ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2004-026

September 18, 2006

ALBERTA LABOUR RELATIONS BOARD

Review Number 2793

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request pursuant to the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Alberta Labour Relations Board (the "Public Body") for records, for the year 2003, documenting communications between the Public Body and any Department of the Government of Alberta, Cabinet Minister, or Minister's staff, concerning the enactment, promulgation and implementation of Bill 27 and the regulations thereto. The request also asked for records of communications between the Public Body and stakeholders on the same subject.

The Public Body provided some responsive records but refused to provide a large number on the grounds that they were properly withheld under sections 22(1) ("cabinet confidences"), 24(1)(a) and 24(1)(b) ("advice from officials"), and 24(1)(e) ("draft legislation") of the Act.

The Applicant asked for a review of this decision, and complained that the Public Body had failed in its duty to assist under section 10(1) of the Act.

The Commissioner held that some of the records or parts of records were properly withheld in reliance on section 24(1)(e) of the Act (draft legislation), and sections 24(1)(a) (advice) and 24(1)(b) (consultations and deliberations). However, he said that these sections of the Act do not cover records or parts of records that disclose information about who was involved in the creation or editing of legislation, or the giving or receiving of advice or in consultations or deliberations about it, unless this information would reveal the contents in a substantive sense. The same applied to the dates on which the

drafts were written or advice was requested or received, and the topic of the legislation, advice or consultations or deliberations, unless these things revealed substantive elements of the discussion. The Commissioner said the Public Body had failed to show that section 22(1) of the Act applied to the records in this case. He also considered whether disclosure of the parts of the records that did not fall within the claimed exceptions would be an unreasonable invasion of the personal privacy of the correspondents under section 17, but found that, with very minor exceptions, it would not. Thus the Commissioner ordered the Public Body to sever the parts of the records that revealed the contents of draft legislation or the substance of advice or consultations or deliberations about it, and to disclose the remaining records or parts of records.

The Commissioner also held that the Public Body had failed to meet its duty to assist the Applicant under section 10, by failing to consider prior to its initial response all of the provisions it ultimately relied on to withhold records. The fact the Public Body provided some of the records only long after a point at which their disclosure would have been highly significant to the Applicant also constituted a breach of its duty to assist. The Public Body also failed to properly clarify the Applicant's request. As well, the Commissioner held that the Public Body failed to meet the requirements of section 12(1)(c)(i) of the Act by not providing in its initial response to the Applicant the numbers of records retrieved and how many were being withheld under particular exceptions.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(n)(vii), 6(2), 10, 10(1), 12, 12(1)(c)(i), 16, 17, 17(2), 17(2)(e), 17(2)(f), 17(4), 17(4)(d), 17(4)(g), 17(4)(g)(i), 17(4)(g)(ii), 17(5), 17(5)(a), 17(5)(c), 17(5)(e), 17(5)(h), 22, 22(1), 23(1)(b), 24, 24(1), 24(1)(a), 24(1)(b), 24(1)(e), 31, 40(1)(bb.1), 72; **ONT:** R.S.O. *Freedom of Information and Protection of Privacy Act*, 1990, c. F.31, s. 13(1); **CANADA:** *Access to Information Act*, R.S.C., 1985, c. A-1.

Authorities Cited: AB: Orders 96-006, 96-010, 96-012, 96-018, 96-019, 98-001, 99-013, 2000-014, F2003-005, F2005-004; **B.C.:** Order 193-1997, Order 325-1999, Order 01-25, Order 02-19; Order 02-38; **ONT:** Order P-1409, Order PO-2087-I, Order PO-2328, Reconsideration Order R-980015, MO-1814, MO-1815.

Cases Cited: *Blank v. Canada (Minister of the Environment*) (F.C.A.) [2001] F.C.J. No. 1844; *Blank v. Canada (Minister of Justice*) (F.C.A) [2004] F.C.J. No. 1455; *Blank v. Canada (Minister of Justice*) (F.C.) [2005] F.C.J. No. 1927.

I. BACKGROUND

[para 1] By letter dated June 2, 2003, the Applicant made an access request pursuant to the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Alberta Labour Relations Board (the "Public Body") for records, for the year 2003, documenting communications between the Public Body and any Department of the Government of Alberta, Cabinet Minister, or Minister's staff, concerning the enactment, promulgation and implementation of Bill 27 [the *Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003*] and the regulations thereto. The request also asked

for records documenting communications between the Public Body and any employer, employers' organization, union or other stakeholder concerning the same matters.

[para 2] By letter dated July 8, 2003, the Public Body notified the Applicant that it was refusing to grant access to records responsive to the request on the grounds that they were properly withheld under sections 22(1), 24(1)(e) and 16(1)(a)(ii) of the Act. Beyond naming the provisions of the Act that were relied on, no reasons were given for the refusal.

[para 3] On August 14, 2003, the Applicant asked that my Office review the Public Body's decision. I authorized mediation.

[para 4] On May 4, 2004, the Public Body wrote to the Applicant advising that it had completed a second review of the documents. The letter stated that the Head of the Public Body had reconsidered his exercise of discretion under section 24 of the Act and had decided to disclose some of the records that had been withheld under that section. Copies of these records were enclosed, together with a chart that described them. This chart included a column that referred, for every row describing a record, to the same section numbers of the Act ("sections 24(1)(a)(b)").[1] It stated further that the Head of the Public Body had decided to release records that had been withheld under section 16 of the Act, and that these records would be disclosed after third parties had been notified. Finally, it advised that records withheld under section 22 had been reviewed again and that the Head had confirmed that the section had been properly applied.

[para 5] The Applicant was not satisfied with this outcome. My Office issued a Notice of Inquiry on July 27, 2004.

[para 6] On July 29, 2004 the Applicant wrote to the Public Body requesting information as follows: the number of records being withheld, the number of pages in each record, the exemption under the Act being cited in each case, the date of the record, and the parties to the communication.

[para 7] On September 3, 2004 the Public Body delivered to the Applicant a list of documents "that were intertwined with the Bill 27 files but were determined to be non-responsive", together with an offer to provide access to these records. It also included the documents which had previously been withheld under section 16 (as no third parties had objected to disclosure).

[para 8] On September 21, 2004, the Public Body notified the Applicant by facsimile as follows:

> Further to the writer's telephone message of September 20, 2004 we are writing to confirm that the Public Body has applied section 24(1)(a) and 24(1)(b) to some of

[1] The reason for including the section numbers is unclear, as the chart was of documents being released, rather than being withheld pursuant to an exception provision in the Act, and the provisions cited were not relied on initially.

> the records that have been withheld. Once again, the reason we raise this point with you is that these Sections were not specifically cited in the July 8, 2003 Notice that was delivered to your client.

[para 9] An oral inquiry was held on October 21, 2004. Following the submission of further written representations by the parties, the oral inquiry was continued and concluded on April 13, 2005.

[para 10] Subsequent to the conclusion of the oral part of the inquiry, I asked the Public Body to make further submissions with respect to some specific questions about whether particular exceptions to disclosure applied. The letter requesting these submissions had an attachment consisting of three records that illustrated certain aspects of the questions. These records had been selected from among records that had been withheld by the Public Body, and supplied to me on an *in camera* basis, not to be disclosed to the Applicant. The request letter was copied to the Applicant. My Office inadvertently and erroneously included copies of the three sample records with the Applicant's copy of the letter. Despite my application to the Court to retrieve these records, I was unable to do so, and they remain disclosed to the Applicant. However, as these events occurred subsequent to the request for review, I will nonetheless consider whether these inadvertently-disclosed records were properly withheld by the Public Body under the Act.

II. RECORDS AT ISSUE

[para 11] The Records consist of 370 documents (many with multiple pages) that were initially selected by the Public Body as responsive to the request. This includes 124 documents that, according to the Public Body, are not responsive but were mistakenly interfiled with responsive documents. I was asked to confirm that these records are not responsive. Twenty-seven documents were released after the Head of the Public Body conducted a second review. Though they are part of the 370 documents originally numbered by the Public Body, these twenty-seven documents are not in issue in this inquiry. Twenty-one documents that the Public Body disclosed after obtaining the consent of third parties are in issue only in terms of the timing of their release.

III. ISSUES

[para 12] The issues as stated in the Notice of Inquiry are:

Issue A: Are the records responsive to the Applicant's access request?

Issue B: Did the Public Body meet its duty to the Applicant, as provided by section 10 of the Act?

Issue C: Does section 22 of the Act (Cabinet confidences) apply to the records/information?

Issue D: Did the Public Body properly apply section 24 of the Act (advice) to the records/information?

Issue E: Does section 16 of the Act (business interests) apply to the records/information?

[para 13] An issue raised in the Applicant's submissions under the "duty to assist" heading (Issue B) relates to the Public Body's failure to provide reasons for withholding the records, beyond naming the section numbers it relied on. In my view, this complaint falls under section 12(1)(c)(i) rather than section 10(1). Though breach of section 12(1)(c)(i) was not listed among the issues set out in the Notice of Inquiry, the Applicant specifically mentioned the section in its initial submission relative to the "duty to assist". Thus the Public Body has had an opportunity to respond to this part of the Applicant's argument. I will therefore also consider the following issue:

Issue F: Did the Public Body meet the requirements of section 12(1)(c)(i) of the Act?

[para 14] Because in this Order I do not uphold all of the Public Body's decisions to withhold information under the sections it relied on, and some of the records contain information of public body employees, I have also added the following issue:

Issue G: Does section 17 of the Act (unreasonable invasion of personal privacy) apply to the records/information?

[para 15] An additional issue was raised during the course of the inquiry, as to the interpretation of the Applicant's request. The Public Body interpreted 'implementation' in the request to include implementation of the Bill only, in the sense that the request was taken to cover only documents related to actions taken to put the legislation in place, rather than in the broader sense of documents related to actions taken by the Public Body in its role of administering the Bill after its enactment. The Applicant objected to this narrow interpretation. Thus initially there was an issue as to whether the Public Body's interpretation was reasonable. However, I do not have to deal with it in this inquiry, because the Applicant has submitted a further request in which it broadened the scope to make this issue clear. This subsequent request is not a part of the present inquiry. However, the Applicant does ask for a declaration that the Public Body's failure to ask for a clarification of this aspect of the request constituted a failure on the part of the Public Body to meet its duty to assist under section 10 of the Act. I will deal with this contention under Issue B.

IV. DISCUSSION OF ISSUES

Issue A: Are the records responsive to the Applicant's access request?

[para 16] Some documents were, apparently, interfiled with responsive records and mistakenly included in a bundle of records selected as responsive. A record is responsive

if it matches the criteria set out in the request. I have reviewed the following documents that the Public Body concluded were non-responsive.

20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 106, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 136, 138, 139, 142, 144, 145, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 179, 203, 204, 207, 216, 218, 219, 230, 245, 258, 259, 260, 261, 268, 269, 270, 271, 272, 273, 274, 275, 277, 278, 279, 280, 281, 282, 289, 290, 291, 299, 300, 301, 302, 303, 307, 308, 309, 310, 311, 313, 323, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370.

[para 17] With the exception of a single record (which appears to have been mis-filed[2]), all of these documents have at least one of the following features:

- they were created outside the dates specified
- they do not relate to the specified subject matter
- they are not, or do not document, communications
- they relate to post-enactment implementation of Bill 27 (which, because of the more recent access request, is no longer a subject of this inquiry[3]).

Thus I accept the Public Body's submissions that none of the records listed in the preceding paragraph (except 323) meets the criteria of the request.

[para 18] I note also that the Public Body offered the Applicant an opportunity to view these records (though the Applicant apparently did not take up this offer).

[para 19] In addition to the documents listed above, a number of the other documents, or parts of them, located by the Public Body and supplied to this Office, are unresponsive. Record 42 is mainly unresponsive as it was created after the legislation was enacted.[4] Record 100 is also mainly unresponsive, as it is a list of documents that were apparently in the possession of the Public Body, most of which are not responsive to the request in this case.[5] Records 202, 304, 305, and 306 are not communications with a Department or a stakeholder, and were created after the enactment of the legislation.[6] Parts of some of the e-mail communications are internal communications within the Public Body (the first portion of record 67 and the last portion of the last page in record

[2] This is record 323, which is quite similar to record 334. In the discussion below, I hold that the latter record may be withheld under sections 24(1)(a) and 24(1)(b) as it is part of the seeking and giving of advice relative to Bill 27. Record 323 may be withheld on the same basis.
[3] See paragraph 15 above, which explains that the Applicant is not asking for these records in this inquiry.
[4] The date of the record coincides with the date the legislation (the regulation) was passed in the legislature. The references in this record to the contents of various drafts of the regulation can be withheld under section 24(1)(a) and 24(1)(b), for the reasons discussed under Issue D, below.
[5] The few responsive parts of record 100 (those parts of the list that refer to responsive documents and thus "document communications") can be partially withheld under sections 24(1)(a) and (b), for the reasons discussed under Issue D, below.
[6] Record 202, of which records 304 and 305 are copies, was, in any event, disclosed after the second review.

228).[7] Record 208 is also an internal communication. The concluding portions of a large number of the e-mail communications (records 43, 44, 45, 46, 47, 50, 51, 52, 55, 58, 59, 60, 61, 62, 69, 72, 73, 74, 77, 78, 80, 81, 88, 90, 91, 92, 184, 185, 189, first page of 262, 263, 264, 265) are unresponsive in that they consist of an internal communication from a clerical operator to a lawyer within a department. Records 214 and 225 were created after the legislation in question was enacted.[8]

Issue B: **Did the Public Body meet its duty to the Applicant, as provided by section 10 of the Act?**

[para 20] Section 10(1) of the Act provides:

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

[para 21] The Applicant contends the Public Body failed to meet its duty on the basis of the following.

[para 22] First, the Applicant refers to a "late-breaking change in position by the public body". I believe this reference is to the fact the Public Body changed or added sections of the Act on which it was relying to exclude certain documents, at a point in time later than the original response was given, and later than the date of the request for review that gave rise to this inquiry. The Applicant says it was important for it to have the documents at the time the public controversy to which the documents relate - enactment of Bill 27 - was current, that a timely response was thus critical, and that the Public Body could only have met its duty to assist by dealing with the request properly in a timely way. The Applicant argues that the Public Body cannot meet its duty to assist much after the fact by putting forward new exceptions on which to base withholding, after this critical point in time has passed.[9]

[para 23] I agree that a Public Body's failure in its original response to carefully consider, and correctly choose, which exceptions to apply, meant that it did not make

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[7] Some of the other records, though internal communications, are nevertheless responsive because they document external communications within the scope of the request. However, these two internal communications do not have this feature.

[8] With respect to records that I have identified in this paragraph as only partially responsive, because the unresponsive parts need not be provided in this request, I have marked them in the same manner as parts that may be severed pursuant to exceptions in the Act. However, these unresponsive parts of records do not need to be provided in this request only on the basis the Applicant did not ask for them. Thus my marking of them in this way has no bearing on whether these unresponsive parts would be disclosable on some other access request.
Records that I have identified in this paragraph as unresponsive to the present request in their entirety have been separated from the severed records and included in the bundles of unresponsive records.

[9] I will deal with whether the Public Body can rely on a provision different from that originally relied on, in these circumstances, in the part of this decision that deals with the application of section 24. I conclude in that section that the Public Body can rely on the new exceptions even though it raised them late.

every reasonable effort to assist the Applicant.[10] However, there are factors that mitigate the seriousness of this failure.

[para 24] The Public Body initially claimed reliance on section 22(1) (Cabinet confidences), and section 24(1)(e) (information revealing the contents of draft legislation).[11] The Public Body did not directly explain why it did not also claim sections 24(1)(a and 24(1)(b) at that time, but its main witness did say that this was the first application he had dealt with that related to sections 22 and 24 of the Act. Thus it seems the Public Body was not familiar with the relevant part of the legislation and that it assumed that one or the other of the provisions first selected covered advice and consultations or deliberations relating to development of the legislation.

[para 25] The factors which I regard as mitigating are as follow. First, both sections 24(1)(e) and 22(1) are closely related in principle to sections 24(1)(a) and 24(1)(b). Second, section 24(1)(e) encompasses not only drafts of legislation, but also records that reveal the contents of those drafts. Thus for many of the withheld records or parts of records, section 24(1)(e) would be equally as applicable as sections 24(1)(a) and 24(1)(b). While some of the provisions just discussed are more suitable than others for particular documents, all of them can be applied to records that disclose the development phase of legislation. When they are so applied, the principle for withholding them – to protect the confidentiality of this phase to enable a free discussion and sound decisions - is the same. Thus while the naming of only one of the subsections of section 24 on which it ultimately relied (which was too narrow in the sense that there were other provisions more apt for some of the withheld records), does constitute a failure by the Public Body to meet its duty under section 10(1), the similarity in principle among the provisions relied on at the earlier and later points in time is a factor that mitigates the seriousness of this failure.

[para 26] In its oral argument the Applicant argued that the Public Body's decisions relative to section 16 of the Act also constituted a failure in its duty to assist. Certain records that were withheld under this section were eventually provided. However, the Public Body did not agree to provide them until almost a year after the request, and did not actually provide them until four months after that decision (after consent of the third parties had been obtained). No explanation was given for this lengthy delay. I agree it was unwarranted, and that even though the documents were provided eventually, the delay constituted a failure in the duty to assist.[12]

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[10] The failure to name the correct sections is arguably also a breach of section 12, which requires that in the case of a refusal, the provision of the Act on which the refusal is based is to be set out. Earlier decisions of my Office have said that the provisions of the Act are intended to operate discretely, and that section 10(1) does not encompass other, more specific, duties set out under the Act (see Order 2000-014). Thus a failure under, for example, section 12, should, arguably, not also be seen as a failure in the duty to assist. However, in my view, section 10(1) is the more appropriate provision on which to base the complaint in this case because the crux of the failure was not that the provision was not named at the earlier point, but rather that a proper assessment was not done such as would have enabled the correct choice of provisions to be made.

[11] I note that in its oral argument the Applicant seemed to suggest that the Public Body had not initially relied on section 24 at all, but that is not the case.

[12] The delays in this case arguably fall under the other provisions in the Act that provide specified time limits for responding to access requests. Under section 31 of the Act, the Public Body is to make a decision

[para 27] The Applicant also argued that failure to meet the duty to assist is demonstrated by other "information" which the Applicant has that "suggests that the public body did not provide accurate or complete information". I am not able to tell what information the Applicant is referring to, and can make no finding about this argument.

[para 28] Another point made by the Applicant under the "duty to assist" heading is that the Public Body did not provide reasons for withholding documents. As noted earlier, the Applicant pointed to 12(1)(c)(i) in making this point. I will deal with it in a separate heading relating to section 12(1)(c)(i) specifically (Issue F).

[para 29] The Applicant also says the Public Body made no effort to determine whether information could be severed as required by section 6(2) of the Act. I will deal with the obligation to sever in my analysis of whether responsive records or parts thereof were properly withheld on the basis of the claimed exceptions.

[para 30] Finally, in its oral submission, the Applicant argued that the Public Body failed in its duty to assist by failing to clarify with the Applicant what it meant by "implementation" in the context of its original request. The Public Body suggested it did not do this because it assumed that it already understood the request. It explained that it thought it would not be reasonable for the Applicant to ask for the numbers of records that would be involved on the other understanding (that the request included all records in 2003 created by the Public Body relative to Bill 27 after the Bill's passage - which the Public Body described as "11 cubic feet of records"). While I have some sympathy with the Public Body's point, I have also been advised by the parties that the Applicant has since clarified this aspect of the request, which suggests that clarification was possible, and that there is indeed some further information relative to this aspect that is being sought. Thus I agree that the Public Body should have asked for clarification as to the part of the request that was ambiguous in its wording, rather than relying on its assumption, and that its failure to take this step was a failure to assist the Applicant.

Issue C: Does section 22 of the Act (Cabinet confidences) apply to the records/information?

[para 31] The Applicant submitted that the following records fall under the mandatory exception to disclosure under section 22(1) of the Act: 2, 13, 14, 15, 40, 41, 101, 102, 103, [1149 – likely either 114 or 149], 151, 155, 156, 157, 158, 159, 160, 172, 173, 177, 200, 211, 212, 220, 231, 250, 256, 267, 276, 314, 326, 327, 329, 332, 333, 341, 342.

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within 30 days of notice to the third parties that it is considering giving access. However, again, the Applicant's complaint is not so much that the particular time lines were not met as that the response was given only a very long time after it would have been most useful to the Applicant. It says the Public Body's duty to assist included giving consideration to this fact. I agree that when the timing of a response has a particular importance, a public body's failure to take this factor into account can be, and was in this case, a breach of the duty to assist.

[para 32] Section 22(1) provides:

> *22(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.*

[para 33] I note first that this provision permits the withholding of information that would reveal the *substance* of deliberations of Executive Council, including in the specific forms stated. Thus, in my view, it does not extend to the withholding of other information such as the names of persons who prepared the material, or the dates, or the topics of the deliberations, unless this information would in itself reveal the substance of the deliberations.

[para 34] Further, I note that the Public Body's submissions about these records are that they would *likely* have been provided to Cabinet by a Cabinet minister during its deliberations on the topics to which they relate. They also suggest that a comparison of the records with the final legislation (Bill 27) would lead to the conclusion that the records *likely* reveal the substance of the discussions of Cabinet. However, there is no positive assertion that they were so provided, or that there were Cabinet discussions about the particular information contained in them. I accept that it need not be shown that a record was actually placed before Cabinet to meet the terms of the provision. However, section 22(1) speaks to information that *would reveal* the substance of deliberations of Cabinet – not to information that would *likely* reveal it. Withholding records must be based on a belief on the part of the Public Body, based on evidence, that the terms of the section were met, not a speculation that they were *likely* met.

[para 35] I note as well that many of the documents in the list for which this exception was claimed do not on their face appear to be of a kind that would be submitted to or considered by Cabinet, and that some of the records in this inquiry that seem more likely to be of the type that would be placed before Cabinet, for example, record 349 (which has attached at the end some forms suggesting it may have been prepared for consideration by Cabinet), are not on the 'section 22' list. As well, exact copies of some of the records on the list are found in other documents that are not on the list. For example, exact copies of 13 pages of record 155 (on the list) are found in record 349 (not on the list).

[para 36] Because Bill 27 was enacted, I accept that Cabinet discussed some aspects of it, and that documents were presented to Cabinet on the subject of the Bill. However, by virtue of the terms of the request, all the records at issue in this inquiry relate to this legislation in some way. It cannot be known without more which aspects of, or at what level of detail, Cabinet was asked to consider and did consider the Bill, and therefore which of the records, if any, were provided to Cabinet, or which of them contain

information that was actually discussed by it. Neither the speculative submissions of the Public Body about the particular records for which section 22 was claimed, nor my review of these records, permit me to conclude that any of them contain the particular material that Cabinet was asked to consider or did consider.

[para 37] Thus the Public Body has failed to demonstrate, even with regard to the substantive information in the records, that it was properly withheld under section 22(1).

[para 38] However, as will be seen below, with respect to the substantive content of these records, I find that all such substantive information can be withheld under one or both of sections 24(1)(a) and 24(1)(b) of the Act.

Issue D: Did the Public Body properly apply section 24 of the Act (advice) to the records/information?

Legislation

[para 39] The relevant parts of section 24 provide:

> *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,*
> >
> > *(e) the contents of draft legislation, regulations and orders of members of the Executive Council or the Lieutenant Governor in Council,… .*

Section 24(1)(e)

[para 40] I will deal first with records withheld under section 24(1)(e) – draft legislation – as this is the section on which the Public Body initially relied, and because its meaning is relatively clear. The Public Body relies on sections 24(1)(e) to withhold the following records: 5, 6, 8, 9, 13, 15, 17, 18, 19, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 101, 102, 103, 107, 135, 140, 141, 143, 147, 148, 182, 183, 184, 187, 188, 189, 191, 192, 193,

220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 231, 252, 253, 262, 263, 264, 265, 276, 314, 318, 326, 341.

[para 41] I have reviewed these records, and find that, with the exception of the headings and dates, some of them clearly fall within the exception in section 24(1)(e) in their entirety. These are records 5, 6, 8, 9, 13, 15 (except that the next-to-last page does not appear to relate to the draft[13]), 17, 18, 19, 135, 182, 183, 187, 188, 191, 192, 193, 252, 253, and the drafts attached to the covering pages in 262, 263, 264 and 265.

[para 42] In some of the remaining records of the ones listed in paragraph 40, only a portion falls within the exception, and in some of the documents, there is only information about who was involved in the creation or editing of legislation, who commented on it, the dates on which the drafts were written, sent or commented on, or the topic of the legislation. By its terms, section 24(1)(e) does not cover such information unless this information would reveal the contents in a substantive sense. In this case it has not been demonstrated to me that revealing the names of the correspondents in these records, the dates the communications took place, or, in many cases, the subject lines, would reveal the contents of the drafts. (While the headings or subject lines would reveal the topic of the legislation, they would not reveal the contents in a substantive sense. I read 'contents' to refer to the latter.[14]) In many of the records listed (which consist largely of e-mail correspondence), non-substantive information is contained not only in the "from', 'to', 'sent' and 'subject' lines, but also in the text of the correspondence. As I find that section 24(1)(e) applies only to the parts of these records that are or actually reveal the substantive contents of draft legislation, it applies to only a part of most of the documents for which it was claimed, and does not apply to a few of them at all. While the contents of the draft legislation and related comments may be withheld under section 24(1)(e), the remaining portions may not.

[para 43] I will provide to the Public Body a copy of records or parts of records 5, 6, 8, 9, 13, 15 (except the next-to-last page), 17, 18, 19, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 135, 182, 183, 184, 187, 188, 189, 191, 192, 193, the first page of 220, 221, 222, 223, 224, 226, 227, 228, 229, 231, 252, 253, 262, 263, 264, 265, severed or otherwise marked, in the manner I have described, to show which parts are to be disclosed and which may be withheld under section 24(1)(e).[15]

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[13] However, the substantive part of this record may be withheld under section 24(1)(b) (in accordance with a severed copy of the document which I will provide to the Public Body), for the reasons discussed under the next heading.

[14] Support for the idea that the name of legislation is to be disclosed although the contents may be withheld is found in Order F2005-004 (July, 2005). In this case, the Commissioner named the title of the legislation at issue, while permitting withholding of the contents.

[15] The same records may also be withheld under sections 24(1)(a) and 24(1)(b). As the same portions could properly be withheld under 24(1)(e) as under one or both of the latter sections, I provide only one severed copy of these records. Record 42 is mainly unresponsive in terms of its timing, and the remainder may be withheld under sections 24(1)(a) and 24(1)(b). Record 47 is of the same nature as the remaining records in

[para 44] Included in the list (in paragraph 40 above) for which section 24(1)(e) is claimed are several records or parts of records that, although some of them discuss matters which may or are to be legislated in future, do not take the form either of draft legislation (or of the typical precursor thereto, a three-column document), or of comments about such records. These are records 101, 102, 103, 107, 140, most of 141[16], 143, 147,148, the second and third pages of 220, 276, 314, 318, 326, and 341. To find that these documents reveal draft legislation would necessitate a comparison between the contents of the documents and versions of the actual drafts of legislation, by someone knowledgeable about the subject matter. However, as the substantive portions of all these documents fall within the exceptions under one or both of sections 24(1)(a) and 24(1)(b) (except record 148[17]), and as these exceptions were also claimed relative to these documents, I will deal with them instead under these latter provisions (see below).[18]

[para 45] I turn to whether the Public Body exercised its discretion properly to withhold the records or parts of records that fall under section 24(1)(e). In support of its proper exercise of discretion, in its initial submissions the Public Body adverts to the fact that the Head of the Public Body "reviewed each document that had been withheld under section 24(1) for a second time … and as a result of that second review, decided to disclose 27 documents that had previously been withheld under section 24". I presume this statement is meant to indicate that the Public Body was having regard to the following objects and purposes of the legislation: (i) that government information should be available to the public, and (ii) that exceptions to the right of access should be limited and specific.

[para 46] In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case. I find support for this position in orders of the British Columbia Information and Privacy Commissioner. Orders 325-1999 and 02-38 include a list of factors relevant to the exercise of discretion by a public body. In addition to "the general purposes of the legislation (of making information available to the public) the list includes "the wording of the discretionary exception and the interests which the section attempts to balance". It strikes me as a sound approach that the public body must have regard to why the exception was included, and whether withholding the information in a given case would meet that goal.

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records 43 to 99 (and was likely inadvertently omitted), but may be partially withheld under either 24(1)(e) or 24(1)(a) or (b) (in accordance with a severed copy of the document which I will provide to the Public Body). Record 231 does not self-evidently reveal the contents of draft legislation, and is better dealt with under sections 24(1)(a) and 24(1)(b).

[16] This record includes a one-page portion of a three-column document, but the greatest part of the document is in a report format.

[17] Record 148 is dealt with below.

[18] Record 225 is included in the list for which the Public Body claimed reliance on section 24(1)(e), but I have held (see above) that this record is unresponsive.

[para 47] In this case, the Public Body did, in its second submission, engage in an extensive discussion about the purposes of section 24. It said this was to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions, and that the Head should exercise the discretion to withhold documents where disclosure would defeat the purpose of this section. I am persuaded the Head was mindful of these policy goals, and withheld the records to ensure they would be met. These policy goals apply to section 24 generally and to section 24(1)(e) in particular. This explanation, together with the fact that additional records were disclosed on the second review, leads me to conclude the Head exercised his discretion under section 24(1)(e) properly. (I note, however, that I do not have an affidavit from the Head of the Public Body that explains the basis for his exercise of discretion. In my view, direct evidence from the Head on this point would be preferable to assertions to the same effect in the Public Body's written submission.)

Sections 24(1)(a) and 24(1)(b)

Late raising of discretionary exemption

[para 48] As already noted above, in its initial response to the Applicant, the Public Body cited section 24(1)(e) (and section 22(1)) as the sections on which it was relying.[19] In the Public Body's submission it indicated that at a later point (during the mediation stage), it reviewed the records again. At that time it either changed or added to the provisions on which it was relying. In the index of records which it provided to me, it said it was relying on sections 24(1)(a), and 24(1)(b) for large numbers of records. I am not aware whether the Applicant was aware of this change at the time of the mediation.

[para 49] The Applicant objects to this change. It says that the change shows the Public Body could not have been properly exercising its discretion to withhold at the time the original decision to withhold was made.

[para 50] I have considered the matter of a late raising of discretionary exceptions in earlier orders.

[para 51] In Order 96-010, the former Commissioner held that a Public Body could not do this if it resulted in a delay, or prejudiced the other party. In that case, the late raising of the exemption did not have such an effect because the Public Body notified the Applicant and this Office well in advance of the inquiry. In this case, the Public Body also notified the Applicant in advance of the inquiry, and the Applicant has had an opportunity to make submissions about the newly-raised provisions. Where, despite the Applicant's representations to the contrary, records could be properly withheld on the

[19] This was the only part of section 24 mentioned in the Public Body's initial response to the Applicant, and it did not specify which records it was excluding in reliance on this subsection.

basis of the newly-raised provisions, the Applicant cannot generally be said to have been prejudiced by the fact they were raised late.[20]

[para 52] I have noted the Applicant's point that the Public Body cannot have been properly exercising its discretion under a particular provision when it did not even have that provision in mind. I agree that at the time of the initial response, there was a defect in the way the Public Body exercised its discretion, in that it did not have precisely the right provisions in mind for some of the documents. However, as I noted earlier, the principle behind the provisions – to protect the confidentiality of the legislative development process, including the advice provided to the lawmakers – was the same for both the provisions initially referenced, and the later ones. This detracts significantly from the idea that the failure to name the right provisions at a particular point in time should preclude the ability to withhold documents in the final result.

[para 53] The Applicant has had an opportunity to comment, and the same or a similar policy underlay all the provisions referenced – both earlier and later. Therefore, in this case, I will not order the release of records that fall within particular provisions because the Public Body's exercise of discretion to withhold the records in reliance on those provisions took place at a later, rather than earlier, point in time.

Substantive application of sections 24(1)(a) and 24(1)(b)

[para 54] I turn now to the substantive application of sections 24(1)(a) and 24(1)(b). The Public Body relies on these sections to withhold the following records: 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 107, 135, 140, 141, 143, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 172, 173, 174, 175, 176, 177, 178, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 200, 208, 211, 212, 213, 214, 215, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 231, 232, 233, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 262, 263, 264, 265, 267, 276, 304, 305, 306, 314, 315, 316, 317, 318, 320, 322, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 339, 340, 341, 342, 343, 344, 347, 348, 349, 350, 351.[21]

[para 55] Earlier decisions of this office have considered the circumstances under which the criteria in these provisions apply. Order 96-006 said that to determine if section 24(1)(a) [then section 23(1)(a)] will apply to information, the advice, proposals, recommendations, analyses or policy options ("advice"), should:

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[20] A possible exception to this general statement would be where the circumstances are such that had the issue been decided at the earlier time, the result would have been favourable or more favourable to the Applicant. However, I am not aware of any such circumstance in this case.

[21] Section 24 was also initially claimed relative to a number of records that were released to the Applicant after the second review. These are: 1, 137, 202, 205, 206, 209, 210, 217, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 312, 319, 321, 336, 337, 338, 345, and 346. Record 1 is the same as records 233 and 316. Therefore the latter records should also be disclosed.

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.

[para 56] With respect to ‘consultations or deliberations’, in Order 96-006, the former Commissioner said

> When I look at section 23 [now 24] as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank deliberations were to be made public. ... I therefore believe that a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice.

[para 57] In Order 99-013, the former Commissioner reiterated that the consultation or deliberation must meet the same criteria as for section 24(1)(a) [then 23(1)(a)] ("advice"), in that the consultation or deliberation must be

(i) sought or expected, or be part of the responsibility of a person by virtue of that person's position,
(ii) directed toward taking an action, and
(iii) made to someone who can take or implement the action.

[para 58] I have reviewed the records withheld by the Public Body on the basis of sections 24(1)(a) and 24(1)(b).

[para 59] I note first that some of these records self-evidently seek or give advice on the topic mentioned in the request, but it is not evident on their face or from the evidence which person created them or to whom they were sent. I must decide whether despite this, the records fall within subsection 24(1)(a) and/or 24(1)(b).

[para 60] I note second that some records or parts of the records withheld under these sections reveal that advice was given, or that consultations or deliberations took place, and reveal the persons among whom such communications took place, or the dates they took place, or the topic of the advice or consultations, but do not reveal the substantive content of the advice or of the consultations or deliberations. I must decide

whether the records or parts of the records that do not reveal the substance of advice or consultations or deliberations can be withheld under these subsections.

Records revealing advice, etc., but not who gave it

[para 61] Can a record that does not identify its sender or recipient meet the requirement that the comments or advice that it contains were sought or expected, or were part of the responsibility of a person by virtue of that person's position, and the requirement that they be made to someone who can take or implement the action? I asked the parties to address this issue by answering the following question:

> Does section 24(1)(a) apply to records that on their face contain advice about a matter being decided by public officials, where it is not evident on their face or from the evidence which person created them or to whom they were sent?

[para 62] The Public Body answered by saying, in both its written and oral arguments, that in this case I can know the records meet the conditions in the preceding paragraph simply from the fact that they are responsive to the request. Because the responsive documents were communications between the Public Body and any Department of the Government of Alberta, Cabinet Minister, or Minister's staff , I can know they were sought or expected, or were part of the responsibility of a person by virtue of that person's position. Because they concerned a matter about which action was ultimately taken by members of a government department (steps leading to the enactment, promulgation and implementation of Bill 27), I can know they were made to someone (although possibly through intermediaries) who could take or implement the action. Thus I may conclude that the records meet the terms of sections 24(1)(a) and 24(1)(b) regardless of which particular staff members of the Public Body or government sent the advice or sought or received it.

[para 63] I accept the Public Body's argument that some of the records fall within the terms of section 24(1)(a) and/or 24(1)(b) even though they do not reveal who created or received them. The contrary conclusion could result in the disclosure of advice in situations where this would defeat the policy of the provisions.[22]

[para 64] With respect to the proper exercise of discretion, the Public Body has submitted that the discretion to withhold these records was exercised to safeguard the process by which governments enact legislation and permit it to obtain the necessary advice, through free and open discussions, such as allows for making well-reasoned decisions. I accept that this was a proper reason to withhold the records that contained the advice, consultation, and deliberations in this case.

[22] I note that a similar conclusion was reached relative to documents that did not contain the names of the public servants who created them in Ontario Order PO-2087-I. See paragraphs 69, 73 and 79.

Information that advice was given or consultations took place, or who was involved, but not the advice, or substance of the consultations or deliberations, itself

[para 65] As noted earlier, some records or parts of records withheld under sections 24(1)(a) and 24(1)(b) reveal that advice was given, or that consultations or deliberations took place, and reveal the persons among whom such communications took place, or the dates they took place, or the subject of the advice or consultations, but do not reveal the substance of the advice or of the consultations or deliberations. It would be possible to disclose the former information without revealing the advice or substance of consultations.

[para 66] In this inquiry I asked the parties to specifically address the following question:

> Do sections 24(1)(a) and (b) apply to documents or parts of documents that reveal that advice (about a particular action or course to be taken) was sought from or given by particular persons?

Submissions of the parties

[para 67] The Public Body responded by saying that the purpose of section 24(1) is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions without fear of being wrong or appearing foolish, and that this purpose would be defeated where

(1) the disclosure would allow an applicant to infer some knowledge about the substance of the advice by reference to who gave it, the timing of the advice, or to the outcomes that followed the giving of the advice; and
(2) the disclosure of a document or a portion of a document would reveal that an individual participated in a discussion.

[para 68] In support of the first of these points, the Public Body asserted that disclosure of the names of individuals who participated in the discussion and the timing of their participation, together with the end result of their discussions (presumably this means the legislation) would allow an accurate inference about the substance of the advice that was given. It added that the Head of the Public Body was in the best position to know whether such an inference could be drawn. In its second supplementary submission (made after the conclusion of the oral inquiry), as well as in its second oral presentation, the Public Body elaborated on the "accurate inference" point. It said that a particular group of people were given responsibility to draft the legislation at issue, and to provide specific knowledge and expertise, and that if these persons were named, others who knew the responsibilities of these people, the general process that governments follow, and the timelines surrounding the enactment of the legislation in question, would be able to make accurate inferences about the contents of the advice given by particular individuals in particular communications. The Public Body added that the ability to draw

such inferences was enhanced by the inadvertent release of some of the withheld records by this Office.

[para 69] With respect to the second of the Public Body's two points, it argued that the purpose of the section can be defeated where individuals become reluctant to participate freely in the discussion knowing their participation or advice-seeking may be disclosed, which can have the result that decision makers are unable to obtain the advice needed to arrive at well-reasoned decisions. In its supplementary submission made after the conclusion of the oral inquiry, the Public Body reiterated its point that a person who feels they would suffer harm as a result of others knowing they sought or gave advice could become reluctant to seek or give it. It added that the result of the inadvertent disclosure by this Office of some of the names of the particular people named in these documents illustrated the kind of harm that can be suffered by disclosure of such information.

[para 70] The Applicant's submissions on the question set out above include reference to a decision of the Ontario Information and Privacy Commissioner (PO-2328 [2004] O.I.P.C. No. 216). This decision dealt with whether dates of meetings and notes of headings about the topics constituted or could reveal advice and recommendations, and concluded they could not.

Discussion

[para 71] In my view, section 24(1) does not generally apply to records or parts of records that in themselves reveal *only* any of the following: that advice was sought or given, or that consultations or deliberations took place; that particular persons were involved in the seeking or giving of advice, or in consultations or deliberations; that advice was sought or given on a particular topic, or consultations or deliberations on a particular topic took place; that advice was sought or given or consultations or deliberations took place at a particular time. There may be cases where some of the foregoing items reveal the content of the advice. However, that must be demonstrated for every case for which it is claimed.

[para 72] The first of the Public Body's two points (set out at paragraph 68 above) is that the names of the givers of advice in this case allow the drawing of an accurate inference about the content of the advice they gave. Presumably, it is suggesting that particular aspects of Bill 27 can be tied to particular persons, so that it is possible to infer what advice was given or comments made by particular persons.

[para 73] I do not accept that in this case, any inferences can accurately be drawn about what advice was given by particular persons. The Public Body did not point to a particular clause in the resulting legislation and say "here is the clause that reflects the advice given by person X." At most the Public Body says that based on such names, I may know that the advice of a particular person or persons was advice about Bill 27 generally, or the regulations, or some component of either, or had a particular degree of importance relative to the final outcome. This does not tell me what particular advice was

given by any particular individual, much less in any particular document. The legislation that was enacted is highly complex. As the Applicant has pointed out, there were many bodies and individuals providing advice and comments on the proposed legislation, at various stages of the process. Even if it could be concluded, from knowing the names alone, that a particular person or persons provided much of the advice for the development of the legislation, there is nothing to establish or even suggest that no significant advice on the same topic came from other sources at earlier or later times, nor that the ultimate decision makers followed the advice given by any particular persons. Significant advice and significant changes to proposed legislation can occur at many stages both before and after the drafting stage.

[para 74] It is possible to imagine a situation in which the name of the giver of advice could reveal the substance of the advice. Where advice about a particular topic was given by a person who was known to be a proponent of a particular viewpoint on that topic is a possible example. A hypothetical example suggested by counsel for the Public Body is a document created by a known anti-smoking group. It might be possible to infer in some circumstances that a particular document authored by such a group contained anti-smoking material. However, this is not such a case. In my view, the Public Body did not establish that any of the people involved in this case held particular opinions, nor has it shown or suggested any other way in which an accurate inference about the substance of the particular advice given can be made from disclosure of the names of the persons receiving or giving it.

[para 75] I turn to the second of the Public Body's points (discussed at paragraph 69 above), that the names of public servants who participated in a discussion must be kept confidential to ensure they are not dissuaded from participating in certain kinds of discussions. I accept that the policy behind the rules is to allow a free discussion. However, in my view the rule achieves this policy by shielding the substance of the discussions. Sections 24(1)(a) does not permit the withholding of who gave advice; it permits the withholding of advice. In my view the words "reveal advice" means 'reveal what the advice was', Similarly, with respect to section 24(1)(b), "reveal … consultations or deliberations" means 'reveal what the consultations or deliberations were'.

[para 76] I acknowledge there may be circumstances where a public servant's participation in certain kinds of discussions may give rise to criticism. Despite this, I do not accept that the words of section 24(1) are intended to shield from exposure the very fact that consultations or deliberations between particular officers or employees took place, or took place about a particular topic, on the basis that this may dissuade public servants from participating in discussions of particular subjects. Where a person consults or is consulted on a given subject as a function of their office, and the application of section 24 is claimed on the basis that they are officers or employees of a public body, the very fact they participated in the consultation cannot, in my view, be withheld under section 24 unless this fact also reveals the substance of the consultation.[23] If there is something in such a disclosure that could give rise to an unreasonable invasion of the

[23] This point applies to both public body officials, and people who are consulted and provide advice on a 'fee for service' basis.

personal privacy of such employees, that is a consideration to be addressed under section 17, not section 24.[24] I reject the Public Body's argument that sections 24(1)(a) and 24(1)(b) permit withholding of a document or a portion of a document that would reveal only that an individual participated in a discussion. This reasoning applies as well to the parts of the correspondence that contain non-substantive content (for example, cover documents that convey the advice, or parts of the bodies of e-mail exchanges indicating only that comments are being sought or provided).

[para 77] The same point applies to subject matter or timing of the consultation. The exceptions in section 24(1)(a) and 24(1)(b) do not apply to the subject line or other indicator of the topic (or the date it took place), unless they would allow an accurate inference to be drawn about the substance of the advice or consultations. In Order 96-012, the former Commissioner held (at paragraph 31) that "... a summary statement of the topic of a consultation or deliberation, as opposed to a summary of the consultation or deliberation in itself, is also not exempt." I note as well that in the present case, given the nature of the request, it is clear that this inquiry is about information relating to a particular topic, so that disclosure of the subject line in much of the correspondence does not reveal information that cannot be derived from the very fact the documents are responsive. (However, this reasoning does not necessarily apply to headings of a more specific nature. A heading or sub-heading in a document can itself constitute advice – for example, where the need to address a particular matter or matters is part of the advice, or where part of the advice consists in developing categories. In such cases, headings may be withheld because they are substantive components of the advice.[25])

[para 78] In defining the scope of the exceptions in sections 24(1)(a) and 24(1)(b), I have in mind that these exceptions are broader than those in parallel provisions in some other jurisdictions. The legislation in Ontario and British Columbia, for example, excepts only "advice and recommendations". In Alberta, "advice, proposals, recommendations, analyses or policy options" are all excepted, as well as "consultations or deliberations". Thus, in my view, the exceptions in section 24(1)(b) embrace the substantive parts of communications that seek an opinion as to the appropriateness of particular proposals respecting a course of action to be decided, including any background materials that inform the advisors about the matters relative to which advice is being sought, and are thus inextricably interwoven with the questions being asked ("consultations"). This includes correspondence between government departments and third-party advisors, which was conveyed by a department to the Public Body for the purpose of providing background to enable the giving of advice.[26] They also embrace the reasons behind

[24] Section 17 was not raised by the Public Body with reference to disclosure of information about the involvement of public body employees in the matters to which the documents relate. I have nevertheless considered whether section 17 applies, because it is a mandatory exception. See the discussion at paragraph 100 et seq. below.

[25] The same point applies where advice is being sought relative to a particular topic or category which has already been developed in the course of formulating a proposal. Where a communication asks for comments on a proposal relative to such a topic, the subject line may be withheld because it is itself a component of the advice which is being discussed.

[26] In such cases, the entire document, including the names of the correspondents, may be withheld , because the entire document was conveyed for the purpose of providing background information relative to the

advice - "the reasons for and against an action" - as well as the advice itself, and possibly also the presentation of available alternatives ("policy options"). In my view, "deliberations" also includes comments that indicate or reveal reliance on the knowledge or opinions of particular persons, including those of the person making the communication.[27] However, these wider exceptions do not encompass non-substantive material which merely indicates that someone sought or gave advice or had a discussion about a course of action, without revealing substantive elements of the request or the advice, or the content of the discussion.[28]

[para 79] I am strengthened in the view that sections 24(1)(a) and 24(1)(b) embrace only substantive information by reference to the remainder of the subsections of section 24(1). Each of these deals with substantive information. I note that some of them speak expressly of "contents of…", whereas subsections (a) and (b) do not. However, in each of the subsections that speak expressly of "contents of", a particular type of document – draft legislation or orders, agendas or minutes, and formal research or audit reports – is specified. In my view the inclusion of "contents of" is meant to ensure that not only the specified documents, but also information from other sources about what is in the specified documents, may be excluded. Where a particular type of document is not specified (as in subsections (a) and (b)), the added words are not necessary.

[para 80] I also note that the two other provisions of the Act that refer to deliberations (section 22(1) and section 23(1)(b)) refer specifically to "the substance of" deliberations, whereas section 24(1)(b) does not. Again, however, because in these other provisions there are likely to be records of the deliberations themselves in the form of agendas and/or minutes, in my view the added words are intended to ensure that not only information in these particular forms, but also information from other sources about what was discussed, may be excluded. Again, as there is no particular category of documents that are likely to be captured by section 24(1)(a) and 24(1)(b), there is no need for added words to ensure that records other than in a particular form are within the exception.

[para 81] I am also strengthened in my view that the names of authors or correspondents, dates, and subject lines are not excepted from disclosure under section 24 of the Act by a number of court decisions and decisions of Offices of the Information and Privacy Commissioners in other jurisdictions.

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matter about which advice was being sought. The name of the advisor in such a circumstance can be a substantive element in the discussion.

[27] Withholding of such information is permitted under the legislation, even though no specific content about the topic in issue (in this case, the Bill) is revealed, because such information falls within the policy rationale that persons must be able to freely express the reasons why they are choosing a particular course – in this situation, that they are or are not relying on their own expertise or opinions or those of someone else. Statements of this kind have a substantive element, and could conceivably be inhibited if they were subject to disclosure.

[28] I note that the federal *Access to Information Act* includes in its list of exceptions "*an account of* consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown". While our legislation does not use the phrase "an account of", in my view, the intention is the same in that both provisions are meant to protect the content of the discussion rather than the names of participants.

[para 82] A decision of the Ontario Office of the Information and Privacy Commissioner (PO-2328) supports the idea that headings (in that case of agendas) that, in the words of the Ministry "*would reveal that advice and recommendations were being formulated or given*" in respect of a matter, cannot be excepted from disclosure. The Assistant Commissioner said that "Clearly this is not sufficient to establish the requirements of section 13(1) [the section in the Ontario legislation dealing with advice and recommendations]". I agree that the mere statement of a topic about which advice or a recommendation is given or a discussion is being held does not in itself necessarily advise or recommend. Neither does it reveal the substance of a consultation or deliberation.

[para 83] As well, I note Ontario Order PO-2087-I. This case involved an extensive review and analysis of records relative to the section (section 13(1)) discussed in the preceding paragraph. After reviewing which parts of records could be withheld on the basis that they revealed advice and recommendations, the Adjudicator stated:

> Other information on these memoranda, such as the "to" and "from" lines, date and so on can be severed from the "content" of each record and to do so *provides the appellant with information about the process without revealing exempt information.* In my view, although the amount of information is small, it cannot be characterized as "worthless" or "meaningless" or "disconnected snippets" (as discussed above[29]), and should therefore be disclosed to the appellant. (emphasis added)

[para 84] In an order of the British Columbia Privacy Commissioner, B.C. Order 01-25, the B.C. legislation under consideration permitted public bodies to withhold information that would reveal advice or recommendations developed by or for a public body or Minister. The Public Body argued that this section applies to the identity of an employee who wrote a memorandum on the basis that "the document inherently recommends that one option available to the Board is that the author or the author's office take certain actions with respect to the Appeal Division matter." The Commissioner wrote:

> Even if the record did contain advice or recommendations, which it does not, I fail to see how the identity of the employee who wrote the memorandum "inherently" reveals advice or recommendations.

In the same case, the B.C. Commissioner also cited an earlier decision of his own office. In British Columbia Order No. 193-1997, the former Commissioner wrote with respect to the same legislation:

> The applicant submits that this section cannot be used to protect the names of public servants who may have participated in a meeting, or their names generally, from government records.

[29] The Adjudicator was referring to her earlier discussion of situations in which severing was unwarranted because it would result in disclosing only of meaningless "snippets" of information.

> The Ministry replies that disclosing the names and positions may reveal "a recommendation that a matter be dealt with at a particular level." … The Ministry has not provided any evidence as to how the disclosure would reveal recommendations in this case. I note that names of public servants were disclosed to the applicant. The fact that a particular person provided advice or recommendations does not, in this case, in and of itself reveal the advice or recommendations. There may be sensitive issues where the very fact that a particular person has given advice on a particular date reveals the advice or recommendations. I am unable to conclude that in this case the names and positions withheld would reveal advice or recommendations.[30]

[para 85] I note as well relative to the related cases that there are a number of decisions in which the question of the names of seekers or givers of advice, dates, and subject headings does not arise as an issue because the Public Body disclosed this information (while severing the substantive contents) to begin with. Presumably where this was done it was on the basis of an interpretation of the legislation that accords with my conclusions here.[31]

[para 86] I note, finally, recent decisions of the federal court which deal with names of correspondents and subject lines in the context of legal privilege. *Blank v. Canada (Minister of Justice*) (F.C.A) [2004] F.C.J. No. 1455, and *Blank v. Canada (Minister of Justice*) (F.C.) [2005] F.C.J. No. 1927 reaffirmed an earlier decision to the same effect in *Blank v. Canada (Minister of the Environment*) (F.C.A.) [2001] F.C.J. No. 1844. In the earlier of these judgments the Federal Court of Appeal considered whether the names of correspondents and subject lines contained in communications that sought or gave legal advice could be withheld on the ground of legal privilege under the federal *Access to Information Act*. This act provided that the Public Body may refuse to disclose any record that contains information that is subject to solicitor-client privilege. The court said (at paragraph 23):

> In the second category are letters and memoranda in which disclosure was ordered of the part of the document showing what I would characterize as general identifying information: the description of the document (for example, the "memorandum" heading and internal file identification), the name, title and address of the person to whom the communication was directed, the subject line, the generally innocuous opening words and closing words of the communication, and the signature block. The partial disclosures in this category enable the appellants to know that a communication occurred between certain persons at a certain time on a certain subject, but no more.
>
> There may be instances in which such general identifying information might be subject to solicitor-client privilege. However, the Minister has provided no evidence upon which I can conclude that this is such a case. Strictly speaking, therefore, the

[30] See also B.C.I.P.D. Order 02-19 at paragraph 82.
[31] See, for example, Ontario order MO-1815 at paragraph 18, MO 1814 at paragraph 80.

> Judge could and should have ordered the disclosure of general identifying information for every letter or memorandum containing a privileged communication.[32]

As noted, this case related to advice given to a public body by lawyers rather than by public officials, and related to legal privilege rather than to exceptions such as those in sections 24(1)(a) and 24(1)(b) of the Act. Thus it is persuasive by way of analogy only. However, legal privilege is jealously guarded by the courts. In light of this, the court's willingness to require disclosure of names and subject lines even in the context of legal privilege lends support to the idea that, unless the names reveal the advice, the names of the givers of advice should not be withheld under legislation permitting the withholding of the advice.

[para 87] I acknowledge, once more, that the exceptions in sections 24(1)(a) and 24(1)(b) of the Act are broader than those in parallel provisions in some of the other jurisdictions. Thus the exceptions in section 24(1)(b) embrace communications that seek advice as well as give it, the reasons behind the advice, and possibly also the presentation of available alternatives ("policy options"). However, these wider exceptions do not encompass non-substantive material which merely indicates that someone gave advice or had a discussion, without revealing some substantive element of the advice or substance of the discussion.

[para 88] Finally, I reject any suggestion by the Public Body that I ought to defer to the Head of the Public Body to decide whether an inference as to the substance of advice or discussions can be drawn from other factors, as he is in the best position to do this. If the Public Body wishes to rely on section 24(1)(a) or (b) on this basis, it must satisfy me that this condition is met for every document for which the condition is claimed.

Conclusions under section 24

[para 89] I find, therefore, that the Public Body is entitled to withhold under sections 24(1)(a) and 24(1)(b) only the records or parts of them that reveal substantive information about the matter or matters on which advice was being sought or given (Bill 27), or about which the consultations or deliberations were being held. The remainder of the information cannot be withheld under section 24(1)(a) or (b). The latter includes the names of correspondents, dates and, in many cases, subject lines, as well as documents or parts of documents that express the fact that advice is being sought or given or that information is being conveyed, without revealing any substantive content. A great many of the documents include such information.

[para 90] However, I accept that the following parts of documents were properly withheld under sections 24(1)(a) and 24(1)(b): substantive advice, proposals, recommendations, analyses or policy options relative to the proposed legislation (including subject headings where it may be presumed that the headings consist of

[32] Despite this conclusion the court did not actually vary the order of the Judge to require further disclosure of identifying information, because the most important identifying information had been provided in a list of particulars.

matters that need to be addressed relative to the legislation at issue, and were developed as part of the development of the legislation[33]); the substantive parts of communications that expressly or implicitly seek an opinion as to the appropriateness of particular proposals respecting the legislation at issue, or that provide background information interwoven with the questions for which answers are being sought ("consultations"); and discussions or consideration of the reasons for and against particular components of the legislation ("analyses" or "deliberations"). "Consultations" includes correspondence between third-party advisors and government departments, that was conveyed to the Public Body by a government department as background information to enable the Public Body to provide advice. "Deliberations" include comments that indicate or reveal reliance on the knowledge or opinions of particular persons throughout the decision-making process, including those of the person making the communication. (The same substantive information may be withheld from communications in this case that do not reveal the name of the person requesting or giving advice, or engaging in the consultations or deliberations.)

[para 91] However, comments that indicate or reveal *nothing more* than that a person participated in a discussion about a particular subject matter, or was asked to do so, without indicating anything substantive about their involvement, cannot be withheld in reliance on these provisions. I appreciate that it may be difficult to draw a line between the fact comments were requested from or made by an individual about a topic (not substantive), and the fact their particular comments were being considered or relied on in the discussion (which reveals something substantive about that discussion). However, in my view, these are distinct ideas, which are to be placed on opposite sides of the line that I have drawn in this case between documents that are to be disclosed on the one hand, and may be withheld on the other.

[para 92] In accordance with these conclusions, records 14, 41, 42, 146, 149, 156, 157, 158, 159, 174, 177, 178, 200, 211, 212, 213, 249, 267, 276, 314, 323, 328, 331, 334, 335, 339, 343, and 351 may be withheld under sections 24(1)(a) and 24(1)(b) in their entirety, except that the number of pages for each of these records should be disclosed.

[para 93] The following records (some of which are only partially responsive) may be withheld or partially withheld under sections 24(1)(a) and 24(1)(b): 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100[34], 101, 102, 103, 104, 105, 107, 135, 140, 141, 143, 146, 147, 150[35], 151, 152, 153,

[33] This applies to the same headings in documents that comment on the content of other documents. In such cases, officials are being asked to comment on advice already developed by other officials. The headings are 'substantive' in either case.

[34] Record 100 is a list of documents. Most of the documents listed are not in themselves responsive to the present request, but a few of them are. Thus these latter parts of the record "document" communications responsive to the request. I have severed record 100 such that those parts must be disclosed that consist of references to other documents (or parts thereof) that must themselves be disclosed. The parts of the list that describe information in the other records that may be withheld in reliance on sections 24(1)(a) and (b) may also be withheld under the same sections.

154, 155, 160, 172, 173, 175, 176, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 215, 220, 221, 222, 223, 224, 226, 227, 228, 229, 231, 232, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 262, 263, 264, 265, 315, 317, 318, 320, 322, 324, 325, 326, 327, 329, 330, 332, 333, 340, 341, 342, 344, 347, 348, 349, and 350.[36] I will provide the Public Body with a copy of these records, severed in accordance with my conclusions.[37]

Issue E: Does section 16 of the Act (business interests) apply to the records/information?

[para 94] The Public Body has now provided the Applicant with all the records it initially withheld on the basis of this section. (This includes records 36, 39, 196, 197, 198, 199, 201, 266, 283, 284, 285, 286, 287, 288, 292, 293, 294, 295, 296, 297, and 298.) Therefore I do not need to decide the substantive aspect of this question.

[para 95] I have already discussed (under the 'duty to assist' heading in this decision – Issue B) the timing issues relating to the Public Body's response relative to the records originally withheld under section 16.

Issue F: Did the Public Body meet the requirements of section 12(1)(c)(i) of the Act?

[para 96] The Applicant complains that the Public Body did not provide reasons for withholding documents. It points to section 12 of the Act, which provides in part that:

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

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[35] The third page of record 150 is a copy of record 319, which was released after the Head's second review of documents. Therefore the third page of record 150 should be disclosed.

[36] Portions of records 107, 140, 141, 155, 172, 173, 347, 348, and 349 are almost identical to record 338, which was released after the Head conducted a second review. Therefore, these portions of the aforementioned records should be disclosed. Similarly, portions of records 141, 147, 348 and 349 are almost identical to record 171, which was determined by the Public Body to be unresponsive (and access to them was offered to the Applicant), and they should be disclosed. As well, parts of records 155, 172, 173, and 349 contain copies of records 336 and 337 (which are also copies of records 345 and 346). These latter four records were released after the Head's second review, and copies of them found in other records should be disclosed. Records 233 and 316 are the same as record 1. The latter was released after the second review, and therefore records 233 and 316 should be disclosed. Finally, some of the records in the set referred to in this paragraph contain a page that appears to have been taken from an internet website. I urge the Public Body to consider whether this is so, and if it is, to release these pages.

[37] For the records in this list that are the same as the records severed under section 24(1)(e), the severing is the same. Therefore, I enclose only one copy of these records.

[para 97] The Applicant says that naming a section number is not enough and that a reason or explanation must also be given.[38]

[para 98] I do not accept this complaint. In my view, the language of section 12 does not imply that a reason must in every case be given *in addition to* the naming (or quoting or summarizing) of a particular statutory exception. There are some circumstances in which both parts of the requirement in subsection (i) can be fulfilled by naming the section number (or describing the provision). While in some circumstances more in the way of an explanation may be called for, in others there would be nothing more that could usefully be said by way of providing a reason than what the provision creating the exception says.[39] I accept that this was so in this case.

[para 99] However, I do read into section 12(1)(c)(i) the requirement that in a response, responsive records that are being withheld be described or classified insofar as this is possible without revealing information that is to be or may be excepted, and that the reasons be tied to particular records so described or classified.[40] At a minimum, it would, at least in most cases, be possible to set out the number of records being withheld under a particular subsection without disclosing the contents. This was certainly so in the present case, and indeed, it was eventually done, and such a list was provided to the Applicant after the conclusion of the first portion of the oral inquiry. In my view, in this case the Public Body's initial response was deficient under this section, in that it did not provide in its response to the Applicant the numbers of records retrieved and how many were being withheld under particular exceptions. It should also have provided the number of pages of which each withheld record consisted. I note that had the Public Body engaged in this exercise at the earlier point in time, it might have helped it to choose all of the appropriate exception provisions.

Issue G: Does section 17 of the Act (unreasonable invasion of personal privacy) apply to the records/information?

[para 100] Some of the records contain information that, according to this decision, does not fall within the claimed exceptions. This consists of the names, titles or positions, and business contact information, of employees, both of the Public Body in this case and of another public body (including contracted employees), who were involved in the seeking or giving of advice or the consultations or deliberations. A considerable proportion of the correspondence also contains some non-substantive content (for example, non-substantive subject lines, and words that merely request or convey substantive content) that does not fall under the exceptions that were claimed.[41] These

[38] Though it makes this point under the "duty to assist" heading (probably because section 12 was not listed in the Notice of Inquiry), in my view, it is more appropriate to deal with this question directly under section 12(1)(c)(i).

[39] In such cases, relative to Applicants who are unfamiliar with the legislation, it may also be useful to provide a brief summary or caption of the provision.

[40] Order 2000-014 held that public bodies should be as specific as possible about records to which they have decided to give access and not give access.

[41] Because all substantive information is to be severed on the basis of other exceptions, I do not have to make a decision under section 17 about the substantive content of the correspondence.

parts of the records disclose the subject matter of the duties of the employees in question, and something about the way they discharged their duties.

[para 101] It is necessary to consider whether disclosure of any of this information would be an unreasonable invasion of the privacy of the employees in question. Because section 17 is a mandatory provision, it is the practice of my Office to consider whether it applies though the parties themselves do not raise it. (See, for example, Order 96-018.)

Legislation

[para 102] The parts of section 17 relevant to this discussion provide:

> *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.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> > *(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council,*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if …*
>
> > *(d) the personal information relates to employment or educational history,…*
> >
> > *(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, … .*
> >
> > *(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*
> >
> > *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,…*

> *(c) the personal information is relevant to a fair determination of the applicant's rights,…*
>
> *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant,… .*

Discussion

[para 103] Previous orders of this Office have held that employees of public bodies can be considered as third parties relative to the manner of dealing with their personal information. (See Order 96-019 at paragraphs 72-78.)

[para 104] Some of the records reveal only the names of the participants in the discussion. According to the definition of "personal information" in section 1(n), a name alone is personal information. I will deal with the 'names alone' at the conclusion of this part.

[para 105] The description of a person's position is personal information. However, section 17(2)(e) of the Act lists matters relative to which disclosure of personal information is not an unreasonable invasion of personal privacy. Section 17(2)(e) includes "information … about the third party's … employment responsibilities as an officer, employee or member of a public body". Position descriptions or titles fall under this section. Therefore, releasing this part of the information in the records is not an unreasonable invasion of privacy, and it should be disclosed.

[para 106] Business contact information is also personal information. Section 17(4)(g)(i) potentially applies to such information. This provision creates a presumption that disclosure of a name together with other personal information about the person is an unreasonable invasion of personal privacy. Arguably, the presumption should be interpreted so as not to apply to business contact information because it is routinely disclosed by public bodies. (Indeed, it may be disclosed by reference to section 40(1)(bb.1)). Even if the presumption does apply, in my view, the public availability of the information is a factor under section 17(5) that has sufficient weight (in favour of disclosure), that disclosure of business contact information in this case would not give rise to an unreasonable invasion of personal privacy.

[para 107] I turn next to the parts of the records in which a name appears together with 'non-substantive' subject lines, and with 'non-substantive' comments that preface or surround the conveying of advice or consultations or deliberations. As noted, this information is a record of the subject of work duties, as well as a partial record of the discharge of employment responsibilities, relative to these individuals.[42] Is this information "personal information" under the Act?

[42] Arguably, with respect to what the subject lines and comments reveal about work duties, section 17(2)(e), discussed above relative to position descriptions, also applies. However, in my view, the term "employment responsibilities" under section 17(2)(e) refers to definitions or descriptions of work duties, rather than to information that incidentally and inferentially reveals work duties.

[para 108] Dealing first with the comments, in my view, records of the performance of work responsibilities by an employee of a public body are not, generally speaking, personal information about that employee within the terms of section 1(n). However, they may be personal information if there is some factor which gives the information a personal dimension.

[para 109] The question of whether the recorded activities or work product of employees is information about them has been thoroughly canvassed in Ontario decisions that relate to the definition of "personal information" in the Ontario legislation.[43] These decisions are summarized in Order P-1409, which states:

> To summarize the approach taken by this office in past decisions on this subject, information which identifies an individual in his or her employment, professional or official capacity, or provides a business address or telephone number, is usually not regarded as personal information. This also applies to opinions developed or expressed by an individual in his or her employment, professional or official capacity, and information about other normal activities undertaken in that context.

The Ontario position is that the latter such information is not personal in nature and is not about the employees, hence is not their personal information. Order R-980015 offers a policy rationale for this approach (at paragraphs 38 to 41), which includes the following comments:

> … the rationale for the distinction between personal information and information that relates to a person's employment, professional and official government capacity also relates to the integrity of the regime establishing the public's rights of access and government's disclosure obligations. Without this distinction, the routine disclosure of information by government … could be greatly impeded as institutions sought to meet statutory notice and process obligations meant to apply only to "personal information" deserving of this kind of protection. This could, in turn, become an obstacle to access to information pertaining to the business of government which, of necessity, is conducted by individuals in the public service.
> …
> … It would also be contrary to one of the fundamental purposes of the Act, that "necessary exemptions from the right of access should be limited and specific", to interpret personal information so broadly as to encompass records subject to other exemptions which have been carefully crafted to establish appropriate boundaries for protecting government's confidentiality interests and defining its disclosure obligations.

[43] As in Alberta, under the Ontario legislation, "personal information" is, defined as "recorded information about an identifiable individual", and in each case, this definition is followed by a list of items that are included. The itemized inclusions differ to some degree as between the two acts, but these differences do not, in my view, impact the relevance of the Ontario cases.

[para 110] Earlier orders of this Office declined to take up the Ontario approach to recorded employment activities. In Order 98-001, the former Commissioner said he would not follow the Ontario cases that (in his view) held that "employment responsibilities are not personal information" because it is implicit in section 17(2)(e) [formerly section 16(4)(e)] that employment responsibilities are personal information.[44]

[para 111] However, in my view, these earlier decisions of this Office do not have to be seen as in conflict with the Ontario approach to information created in the discharge of employment responsibilities.[45] Information *about* a person's "employment responsibilities" – a description of their position or duties – is different from information that records their performance of their responsibilities. The fact that a description of a person's employment responsibilities is personal information does not conflict with the conclusion (found in the Ontario cases) that recorded information created by people "in their professional capacity or the execution of employment responsibilities"[46] is not personal information about them. The Ontario cases also acknowledge that even information consisting of records of employment activities can, depending on its nature, have a personal aspect. I agree with the Ontario cases referred to above insofar as they stand for the proposition that a record of what a public body employee has done in their professional or official capacities is not *personal* or *about the person*, unless that information is evaluative or is otherwise of a 'human resources' nature, or there is some other factor which gives it a personal dimension.[47]

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[44] See paragraphs 32 to 34.

[45] In fact, the Ontario legislation has a provision parallel to section 17(2)(e), and the Ontario cases do regard "employment responsibilities" (as this phrase is found in the Ontario provision that is parallel to section 17(2)(e)) as personal information. See, for example, Reconsideration Order R-980015. Paragraph 23 states:

> "The presumptions at sections 21(4)(a) and 21(4)(b) of the Act indicate that certain government employment or work-related information was also intended to be encompassed by the definition of personal information. For example, while "the classification, salary range and benefits, or employment responsibilities of an individual who was or is an officer or employee of an institution or a member of the staff of a minister" would qualify as the personal information of the individual to whom it relates, section 21(4)(a) provides that the disclosure of such information is presumed not to constitute an unjustified invasion of personal privacy. In my view, these examples of personal information in a work-related context do not expand the definition beyond what would normally be considered to be recorded information about an identifiable individual. Rather, they reinforce the conclusion that, in order to qualify under the definition, the information must be about the individual per se, and not simply be associated with the name of an individual in a work-related context."

[46] Reconsideration Order R-980015, at paragraph 28.

[47] An individual's "employment history" is personal information about them by virtue of section 1(n)(vii) and 17(4)(d). However, the information at issue does not, in my view, fall within the ambit of this phrase. In Order F2003-005, the Adjudicator wrote:

> In my view the term 'employment history' describes a complete or partial chronology of a person's working life such as might appear in a resume or personnel file. Particular incidents that occur in a workplace may become the subject of entries in a personnel file, and such entries may properly be viewed as part of 'employment history'. However, the mere fact there is a written reference to or account of a workplace event does not make such a document part of the 'employment history' of those involved. Many workplace incidents of which there is some written record will not be important enough to merit an entry in a personnel file.

para 112] It has been brought to my attention that disclosure of information related to the involvement of particular persons in the discussion of Bill 27 had particular consequences for the some of the individuals involved. The Public Body did not frame this as a section 17 issue. Given the official capacities of the persons in question, and the public aspect of the duties being performed by them, this factor does not, in my view, change the character of the information at issue in such a way as to give it a personal dimension so as to make it an unreasonable invasion of personal privacy. The Public Body also argued that in the case of one individual, disclosure of the person's involvement could give rise to misconceptions as to the person's role relative to Bill 27. I do not see this as a factor that changes the character of the information, or the degree to which its disclosure could constitute an unreasonable invasion of the person's personal privacy. Even if such a misconception occurred, this would not make what is deduced about the person from the appearance of their name in a particular context reflect in any negative way upon the individual in question, or make the information personal to them.

[para 113] Thus, in my view, the parts of the records that record the execution of work duties that are not otherwise exempt (names associated with comments prefacing or surrounding the conveying of advice) are not, for the most part, personal information about the employees. The same reasoning applies to the names associated with a record of the subject matter or topic of the work.

[para 114] However, some of the records contain comments of a purely personal nature, and reveal something personal about the correspondents. The presumption under section 17(4)(g)(i) applies to these records, and there are no factors under section 17(5) in favour of disclosing them. Thus I direct the Public Body to sever comments made by the correspondents that are purely personal.

[para 115] I must, finally, consider whether disclosure of the names alone that appear on some of the records (which, by virtue of the definition of that term in section 1(n), are in themselves "personal information") would be an unjustifiable invasion of the personal privacy of the persons named.

[para 116] As section 17 was not raised as an issue in this inquiry, the parties did not make any submissions about it. Thus the Applicant did not (as presumably it may otherwise have tried to do) point out factors under section 17(5) that might weigh in favour of disclosure of the information it sought. Likewise the Public Body did not make any claim that there were factors under section 17(5) weighing against disclosure.

[para 117] The Applicant did provide some explanation of its purpose for seeking the information. It said this was to cast light on the reasoning and motives behind legislation that in its view had negative consequences for workers and unions in the health care field. I do not need to decide if this is a factor under section 17(5) that weighs in favour of

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I adopt this meaning of the phrase. Discrete pieces of information that indicate something about particular episodes or incidents in a person's employment do not constitute "employment history" within the terms of section 1(n)(vii), or 17(4)(d).

disclosure (for example under section 17(5)(a)), or 17(5)(c)), or whether there are any other such factors. This is because I find there are no factors under section 17(5) that weigh against disclosure of these names alone. At most what the names alone (found in the context of responsive documents) reveal, is that public servants were discharging work-related responsibilities relative to a particular subject matter. I have already held that the inferences about work-related activities that may be drawn from the names as they appear in the context of the records in this case are not personal information. Because this is so, the presumption under section 17(4)(g) (that disclosure would be an unreasonable invasion of personal privacy) does not apply. To the extent the disclosure of a name reveals a contract to supply services to a public body, by virtue of section 17(2)(f), disclosure of this information would not be an unreasonable invasion of personal privacy. Neither does disclosure of the names have any potential to unfairly harm someone or unfairly damage their reputation under sections 17(5)(e) or 17(5)(h). There are no other applicable provisions in section 17(5) that would favour withholding the names.

[para 118] If I am wrong in my conclusion that the comments recording the execution of work duties and the records showing the topics of work duties are not personal information, I find that disclosure of this information would not be an unreasonable invasion of the personal privacy of the employees in question. Earlier orders of this Office have held that disclosure of information relating to people acting in their representative or professional capacities is not an unreasonable invasion of their personal privacy. As well, I note Order F2003-005, which held that where the personal information at issue is a record of the activities of staff of public bodies in the course of performing their duties, this aspect of the information is a relevant circumstance under section 17(5) that weighs in favour of disclosure of the information. Thus even if the information at issue in this paragraph were personal information, and the presumption in section 17(4)(g)(i) were to apply, I would find the fact the employees were acting in representative capacities would be decisive against the conclusion that section 17 requires that their names associated with the information be withheld. The same point applies to the disclosure of names alone. This is so even if the information that may be inferred from the context in which the names appear were personal information, and if, consequently, the presumption in section 17(4)(g)(ii) were to apply. The fact the persons were acting in their representative capacities would be determinative that the names alone cannot be withheld under section 17.

Conclusions under section 17

[para 119] I find, therefore, that except with regard to purely personal comments in the correspondence (which are to be withheld), section 17 does not apply so as to permit the Public Body to withhold the information at issue in this inquiry that does not fall under the claimed exemptions.

V. CONCLUSIONS

[para 120] In summary, I order the Public Body to sever the substantive contents of the advice, consultations and deliberations in the records, in accordance with my conclusions in the preceding sections of this decision, but to disclose the names, positions and business contact information of the employees engaged in the correspondence, as well as the parts of the correspondence (excepting purely personal comments) that do not consist of substantive advice or substantive elements of consultations or deliberations. This conclusion also applies to the information of individuals who were employed by another public body to provide advice on a contractual basis. I will provide the Public Body with a copy of the records severed in accordance with these conclusions.

VI. ORDER

[para 121] I make this Order under section 72 of the Act.

[para 122] I uphold the Public Body's decision that the following records were not responsive to the Applicant's request: 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 106, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 136, 138, 139, 142, 144, 145, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 179, 203, 204, 207, 216, 218, 219, 230, 245, 258, 259, 260, 261, 268, 269, 270, 271, 272, 273, 274, 275, 277, 278, 279, 280, 281, 282, 289, 290, 291, 299, 300, 301, 302, 303, 307, 308, 309, 310, 311, 313, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370.

[para 123] I do not have to deal with records 1, 137, 202, 205, 206, 209, 210, 217, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 312, 319, 321, 336, 337, 338, 345, and 346 (which were withheld initially), because the Public Body disclosed them after the Head conducted a second review. As well, I do not have to deal with the disclosure of records 36, 99, 196, 197, 198, 199, 201, 266, 283, 284, 285, 286, 287, 288, 292, 293, 294, 295, 296, 297, and 298, because the Public Body disclosed them after obtaining the consent of third parties.[48]

[para 124] I find the Public Body failed in a minor way to meet its duty to assist the Applicant under section 10, by failing to name in its initial response all the provisions it ultimately relied on to withhold records. It also failed in its duty to assist by providing some of the records only long after a point at which their disclosure would have been highly significant to the Applicant. As well, it failed to properly clarify the scope of the Applicant's request.

[para 125] I find the Public Body failed to meet the requirements of section 12(1)(c)(i) of the Act by not initially providing in its response to the Applicant the numbers of responsive records retrieved and how many were being withheld under particular exceptions, as well as the number of pages in each withheld record.

[48] The timing of the release of the latter group of documents was dealt with under Issue B.

[para 126] I find the Public Body properly withheld the substantive parts of the following records in reliance on section 24(1)(e) of the Act: records 5, 6, 8, 9, 13, 15 (except the next-to-last page, which does not appear to relate to the draft but may be withheld under section 24(1)(a)), 17, 18, 19, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 135, 182, 183, 184, 187, 188, 189, 191, 192, 193, 220, 221, 222, 223, 224, 226, 227, 228, 229, 231, 252, 253, 262, 263, 264, 265. I will provide the Public Body with a copy of these records, which I have severed or otherwise marked in accordance with my conclusions.[49] I order the Public Body to sever these records accordingly, and to disclose the remaining portions to the Applicant.

[para 127] I find the Public Body properly withheld the following records in their entirety in reliance on section 24(1)(a) and 24(1)(b) of the Act: 14, 41, 42, 146, 149, 156, 157, 158, 159, 174, 177, 178, 200, 211, 212, 213, 249, 267, 276, 314, 323, 328, 331, 334, 335, 339, 343, and 351. In accordance with its obligations under section 12(1)(c)(i), the Public Body must disclose the number of pages in each of these records.

[para 128] I will provide the Public Body with copies of the remaining documents that may be withheld in part under sections 24(1)(a) and 24(1)(b), which I have severed in accordance with my conclusions[50]: 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 40, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 107, 135, 140, 141, 143, 146, 147, 149, 150, 151, 152, 153, 154, 155, 160, 172, 173, 175, 176, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 215, 220, 221, 222, 223, 224, 226, 227, 228, 229, 231, 232, 246, 247, 248, 250, 251, 252, 253, 254, 255, 256, 257, 262, 263, 264, 265, 315, 317, 318, 320, 322, 324, 325, 326, 327, 329, 330, 332, 333, 340, 341, 342, 344, 347, 348, 349, and 350. I order the Public Body to sever these records accordingly, and to disclose the unsevered portions to the Applicant.

[para 129] No explanation was given as to why record 148 should be withheld, and I therefore order that it be disclosed.

[para 130] I make no orders under section 16 of the Act.

Frank Work, Q.C.
Information and Privacy Commissioner

[49] As noted above, the substantive parts of some of these records may also be withheld under section 24(1)(a) and (b), severed in the same manner, and thus they are also listed in paragraph 128 below.
[50] A small number of purely personal comments in the correspondence were severed in accordance with my conclusions under section 17 of the Act.