

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2007-022

September 25, 2007

CONSEIL SCOLAIRE CATHOLIQUE ET FRANCOPHONE DU SUD DE L'ALBERTA

Case File Numbers 3593, 3594, and 3714

Office URL: www.oipc.ab.ca

Summary: The Applicant requested information, including personal information from the Conseil scolaire catholique et francophone du Sud de l'Alberta (the Public Body). The Public Body provided records, but withheld or severed information on the basis of sections 17, 19, 21, 24, 25, and 27 of the Act, and on the basis that some information was not within the scope of the Applicant's access request.

The Applicant requested review of the way in which the Public Body responded to her request and of its decision to withhold some information and records.

The Adjudicator found that the Public Body has not properly applied sections 19, 24, 25, and 27 of the Act to the records and information and ordered the Public Body to disclose the records that had been withheld on the basis of these provisions. The Adjudicator found that the Public Body had properly applied section 21 to the records and information. With some exceptions, the Adjudicator upheld the decision of the Public Body to sever information under section 17. The Adjudicator found that the Public Body had not met its duty to assist the Applicant and ordered the Public Body to conduct an additional search of records and to provide the Applicant with information that had been withheld as "non-responsive".

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10(1), 17, 19, 21, 24, 25, 27; *71 School Act* RSA 2000 c. S-3 ss. 41, 70, 75

Authorities Cited: AB: Orders 96-006, 96-017, 97-007, 98-021. F2003-018, F2004-015

Cases Cited: *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221 (Ont. C.A.) *Solosky v. The Queen* [1980] 1 S.C.R. 821

I. BACKGROUND

[para 1] On December 19, 2005, the Applicant requested all information in the Public Body's custody relating to her termination. On February 15, 2006, the Public Body advised her that it was providing her with the requested information, but that some portions had been severed or withheld under sections 17, 19, 24 and 27 of the *Freedom of Information and Protection of Privacy Act* (the Act).

[para 2] On February 28, 2006, the Applicant requested records from the Public Body that concerned her work with the Public Body from September 2003 to March 1, 2006. She also requested copies of surveys and performance evaluations from September 2001 to June 30th 2005.

[para 3] On April 7, 2006, the Public Body confirmed with the Applicant the steps it intended to take to locate the requested information. On April 15, 2006, the Applicant clarified her request and suggested additional steps for the Public Body to follow to locate the information.

[para 4] On May 31, 2006, the Public Body advised the Applicant that the requested surveys had been located, but that it would provide only those portions of the surveys that were responsive to her request.

[para 5] The Applicant requested review of the way in which the Public Body responded to her request and of its decision to withhold some information and records.

[para 6] As mediation was unsuccessful, the matter was scheduled for a written hearing. Both parties provided initial written submissions. The Public Body also provided a rebuttal brief, while the Applicant advised that she would not be providing a rebuttal.

II. RECORDS AT ISSUE

[para 7] The Public Body severed or withheld the following records under the provisions of the Act listed below:

Section 17

Records 3, 4, 5, 6, 7, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 86, 88, 89, 91, 92, 94, 95, 96, 97, 98, and 104

Section 19

Records 18 and 84

Section 21

Record 19

Section 24

12, 13, 14, 18, 84, 96, and 100

Section 25

Records 78 and 79

Section 27

Records 7, 8, 17, 85, and 90.

[para 8] In addition, the Applicant seeks additional records, which she believes the Public Body has in its possession but has not provided.

III. ISSUES

Issue A: Did the Public Body properly apply section 17 of the Act (unreasonable invasion of a third party's personal privacy) to the records and information?

Issue B: Did the Public Body properly apply section 19 (confidential evaluations) of the Act to the records and information?

Issue C: Did the Public Body properly apply section 21 (intergovernmental relations) of the Act to the records and information?

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

Issue E: Did the Public Body properly apply section 25 of the Act (economic interest of a Public Body) to the records and information?

Issue F: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records and information?

Issue G: Did the Public Body meet its duty to assist the applicant under section 10(1) of the Act?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body properly apply section 17 of the Act (unreasonable invasion of a third party's personal privacy) to the Records and Information?

[para 9] Section 17 is a mandatory exception. It requires the head of a public body to refuse to disclose information if the disclosure would be an unreasonable violation of a third party's personal privacy. It states:

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

- (a) the third party has, in the prescribed manner, consented to or requested the disclosure,*
 - (b) there are compelling circumstances affecting anyone's health or safety and written notice of the disclosure is given to the third party,*
 - (c) an Act of Alberta or Canada authorizes or requires the disclosure,*
 - (d) repealed 2003 c21 s5,*
 - (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,*
 - (f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,*
 - (g) the information is about a licence, permit or other similar discretionary benefit relating to
 - (i) a commercial or professional activity, that has been granted to the third party by a public body, or*
 - (ii) real property, including a development permit or building permit, that has been granted to the third party by a public body,**
- and the disclosure is limited to the name of the third party and the nature of the licence, permit or other similar discretionary benefit,*

- (h) *the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body,*
- (i) *the personal information is about an individual who has been dead for 25 years or more, or*
- (j) *subject to subsection (3), the disclosure is not contrary to the public interest and reveals only the following personal information about a third party:*
 - (i) *enrolment in a school of an educational body or in a program offered by a post-secondary educational body,*
 - (ii) *repealed 2003 c21 s5,*
 - (iii) *attendance at or participation in a public event or activity related to a public body, including a graduation ceremony, sporting event, cultural program or club, or field trip, or*
 - (iv) *receipt of an honour or award granted by or through a public body.*

(3) The disclosure of personal information under subsection (2)(j) is an unreasonable invasion of personal privacy if the third party whom the information is about has requested that the information not be disclosed.

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

- (a) *the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*
 - (b) *the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
 - (c) *the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,*
 - (d) *the personal information relates to employment or educational history,*
 - (e) *the personal information was collected on a tax return or gathered for the purpose of collecting a tax,*
 - (e.1) *the personal information consists of an individual's bank account information or credit card information,*
 - (f) *the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,*
 - (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,*
- or*

- (h) *the personal information indicates the third party's racial or ethnic origin or religious or political beliefs or associations.*

(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,*
- (b) *the disclosure is likely to promote public health and safety or the protection of the environment,*
- (c) *the personal information is relevant to a fair determination of the applicant's rights,*
- (d) *the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
- (e) *the third party will be exposed unfairly to financial or other harm,*
- (f) *the personal information has been supplied in confidence,*
- (g) *the personal information is likely to be inaccurate or unreliable,*
- (h) *the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
- (i) *the personal information was originally provided by the applicant.*

[para 10]
states:

Section 1(1)(n) defines personal information for the purposes of the Act. It

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

- (ix) *the individual's personal views or opinions, except if they are about someone else;*

[para 11] Section 17 is a mandatory section of the Act. Therefore if section 17 applies, a public body must refuse to disclose the information. Order 99-028 states that there are two criteria that must be fulfilled for section 17 to apply: "the information must be personal information of a third party and the disclosure of the personal information must be an unreasonable invasion of a third party's personal privacy."

[para 12] Section 71(2) of the Act places the burden of proof on the Applicant to prove that disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 13] The Public Body argues that it was appropriate to sever identifying information of third parties including addresses, e-mail addresses, ages, names, grades and number of years the third parties' children had attended a school of the Public Body.

[para 14] The Applicant made no arguments in relation to the Public Body's severance of personal information under section 17.

[para 15] In the affidavit evidence, the Public Body notes that portions of Records 43, 44, and 59 should not have been severed. The severed portions contained opinions of the authors about negotiations taking place between the school board and teachers. Under section 1(1)(n) personal opinions are personal information only if they identify an individual. Once the names of third parties are severed, the opinions contained in these records do not identify third parties. I would add that the Public Body should not have severed the fourth paragraph of records 43 and 44 for the same reason.

[para 16] The Public Body properly severed the names and email addresses of third parties from Record 54. However, the Public Body also severed the first two paragraphs of this email, which do not contain personal information of a third party within the meaning of the Act.

[para 17] The Public Body properly severed the names of third parties in Record 76, but also severed portions of the first paragraph and fifth paragraphs that do not contain personal information about an identifiable individual. This information should not have been severed.

[para 18] With the exception of the information that I have noted was improperly severed, I find that the Public Body properly applied section 17 to the records and information.

Issue B: Did the Public Body properly apply section 19 (confidential evaluations) of the Act to the records and information?

[para 19] Section 19 of the Act is a discretionary exception to a person's right of access to the records in the custody or control of a public body if the information is a confidential evaluation. It states:

19(1) The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body when the information is provided, explicitly or implicitly, in confidence.

(2) The head of a public body may refuse to disclose to an applicant personal information that identifies or could reasonably identify a participant in a formal employee evaluation process concerning the applicant when the information is provided, explicitly or implicitly, in confidence.

(3) For the purpose of subsection (2), "participant" includes a peer, subordinate or client of an applicant, but does not include the applicant's supervisor or superior.

Records 18 and 84

[para 20] The Public Body severed notes of meetings held on June 21 and 24, 2005 between members of the school board and persons who had been appointed by the Minister of Education under section 41 of the *School Act* (Records 84 and 18 respectively). The meeting itself was held under section 70 of the *School Act*. The Public Body indicates that this information was severed from the record under 19(1) and (2), and 24(1)(a) – (d). I will address both arguments in relation to these records together.

[para 21] Section 19 of the Act allows a public body to refuse to disclose confidential evaluations. In Order 98-021, the Commissioner stated that for section 19(1) to apply, all three parts of the following three-part test must be met:

- (1) The information must be personal information that is evaluative or opinion material;
- (2) The personal information must be compiled solely in order to determine the applicant's suitability, eligibility or qualifications for employment, to award a government contract, or to award other benefits; and
- (3) The personal information must have been provided, explicitly or implicitly in confidence.

[para 22] Although there is reference to the Applicant at the meetings, the meeting notes do not reveal discussion of evaluative or opinion material compiled on behalf of the Board for the purpose of evaluating the Applicant's suitability, eligibility or qualifications for employment. In addition, there is no evidence that what was discussed later formed the basis of evaluative or opinion material relating to the Applicant's

suitability, eligibility or qualifications. I also find that the third arm of the test, requiring that the information be provided in confidence, has not been met for the reasons below.

[para 23] Sections 19 and 24 must be read in the context of section 23 of the Act, which states:

23(1) The head of a local public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

- (a) a draft of a resolution, bylaw or other legal instrument by which the local public body acts, or*
- (b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.*

(2) Subsection (1) does not apply if

- (a) the draft of the resolution, bylaw or other legal instrument or the subject-matter of the deliberation has been considered in a meeting open to the public, or*
- (b) the information referred to in that subsection is in a record that has been in existence for 15 years or more.*

The Public Body is a local public body under the Act. Records of its meetings are therefore subject to section 23.

[para 24] Section 70 of the *School Act* is also relevant. It establishes an open, public process for conducting school board meetings. It states:

70(1) The meetings of a board shall be held in public and no person shall be excluded from them except for improper conduct.

(2) The chair of the board may cause to be excluded from a meeting any person who, in the opinion of the chair, is guilty of improper conduct at that meeting.

(3) Notwithstanding subsection (1), when a majority of the trustees present at a meeting of the board are of the opinion that it is in the public interest to hold the meeting or a part of the meeting in private for the purpose of considering any matter, the board may by resolution exclude any person from the meeting.

(4) When a meeting is held in private, the board does not have the power to pass a bylaw or resolution at that meeting apart from the resolution necessary to revert to an open meeting.

[para 25] Under the *School Act*, school board meetings are public meetings, unless a resolution is passed to carry on a portion of the meeting *in camera*. Review of Records 18 and 84 indicates that at no time did the board members pass a resolution to hold the meeting in private or to exclude persons from the meeting. The meeting of June 24, 2005 apparently concluded when the school board made a resolution. Under section 70 of the *School Act*, the school board could only have passed a resolution if it had conducted at least this portion of the meeting publicly. While the affidavit evidence indicates that the writer believes the meeting to have been held *in camera*, no evidence is provided to support this belief.

[para 26] As a result, the exception in section 23(1) (b) does not apply to records 18 and 84 as there is no Act or Regulation authorizing holding these meetings in the absence of the public. In other words, the Act does not create an exception for a local public body to withhold the substance of deliberations conducted in public meetings.

[para 27] Section 23 is a specific provision establishing discretionary exceptions for local public bodies. I find that this section does not create an exception to disclosure enabling a local public body to withhold records relating to deliberations when the meeting is held in public. To interpret the Act so that a local public body may rely on discretionary exceptions, such as sections 19 and 24, to withhold the substance of deliberations conducted in a public meeting would render section 23(2)(a) meaningless. In addition, the public nature of the meeting means that the information discussed at it is not confidential for the purposes of section 19.

[para 28] For these reasons, I find that the Public Body did not properly apply sections 19 and 24 to records 18 and 84.

Issue C: Did the Public Body properly apply section 21(1)(b) (information supplied in confidence by government) of the Act to the records and information?

[para 29] Section 21 of the Act creates an exception for information the disclosure of which may be harmful to intergovernmental relations. It states:

21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

- (a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:*
 - (i) the Government of Canada or a province or territory of Canada,*
 - (ii) a local government body,*
 - (iii) an aboriginal organization that exercises government functions, including*
 - (A) the council of a band as defined in the Indian Act (Canada), and*

- (B) *an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada,*
- (iv) *the government of a foreign state, or*
- (v) *an international organization of states,*
or
- (b) *reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.*

(2) The head of a public body may disclose information referred to in subsection (1)(a) only with the consent of the Minister in consultation with the Executive Council.

(3) The head of a public body may disclose information referred to in subsection (1)(b) only with the consent of the government, local government body or organization that supplies the information, or its agency.

(4) This section does not apply to information that has been in existence in a record for 15 years or more.

[para 30] The Public Body withheld a summary of recommendations (Record 19). provided by the Minister of Education to a school board member on the basis of section 21(1)(b) of the Act .

[para 31] The Applicant argues that this record should be disclosed as it is vital to her legal position.

[para 32] The affidavit evidence provided by the FOIP Coordinator of the Public Body explains that the summary of recommendations at issue was produced for the former Minister of Education. The Minister's letter of August 24, 2005, which was released to the Applicant, indicates that the attached recommendations were for the use of the chair of the school board only. The affidavit evidence indicates that the record was withheld because it was information that had been provided by the Minister to the chair of the Public Body in confidence.

[para 33] Counsel for the Public Body cited Order F2004-018 as authority for its decision to withhold the summary of recommendations. Order F2004-018, a decision of the Commissioner, finds that section 21(1)(b) does not require a Public Body to determine that harm would result from release of information before deciding to withhold information. Instead, the Commissioner found that there are four criteria to be met when determining whether section 21(1)(b) applies:

- a) the information must be supplied by a government, local government body or an organization listed in clause (a) or its agencies;
- b) the information must be supplied explicitly or implicitly in confidence;

- c) the disclosure of the information must reasonably be expected to reveal the information; and
- d) the information must have been in existence in a record for less than 15 years.

[para 34] Applying these criteria, I find that the summary of recommendations was supplied by government, in this case the former Minister of Education. I find that the Minister explicitly gave the information in confidence to the chair of the Public Body. I base this finding on the following statement contained in the letter:

I carefully considered your request and am pleased to provide you with a copy of the Recommendations of the report, for your use only, so that GSSCFER can develop an action plan for my review within the next three months.

I find that the disclosure of the summary of recommendations would reveal the information provided in confidence and that this information has been in existence for less than 15 years.

[para 35] The Public Body applied section 21 to withhold Record 19 on the basis that the former Minister had requested that the report remain confidential and because not all recommendations in the report had been implemented or were the subject of ongoing policy and training initiatives.

[para 36] Section 21(3) states that the head of a Public Body may not disclose information under 21(1)(b) without first obtaining the consent of the government body that supplied the information. Therefore, even if the Public Body were to consider disclosing this record it would need to obtain the consent of the Department of Education prior to disclosure.

[para 37] For these reasons, I find that the Public Body correctly applied section 21(1)(b) to withhold Record 19 and properly applied its discretion to withhold the record.

Issue D: Did the Public Body properly apply section 24 of the Act to the records and information?

[para 38] Section 24(1) of the Act creates a discretionary exception for information that may be characterized as advice from officials. It states:

- 24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
- (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
 - (b) consultations or deliberations involving
 - (i) officers or employees of a public body,*
 - (ii) a member of the Executive Council, or*
 - (iii) the staff of a member of the Executive Council,**
 - (c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of*

- the Government of Alberta or a public body, or considerations that relate to those negotiations,*
- (d) *plans relating to the management of personnel or the administration of a public body that have not yet been implemented,*
 - (e) *the contents of draft legislation, regulations and orders of members of the Executive Council or the Lieutenant Governor in Council,*
 - (f) *the contents of agendas or minutes of meetings*
 - (i) *of the governing body of an agency, board, commission, corporation, office or other body that is designated as a public body in the regulations, or*
 - (ii) *of a committee of a governing body referred to in subclause (i),*
 - (g) *information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision, or*
 - (h) *the contents of a formal research or audit report that in the opinion of the head of the public body is incomplete unless no progress has been made on the report for at least 3 years.*

Records 12 13, 14, 96 and 100

[para 39] Although counsel for the Public Body made no submissions regarding these records, I note that they were withheld on the basis of section 24(1)(a)-(d). I will therefore consider whether it was appropriate for the Public Body to withhold these records.

[para 40] Records 12, 13 and 14 are emails from a school board member to other members of the board discussing a meeting agenda, recapping discussions and confirming meeting times.

[para 41] Record 96 is an email from one school board member to another. It refers to an attached analysis of survey data, which was provided to the Applicant, and comments on the actions of an employee of the Public Body.

[para 42] Record 100 is an email containing advice from an employee of the Alberta School Boards Association (ASBA) to a member of the school board and a school board member's notes.

[para 43] The handwritten notes on the records provided to the applicant indicate that these were withheld on the basis of sections 24 (1)(a)-(d). The affidavit evidence indicates that these records were withheld from the Applicant for the following reasons:

1. They relate to analyses, advice and deliberations involving a personnel matter and contain possible options to be considered.
2. In the case of Record 100, the Record contains analysis of possible political ramifications to be considered by the Public Body in relation to an inquiry panel.
3. The subject of the deliberations and analyses remains outstanding.

[para 44] It is not clear on which provision of section 24 the Public Body is relying to withhold the records, as none of the reasons provided by the Public Body corresponds to an exception in this section.

[para 45] As the notes indicate that these records relate to a personnel matter, it appears that the Public Body is relying on section 24(1)(d), which permits a public body to withhold records that could reveal plans relating to the management of personnel or the administration of a public body that have not yet been implemented. This provision recognizes that a public body's ability to manage personnel and administration would be compromised if information about its plans was released prior to implementation.

[para 46] The records at issue do contain information relating to the management of personnel or the administration of a public body. However, I find that the plans in relation to the management of personnel and administration of the Public Body referred to in these records were implemented when it terminated the employment of the Applicant. The Public Body's rationale for withholding these records is not that the plan has not yet been implemented, but that implementation of the plan resulted in ongoing litigation. However, section 24(1)(d) does not enable a public body to withhold records once it has taken the planned action in relation to management of personnel or the administration of a public body.

[para 47] I will address 24(1)(a), (b) and (c) briefly as the Public Body indicated that it was relying on these provisions as well.

[para 48] I find that section 24(1)(a) – (c) do not apply to plans relating to the management of personnel or the administration of a public body, as that is the subject matter of section 24(1)(d). To interpret these provisions otherwise would enable a public body to withhold records relating to plans that had been implemented, which would be counter to the purpose of section 24(1)(d).

[para 49] I find that the Public Body has not established that section 24 applies to the information in Records 12, 13, 14, 96 and 100.

Issue E: Did the Public Body properly apply section 25(1) of the Act (economic interest of a Public Body) to the records and information?

[para 50] Section 25(1) of the Act creates a discretionary exception for information that could reasonably be expected to harm the economic interests of a public body. It states:

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

- (a) *trade secrets of a public body or the Government of Alberta;*
- (b) *financial, commercial, scientific, technical or other information in which a public body or the Government of Alberta has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value;*
- (c) *information the disclosure of which could reasonably be expected to*
 - (i) *result in financial loss to,*
 - (ii) *prejudice the competitive position of, or*
 - (iii) *interfere with contractual or other negotiations of, the Government of Alberta or a public body;*
- (d) *information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee or the public body of priority of publication.*

[para 51] The Public Body severed information relating to representations made to the Public Body by a representative of the Alberta Teachers' Association (ATA) at a board meeting of May 30, 2005, relying on section 25(1) of the Act.

[para 52] In its submissions, the Public Body refers to Order 96-016 as the correct approach to the interpretation of section 25(1) (formerly section 24(1)). In this decision, the former Commissioner stated:

The public body claims that section 24(1) should be interpreted so that the harm to a public body does not have to result directly from disclosing the specific information, but can be "harm at large" or "indirect harm" (my interpretation of the public body's claim). The essence of the public body's argument is this: The information in the record was produced under a contract between a division of a public body and an organization independent of government. There was a confidentiality clause in that contract, which restricts publication of the information. Releasing this information under the Act, contrary to the confidentiality clause, will affect AEC's and, consequently, ARC's contracts with this and other organizations, thereby causing harm to both AEC and ARC. Harm will result from cancelled contracts, and from other organizations bypassing AEC and ARC, knowing they are subject to the Act. That harm is quantifiable.

However reasonable the public body's argument sounds, I do not think that section 24(1) can or should be interpreted as the public body claims. Section 24(1) focuses on the harm resulting from the disclosure of *that specific information* (emphasis in original). The wording of section 24(1) implies that it is the specific information itself that must be capable of causing the harm, if that information is disclosed. When I look at the kinds of information listed in section 24(1)(a)-(d), two things are clear to me: (i) the legislature had very specific kinds of information in mind when it was contemplating what information had the potential to cause harm if disclosed; and (ii) there must be a direct link between disclosure of that specific information and the harm resulting from disclosure; in other words, there must be something in the information itself capable of causing the harm.

[para 53] The Public Body argues that if the information contained in records 78 and 79 is disclosed, its relationship with the ATA will be undermined. The Public Body also argues that the information was provided in confidence and that disclosure of the records could lead to litigation by the Applicant against members of the association.

[para 54] While I agree with the Public Body that Order 96-016 is on point and contains the appropriate test, I find that the Public Body has failed to establish any link between the information that it is seeking to withhold and the projected harm it foresees. The Public Body has provided no explanation of how its ongoing relationship with the ATA would be undermined by disclosing these records and how this would lead to labour difficulties. As a representative of the ATA created Record 78, it would seem likely that the ATA is aware of the information within it. It is therefore unclear how disclosure of this record could harm ongoing labour relations between the Public Body and the ATA. As Record 79 was severed because it reproduces excerpts from document 78, the same analysis applies to the information in this record.

[para 55] The Public Body's argument that disclosing this information would enable the Applicant to identify parties who are not named in the records and commence legal action against them is speculative at best. No explanation is provided as to what type of legal action it imagines may result from disclosure. As the author of the record removed the names and identifying information of third parties the identity of third parties would not be revealed to the Applicant if the record were disclosed. In addition, Record 79 makes it clear that the Applicant was made aware of the information contained in Record 78, as it contains her responses to it. As a result, arguments that disclosing the information to the Applicant will result in harm to unnamed individuals are without merit.

[para 56] For these reasons, I find that the Public Body did not properly apply section 25(1) to the records and information.

Issue E: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records and information?

[para 57] Section 27 of the Act creates a discretionary exception for privileged information. It states:

- 27(1) The head of a public body may refuse to disclose to an applicant*
- (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
 - (b) information prepared by or for*
 - (i) the Minister of Justice and Attorney General,*
 - (ii) an agent or lawyer of the Minister of Justice and Attorney General,*
or
 - (iii) an agent or lawyer of a public body,*
in relation to a matter involving the provision of legal services, or
 - (c) information in correspondence between*

- (i) *the Minister of Justice and Attorney General,*
- (ii) *an agent or lawyer of the Minister of Justice and Attorney General,*
or
- (iii) *an agent or lawyer of a public body,*
and any other person in relation to a matter involving the provision of
advice or other services by the Minister of Justice and Attorney General
or by the agent or lawyer.

(2) *The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.*

Record 85

[para 58] The Public Body withheld Record 85 on the basis that this is a legal opinion and is subject to solicitor-client privilege. The Public Body argues that this opinion was provided in relation to litigation which has not concluded, so that it was appropriate for it to exercise its discretion not to disclose this record.

[para 59] As a school board, the Public Body is a member of the Alberta School Boards Association (ASBA). Among the benefits and services for members are legal services and labour relations services. The legal services provided by the ASBA to school boards are akin to the services provided by in-house counsel for government bodies. The advice in Record 85 was provided by a solicitor for the ASBA.

[para 60] In *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, the Court noted that in-house counsel may be called upon to provide different types of advice. In order to determine whether advice provided by in-house counsel is legal advice, it is necessary to consider three factors: the nature of the relationship, the subject matter of the advice, and the circumstances in which the advice is sought and rendered.

[para 61] Record 85 contains a request for advice made by the Applicant, who was an employee of the Public Body at the time, and counsel's reply. The request is addressed to the solicitor alone and is a request for advice. It is not clear whether the Applicant made this request on her own behalf, or on behalf of the Public Body, or both. The solicitor provided his response to the request not only to the Applicant, but also to members of the Public Body. The response contained advice regarding points of law and their application in the circumstances.

[para 62] Applying the test set out in *Pritchard*, I find that the opinion provided in Record 85 is legal advice and is subject to solicitor-client privilege. I must now decide whether that privilege applies to withhold the records from the Applicant, as it was the Applicant herself who sought and received the legal advice in question.

[para 63] From the evidence, the records and actions of the parties may be interpreted in any one of three ways:

1. The Applicant requested the legal opinion from the solicitor for her own use and was the solicitor's client.
2. The Applicant requested the legal opinion for her own use, and for that of the Public Body. The solicitor provided the opinion to the Applicant and to members of the Public Body, as they were all entitled to receive it under the agreement with the ASBA. They were all clients by virtue of the agreement.
3. The Applicant, an employee of the Public Body, requested the legal opinion on behalf of the Public Body. The solicitor provided the opinion to the client, the Public Body and to the Applicant, as an employee of the Public Body.

[para 64] In the first scenario, the Public Body cannot rely on solicitor-client privilege to withhold Record 85 from the Applicant as the Applicant would be the client, and not the Public Body.

[para 65] In the second and third scenarios, the Public Body cannot rely on solicitor-client privilege to withhold Record 85 from the Applicant for two reasons: 1) application of the common interest exception, and 2) waiver of privilege.

[para 66] In *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221 (Ont. C.A.), Martin J.A. explained this exception at p. 245:

The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. Consequently, should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication.

In other words, when two or more persons consult the same counsel in relation to the same matter, the group may claim solicitor-client privilege against the outside world, but a member of the group cannot claim privilege against another member in relation to the advice once a dispute arises. Record 85 suggests that the Applicant and the Public Body may jointly have requested legal advice from the same solicitor regarding the same issue.

[para 67] Solicitor-client privilege would also have been effectively waived in relation to the Applicant when the solicitor provided the opinion to her. As the Supreme Court of Canada noted in *Solosky v. The Queen* [1980] 1 S.C.R. 821:

...privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege—(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[para 68] As counsel provided the legal advice to the Applicant on June 15, 2005, it cannot be said that it was intended to be kept confidential from her.

[para 69] For these reasons, I find that the Public Body cannot rely on solicitor-client privilege to withhold Record 85 from the Applicant. I therefore find that the Public Body did not apply section 27 properly to this record.

Record 90

[para 70] Record 90 is a request for assistance made by a board member to the executive director of the ASBA. The board member asks the executive director to have the legal team begin work on a document and requests the executive director's opinion and recommendations. A handwritten note indicates that this email is confidential. Record 2 is an email from the same board member to the other board members, which copies the Applicant. This record was not withheld. In this email, the board member confirms that a solicitor has been instructed to draft settlement documents.

[para 71] In *Solosky*, the Court cited the following principle with approval:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.

[para 72] It is clear from the email that the board member wished to obtain advice and the services of a lawyer to draft documents. However, in relation to the points on which she requested specific advice, she requested the opinion and assistance of the executive director of the ASBA, rather than legal counsel. The records indicate that the executive director provided strategic advice to the Public Body on a number of occasions and that the requested advice would be within his purview. The executive director is not a lawyer, and any advice he provides would not be advice to which solicitor-client privilege would attach.

[para 73] I find that solicitor-client privilege does not apply to Record 90. While sending a request for legal advice to a third party before it is provided to a lawyer does not, of itself, vitiate solicitor-client privilege, in this case, the author of the email seeks advice from the third party, a non lawyer. I therefore find that this email cannot be characterized as "advice sought from a professional legal advisor in his capacity as such". I also find that the instructions to the legal department to draft documents were not intended to be kept confidential from the Applicant, as she was informed in an email dated June 7, 2005 that legal counsel for the Public Body was preparing a severance package for her.

[para 74] While portions of this Record might arguably have been subject to litigation privilege, the Public Body made no argument in relation to privilege other than solicitor-client privilege.

[para 75] Section 71(1) of the Act places the burden of proof on a public body to establish that an applicant has no right of access to the record or part of the record. I find

that the Public Body has not met its burden to establish that Record 90 should be excluded under section 27.

Records 7, 8, 17, 20 and 21

[para 76] Counsel for the Public Body provided no submissions regarding these records; however, as information was apparently withheld on the basis of section 27, I will review whether the Public Body properly applied section 27 to these records.

[para 77] The affidavit indicates that the Public Body did not disclose these records as they contain legal advice and the matter for which legal advice was sought remains outstanding.

[para 78] Records 7 is an email from a solicitor to a member of the Public Body.

[para 79] Record 8, entitled “Quittance” is a draft of a quittance agreement prepared by counsel and was apparently provided to the Applicant in June 2005.

[para 80] Record 17 is the minutes of a school board meeting held June 24, 2005 (2:00 – 2:30 PM). The affidavit evidence indicates that a portion of this record was severed as it contained discussion of legal advice received by the Public Body. It is unclear whether the severed portion of Record 17 is part of the school board meeting, as the minutes do not indicate that a motion to adjourn the meeting or to carry on *in camera* was passed before discussion of the legal advice commenced. The information in question forms part of a document entitled: “Notes of meeting Friday, June 24, 2005 (2:00 PM – 2:30 PM)”. This was apparently a meeting of the school board at which the Applicant was present. As noted above, school board meetings are public, unless the board passes a resolution to proceed *in camera*.

[para 81] Records 20 and 21 are emails from a solicitor to a member of the Public Body.

[para 82] In Order 96-017, the previous Commissioner adopted a definition of ‘legal advice’ set out by the Ontario Information and Privacy Commissioner. This definition requires that the advice in question, “include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications”

[para 83] Applying this test, I find that records 8 and 17 do not contain legal advice. While section 17 contains advice, I find that this is procedural, rather than legal, advice. In any event, the fact that this advice is appended to the minutes of a public meeting, would suggest that any privilege attached to the advice has been effectively waived. I do find that Records 7, 20 and 21 contain legal advice from a solicitor.

[para 84] Section 27 refers to “legal privilege” as opposed to “legal advice”. This is because legal advice is not always subject to solicitor-client privilege. Privilege may be

waived by the actions of the parties. For example, solicitor client privilege may be lost by making legal advice public or by disclosing it to an opposing party. In some instances, solicitor client privilege may not apply against a particular individual, as in the case of the common interest exception. Finally, legal advice is not always given in the context of a solicitor client relationship and is not always intended to be confidential. Therefore, a public body seeking to withhold legal advice on the basis of section 27 must establish that the legal advice is subject to a specific, applicable legal privilege.

[para 85] Based on the evidence before me, I am unable to conclude that the legal advice contained in records 7, 20, and 21 is subject to solicitor client privilege specifically, or any legal privilege generally. The Public Body did not provide evidence to explain the relationship between the solicitor and the Public Body, the circumstances in which the advice was given, or whether the information was kept confidential or was intended to be confidential. As it stands, I am unable to draw an inference that this legal advice is protected by solicitor client privilege, because the evidence indicates that the Public Body and the Applicant relied on the same solicitor regarding the subject of the advice at least until June 6, 2005, and that representatives of the Public Body tended to share advice it received from the solicitor with the Applicant and discuss it at public meetings.

[para 86] Record 2 was provided to the Applicant and is an email from a school board member to the Applicant and to other school board members. It states:

“As part of this discussion, I explained to (the Applicant) that legally we can only pay her 1 year severance as that is part of her contract and part of the CASS agreement... (the Applicant) asked what her options were. I said that:

1. We could not accept her resignation as it stands.
2. We could try to work out the consulting role / severance package.
3. I needed more advice to be clear on any other options.

I also said to (the Applicant) that (the Solicitor) was working with us as a board on possible severance packages and that we had not agreed that he should work on her behalf on this subject. I advised (the Applicant) that she should seek other council (sic) regarding her potential severance. In my view we need to get further advice (from the Solicitor) about our options. I have said we would like to meet with (the Applicant) from about 9:30 tomorrow morning.

[para 87] Record 12, which I found had been improperly withheld under section 24, contains similar references to the solicitor handling the matter on behalf of both parties.

[para 88] For these reasons, I do not find that solicitor client privilege applies to Records 7, 8, 17, 20 and 21. No evidence or argument was put forward that any other form of legal privilege applies to these records. Consequently, I find that the Public Body did not properly apply section 27 of the Act in relation to Records 7, 8, 17, 20 and 21.

Issue G: Did the Public Body meet its general duty to assist the Applicant under section 10(1) of the Act?

[para 89] Section 10 creates a duty for a public body to assist an applicant who makes an access request. It states in part:

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 90] Decisions regarding whether a public body made reasonable efforts are based on the facts relating to how a public body conducted its search in a particular case.

[para 91] The Public Body argues that it has provided the Applicant all the records in its possession that are within the scope of the access request and conducted a thorough search. The Applicant contends that the Public Body has not responded completely to her access request on six points.

1. 2003 letter addressing merit pay

[para 92] This record was provided to the Applicant and is located under tab 152.

2. Records from teachers, school support staff, school administrators, consultants and central office staff containing the applicant's personal information

[para 93] The Applicant notes that no records were provided from teachers, school support staff, school administrators, consultants and central office staff.

[para 94] The Public Body advises that no staff members provided responsive records. The affidavit evidence establishes that the Public Body conducted a search of its electronic database, including all email and files. The FOIP coordinator conducted a search of the Applicant's personnel file and her former office, as well as board members' files and board meeting minutes. The Public Body advises that the total time spent searching for records was over 100 hours.

[para 95] I note that the Public Body does not indicate that it conducted a search of paper records or "hard copies" of information located at schools or that it requested school employees to search their paper records. I also note that the Applicant stated in her letter of April 16, 2006:

...recherche automatisée de la base de données du Conseil ou demand à tous les anciens employés du Conseil et de ses écoles (personnel de soutien, enseignants, administrateurs des écoles et personnel du bureau central) de remettre au Conseil toute documentation produite qui concerne la (omitted) (commentaires ayant une référence à la (omitted) à son travail et à la qualité de son travail comme (omitted))...

[para 96] The applicant's request was not limited to personal information contained in the electronic database. I am therefore not satisfied that the Public Body conducted a

thorough search of records in relation to the hard copy records of teachers, school support staff, or school administrators.

3. June letter to parents from a member of the school board regarding the applicant's departure

[para 97] This record was provided to the Applicant and is located under tab 150.

4. June letters of support from parents which the Applicant received from parents by email and by mail

[para 98] The Public Body advises that all letters of support from parents in its custody were provided to the Applicant, with personal information relating to third parties severed pursuant to section 17 of the Act. I have reviewed the records and find that letters of support written by parents in June were provided to the Applicant with third party personal information severed.

5. Surveys conducted in 2002, 2003 and 2004

[para 99] The Public Body argues that Record 102 is the survey information requested by the Applicant. The Public Body advised that it provided one page of survey information containing the personal information of the Applicant, but it did not provide the remainder of the survey results to the Applicant as these did not contain references to the Applicant.

[para 100] The Public Body indicates that all portions of this record that do not contain the Applicant's personal information are outside the scope of the Applicant's access request. The Applicant argues that these surveys are a measure of her effectiveness at managing and implementing policies.

[para 101] To determine whether the survey information is within the scope of the Applicant's request, it is necessary to review the request itself. I note that on page 2 of the Applicant's letter of April 15, 2006, she clarified that her request includes:

For the period of September 1, 2001 to June 30, 2005, I request a copy of all student, parent and staff surveys, student, parent, and staff satisfaction surveys and (the Applicant's) performance evaluations that concern my work ...

On page 4, the Applicant indicated that an additional step should be taken by the Public Body in order to process her access request:

viii) recherché automatisée de la base de données du Conseil ainsi que des dossiers du Conseil en ce qui concerne les résultats des sondages de satisfaction des élèves, des parents, et du personnel au niveau des écoles et du Conseil.

[para 102] The Public Body takes the position that the surveys must relate to the Applicant's work to fall within the scope of the request. However, the Applicant has

clearly requested all student, parent and staff surveys, and staff satisfaction surveys. The phrase “that concern my work as (omitted)” appears to modify “(the Applicant’s) performance evaluations”, as opposed to the entire sentence. The directions on page 4 of the April 15, 2006 letter clarify that the Applicant is seeking survey results in general. These directions do not include references to “commentaires ayant une référence à la (the Applicant), a son travail et à la qualité de son travail” as the other directions do, so it may be inferred that this limitation does not limit the scope of the survey information requested.

[para 103] The Public Body did not provide for my review the survey information withheld, but confirms that the information relates to parent surveys conducted during the time frame requested by the Applicant. Given the scope of the Applicant’s access request, I am satisfied that the Public Body cannot withhold this information on the basis that it is not “responsive”.

6. Records of the treasurer in relation to collective agreement negotiations

[para 104] The Applicant argues that the Public Body has withheld meeting notes taken by the former treasurer. In her submissions, the Applicant indicates that these notes may refer to an employee or employees of the Public Body other than herself.

[para 105] The affidavit evidence and the records provided by the Public Body confirm that the treasurer did take meeting notes. However, the former treasurer in response to an email from the FOIP Coordinator, indicates that she did not take part in meetings that discussed the performance of the superintendent.

[para 106] On page 3 of her April 16, 2006 letter, the Applicant states:

recherche dans les dossiers administratifs de la trésorière (et ancienne trésorière en ce qui concerne toute documentation produite qui concerne la (the Applicant) (commentaires ayant une référence à la (the Applicant) à son travail et à la qualité de son travail comme (the Applicant))...

The Applicant was clear that she was requesting only those notes that contained references to her work. The Public Body has confirmed with the former treasurer that no such notes exist.

[para 107] If the Applicant wishes to obtain the meeting notes of the treasurer that do not contain her personal information, it would be necessary to make an additional access request.

Section 10(1)

[para 108] As noted above, a public body must establish that it conducted an adequate search for records and inform the applicant in a timely manner about what has been done to meet its statutory duty to assist an applicant.

[para 109] I find that the Public Body has not proven that it has met its duty to assist the Applicant for two reasons:

1. The Public Body provided no evidence that it searched for records containing the applicant's personal information, other than electronic records, from teachers, school support staff, or school administrators. I therefore find that it did not take all reasonable steps to search for the requested records.
2. The Public Body withheld portions of survey records from the Applicant, although these were clearly the subject of her access request. If the Public Body were in doubt as to whether the Applicant wanted this information, it could have sought clarification in a timely manner.

V. ORDER

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

[para 111] I confirm the decision of the Public Body to sever the personal information of third parties from the following records: 3, 4, 5, 6, 7, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 86, 88, 89, 91, 92, 94, 95, 96, 97, 98, and 104.

[para 112] I order the Public Body to provide to the Applicant information severed from Records 43, 44, 54, 59, and 77 that is not the personal information of third parties, as discussed above.

[para 113] As I found that the Public Body did not correctly apply sections 19 and 24 to records 18 and 84, I order the Public Body to provide the Applicant with these records, subject to severance of personal information belonging to third parties if the disclosure of that information would be an unreasonable invasion of the third party's personal privacy.

[para 114] I confirm the decision of the Public Body to withhold Record 19 under section 21 of the Act.

[para 115] As I found that the Public Body did not properly apply section 24 to the records and information, I order the Public Body to provide the Applicant with Records 12, 13, 14, 96, and 100.

[para 116] As I found that the Public Body did not properly apply section 25 to the records and information, I order the Public Body to provide the Applicant with Records 78 and 79.

[para 117] As I found that the Public Body did not properly apply section 27 to the records and information, I order the Public Body to provide the Applicant with Records 7, 8, 17, 85, and 90.

[para 118] I order the Public Body to make the survey records available to the Applicant.

[para 119] I order the Public Body to search for records containing the applicant's personal information, other than electronic records, from teachers, school support staff, and school administrators, and to report the steps it took to locate these records to the Applicant and to provide any records obtained through this search to the Applicant.

[para 120] I permit the Public Body to apply any mandatory ("must") exceptions to the records I have ordered it to provide to the Applicant, particularly section 17 (personal information), subject to review if the Applicant subsequently requests a review.

[para 121] I further order that the Public Body notify me in writing within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

Teresa Cunningham
Adjudicator