of communications that includes clearly privileged material. I must take a holistic approach to this question. In these instances, they are "part of a continuum in which legal advice is given": ***Calgary (Police Service)*** at para 6. What all of them have in common is that they essentially "transmit or comment" on the work products that, I find, are privileged: ***Bank of Montreal v Tortora***, 2010 BCSC 1430 at paras 11-12, 14 BCLR (5th) 386.

[para 134] Where a public body elects not to provide a copy of the records over which solicitor-client or litigation privilege is claimed, the public body must provide sufficient information about the records, in compliance with the civil standards set out in the *Rules of Court* (Alta Reg 124/2010, ss. 5.6-5.8). These standards were clarified in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*). *ShawCor* states that a party claiming privilege must, for each record, state the particular privilege claimed and provide a brief description that indicates how the record fits within that privilege (at para. 36 of *ShawCor*).

[para 135] The role of this Office in reviewing claims of privilege was discussed in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*), at paras. 77-112. In Order F2021-12, the adjudicator summarized the Court's conclusion as follows (at para. 210):

> My understanding, then, in light of *EPS*, *ShawCor*, and rule 5.8, is that I am to consider whether the description of a record enables me to recognize that the elements of solicitor-client privilege set out in *Solosky* are present. At that point, the Public Body will have satisfied the *ShawCor* standard and established a rebuttable presumption that the records are subject to solicitor-client privilege. Absent evidence to rebut the presumption, I must find that the records were properly withheld under section 27(1)(a). Where the standard is not met, in the absence of other evidence that would establish that the records are subject to solicitor-client privilege, I must find that the records were not properly withheld under section 27(1)(a).

[para 136] I agree with this summary.

[para 137] In its submission, the Public Body states:

> The records package includes memos and a briefing note containing advice provided by legal counsel to senior officials regarding the sharing of FOIP-related information between GoA ministries and the Public Body.

[para 138] The Public Body also provided an affidavit in support of its claim of solicitor-client privilege, sworn by a FOIP Coordinator with the Public Body. This affidavit provides some additional descriptions of the withheld information.

[para 139] The Public Body withheld a portion of page 265 under section 27(1)(a), providing the remainder to the Applicant. This page consists of a briefing note. The disclosed portion of this page states that the briefing note contains advice to the Cabinet Operations Committee, in response to that Committee's request for advice regarding the information the Operations Committee is permitted to have about FOIP requests across government. The affidavit states that the withheld information in the briefing note outlines the legal advice provided by counsel.

[para 140] The information in the remainder of the briefing note provides additional context for the Public Body's arguments. From the information before me, I accept that withheld portion of page 265 relays legal advice that the Committee had requested. The Public Body's submission states that the information was intended to be confidential, and the context of the record supports that. I find that the Public Body has properly asserted privilege over the withheld portion of page 265.

[para 141] With respect to pages 266-267, the affidavit states that these pages consist of a Memorandum from the Deputy Chief of Public Affairs Bureau to the Deputy Minister of Executive Council. The affidavit further states that the withheld information

> …outlines the legal advice sought by the ministry and communicated to senior officials for future action. The information was constructed by our legal counsel and any disclosure would reveal legal advice.

[para 142] The Public Body withheld all of page 267 and most of page 266, except the header information and first paragraph. The first paragraph on page 266 refers to having received a legal opinion; it seems clear that the remainder of the Memorandum discusses that legal opinion. The Public Body's submission states that the information was intended to be confidential, and the context of the record supports that. I find that the Public Body has properly asserted privilege over the withheld portion of pages 266-267.

[para 143] Pages 268-273 were withheld in their entirety. The affidavit states only that these pages consist of a Memorandum from Deputy Attorney General to the Deputy Minister of Executive Council.

[para 144] The Applicant argues that this Memorandum "does not automatically meet the threshold to be withheld under section 27(1) simply because the deputy attorney general has authored it" (initial submission, at page 3). I agree, and asked the Public Body to provide additional support with respect to its claim of solicitor-client privilege over this record (letter dated February 10, 2026).

[para 145] On March 31, 2026, the Public Body provided a new affidavit sworn by an Access to Information Coordinator with Service Alberta and Red Tape Reduction (the Coordinator) who had reviewed the records. The Coordinator states that pages 268-273 "contains legal advice provided by the Deputy Attorney General as legal counsel, to the Deputy Minister of Executive

Council" (Schedule 1 attached to the affidavit). The Coordinator further stated that the record was intended to be confidential.

[para 146] From the context of the records, it seems likely that the Memorandum contains the legal opinion referred to on page 266. It would have been helpful if the Public Body's affidavit had said as much. Nevertheless, I accept the statement in the Coordinator's affidavit, and find that the Public Body has properly asserted privilege over the information in these pages.

[para 147] With respect to page 278, this page also consists of a Memorandum (comprising pages 278-279), from a Director to all Directors and Assistant Directors of Communications, presumably across GoA departments. One paragraph was withheld on this page, with the remainder being provided to the Applicant. The subject of the Memorandum is "Sharing of information on active Freedom of Information requests" and the memo is a reminder "of the process for providing weekly FOIP updates from your ministries".

[para 148] The affidavit states that the withheld portion of this Memorandum "outlines the legal advice sought by the ministry and communicated to government officials for future action. The information was constructed by our legal counsel and any disclosure would reveal legal advice."

[para 149] In my February 10, 2026 letter to the Public Body I asked the Public Body to address specific points:

> With respect to the information at page 278, the Public Body should address the fact that the memo appears to have been provided to a number of recipients across government, with no indication on the memo that it was confidential or that was to be treated as confidential. There is also no indication on the email to which that memo appears to have been attached (on page 277) that the memo was intended to be confidential. Other emails, for example on page 280, are clearly labeled as confidential.

[para 150] In the March 31 affidavit, the Coordinator states:

> This record was sent to a discrete and limited number of individuals (only Directors of Communications and Assistant Directors of Communications) who were all Government of Alberta employees who had a need to be aware of this information for the purpose of fulfilling their employment duties.
>
> All Government of Alberta employees are required to maintain the confidentiality of all information that comes to their knowledge by reason of their employment in the public service (s. 20 *Public Service Act,* RSA 2000, c P-42).
>
> This record involved no parties external to the Government of Alberta and was intended by the parties to be confidential.

[para 151] From the context of the records, I accept that confidentiality can be implicit in these circumstances, and that the recipients of the email could reasonably be expected to understand that legal advice repeated in such a memo would come with an expectation of confidentiality. I find that the Public Body has properly asserted privilege over the information in this page.

Exercise of discretion

[para 152] Section 27(1)(a) is a discretionary exception to disclosure under the FOIP Act, which requires a public body to exercise its discretion to withhold information that is subject to privilege.

[para 153] In EPS, cited above, the Court found that establishing the existence of solicitor-client privilege constituted proper grounds for exercising discretion to withhold information subject to it. The Court said (at para. 74):

> In my opinion, a public body like EPS is required to establish its claim to solicitor-client privilege, but only to the extent required by the Court of Appeal in Canadian Natural Resources Ltd v ShawCor Ltd, 2014 ABCA 289 -- and no farther. Satisfaction of the CNRL v ShawCor standard suffices for civil litigation and no higher standard should be imposed in the FOIPPA context. Further, even if s. 27(2) does not apply and a solicitor-client privilege claim remains discretionary, to establish the privilege is to establish the grounds for relying on the privilege. The existence of the privilege is the warrant for reliance on the privilege. No additional IPC scrutiny of discretion concerning solicitor-client privilege claims is warranted.

[para 154] I accept that the Public Body properly exercised its discretion to withhold the information over which it properly claimed solicitor-client privilege under section 27(1)(a).

9. Did the Public Body properly apply section 29 of the Act (information that is or will be available to the public) to the information/records?

[para 155] The Public Body has applied section 29(1)(a) to pages 41-109 in their entirety. This provision states:

> *29(1) The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is readily available to the public,*
>
> *…*

[para 156] 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 29.

[para 157] The Public Body states that these pages are copies of *Hansard* transcripts that are available to the public via the Legislative Assembly of Alberta website. Having reviewed the records, I agree that they are copies of *Hansard* transcripts that are available on the website.

[para 158] Past Orders have discussed the steps a public body must take in order to rely on section 29(1)(a) to withhold information that is available to the public. Order F2024-17 includes a review of Orders from the Ontario IPC regarding a similar provision under Ontario's Act. In Ontario Order PO-4286, the adjudicator noted that the purpose of the provision is to permit a public body to refer an applicant to the publicly available source of information "where the balance of convenience favours this method of alternative access" (at para 58).

[para 159] The same can be said for section 29(1)(a) of the FOIP Act. A public body can refuse to provide a copy of a record that the applicant can obtain via another readily available avenue. However, if the public body does not identify the record to the applicant, or inform the applicant how to obtain the record (i.e. by what other avenue the applicant can obtain access), then the purpose of section 29(1)(a) is not fulfilled. This is because, unless the record is identified and the alternative means of access is identified, the applicant is effectively denied access without those alternative means.

[para 160] The Public Body did not initially inform the Applicant how to obtain copies of the *Hansard* transcripts on pages 41-109; however, it has since done so (letter from the Public Body to the Applicant dated May 16, 2019).

[para 161] While the Public Body did not initially properly claim section 29(1)(a) over pages 41-109, I find that it has done so in its more recent response to the Applicant.

V. ORDER

[para 162] I make this Order under section 72 of the Act.

[para 163] I find that the Public Body is not authorized to withhold information under section 25(1) on page 2 of the records. I order the Public Body to disclose this information to the Applicant.

[para 164] I find that section 4(1)(d) applies to pages 29-30 and 286-319 in their entirety, and section 4(1)(q) applies to pages 385-391 in their entirety. Therefore, I do not have jurisdiction to review the Public Body's decision to withhold these pages.

[para 165] I find that section 6(4)(b) does not apply to the information withheld under that provision. As set out in paragraph 44, I order the Public Body to review the pages 25-28, 113-116, 284-285, and 326-329, make a new decision regarding access, and provide a response to the Applicant.

[para 166] I find that the Public Body did not meet its duty under section 11. However, as the Public Body has responded to the Applicant there is nothing to order in this regard.

[para 167] I find that the Public Body did not appropriately withhold some information as non-responsive. I order the Public Body to review the information that was withheld as non-responsive but that I have found to be responsive per paragraphs 55-61, make a new decision regarding access, and provide a new response to the Applicant.

[para 168] I find that section 17(1) does not apply to much of the information withheld under that exception. I order the Public Body to disclose that information to the Applicant as set out in paragraphs 73-84.

[para 169] I find that the Public Body is required to continue to withhold information on pages 117, 346 and 895, under section 17(1).

[para 170] I find that section 24(1) applies to the information withheld under that exception on pages 32-35, and 375. However, I order the Public Body to re-exercise its discretion to withhold the information under that exception, taking into account the guidance provided at paragraphs 118-126.

[para 171] I find that section 24(1) does not apply to the remaining information withheld under that provision and order the Public Body to disclose that information to the Applicant.

[para 172] I find that the Public Body has properly asserted privilege under section 27(1)(a).

[para 173] I find that the Public Body did not properly apply section 29(1) initially; however, it has since done so.

[para 174] 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