ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2008-032

January 10, 2011

ALBERTA SOLICITOR GENERAL AND PUBLIC SECURITY

Case File Number F4189

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Summary: The Applicant made a request for records from Alberta Solicitor General and Public Security (the Public Body) relating to a cost-benefit study conducted by KPMG of the Royal Canadian Mountain Police's (RCMP) performance as Alberta's contract provincial police force.

The Public Body identified a briefing note and a review entitled *Review of the Provincial Police Services Agreement* (the KPMG review) as records responsive to the Applicant's access request. The Public Body disclosed some information from the briefing note, but withheld the remainder of the information under sections 24(1)(a), (b) and (c) (advice from officials) and section 25 (harm to economic and other interests of a public body) of the Act. At the inquiry, the Public Body sought to apply section 21(1)(a) (harm to intergovernmental relations), to the information it had withheld.

The Adjudicator found that section 21(1)(a) did not apply to the KPMG review or the briefing note, as the Public Body had not established that disclosure of information in the KPMG review would reasonably be expected to harm intergovernmental relations between the Government of Alberta and another government or its agencies. She found that section 25 did not apply, as the Public Body had not established that disclosure could reasonably be expected to harm the economic interests of the Public Body or the Government of Alberta. She found that section 24(1)(a) applied to some information in the KPMG review and the briefing note. However, she found that the evidence of the Public Body established that it had withheld the KPMG review for the sole reason that

the RCMP objected to its disclosure. She ordered the Public Body to reconsider its decision to withhold information under section 24, as she found that it had applied its discretion to withhold the information for a purpose not recognized by section 24(1). She ordered the Public Body to disclose the remainder of the information from the KPMG review and the briefing note.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 6, 17, 21, 24, 25, 32, 72 *Police Act*, R.S.A. 2000, c. P-17 **ON:** *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, c. F.31 s. 62

Authorities Cited: AB: 96-006, 96-012, 96-016**,** 96-017, 97-007, 2000-021, F2004-026**,** F2005-009, F2006-006, F2008-008, F2008-028, F2009-027, F2009-D-001 **PEI:** Order 07-001

Barber, Katherine, ed. *Canadian Oxford Dictionary.* 2nd ed. Don Mills: Oxford University Press, 2004.

Cases Cited: *Canada (Information Commissioner) v. Canada (Prime Minister)* [1992] F.C.J. No. 1054; *Rubin v. Canada (Clerk of the Privy Council)* [1993] F.C.J. No. 203; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23

I. BACKGROUND

[para 1] The Applicant made a request to the Public Body for records about a cost-benefit study, conducted by KPMG, of the Royal Canadian Mountain Police (RCMP) performance as Alberta's contract provincial police force.

[para 2] On July 18, 2007, the Public Body advised that the request was denied by application of sections 4, 24, and 25 of the Act.

[para 3] On August 20, 2007, the Commissioner received the Applicant's request for a review of the Public Body's decision.

[para 4] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry. On November 16, 2007, the Commissioner extended the time for completion of the review and provided an anticipated date of completion of December 14, 2007. On November 28, 2007, the anticipated date of completion of the review was formally extended to September 30, 2009.

[para 5] The parties exchanged initial and rebuttal submissions. The Public Body provided *in camera* submissions, which I rejected on the basis that they did not disclose information contained in the records at issue and the Act did not authorize or require withholding the information they contained. The Public Body then provided exchangeable submissions. I reviewed the submissions of the parties and decided that I had questions for the Public Body and required more evidence from it. In my letter of January 8, 2009, I said:

In *Canada (Information Commissioner) v. Canada (Prime Minister)* [1992] F.C.J. No. 1054, Rothstein J. made the following observations in relation to the evidence a public body must introduce in order to establish that an exception applies or that harm to government will result from disclosure. He said:

> A desirable procedure that has been found helpful is to set out on each page for which exemption from disclosure is sought, the specific injurious effect the release of that page would be likely to cause. In *Turnette v. The Solicitor General of Canada*, T-522-84, (unreviewed) November 22, 1991, T.D., MacKay, J. states at p. 31:
>
> I note for the record that the supplementary affidavit filed in confidence on behalf of the respondent did fully set out, with examples, the concerns about specific injurious effects anticipated to the interests of CSIS and efforts towards detecting subversive or hostile activities, if the information were released. In the exhibits to that affidavit which included all information not released to the applicant, including all pages which had been released with deletions, on each page was noted, by reference, the specific injurious effect or effects that release of that page was anticipated to be likely to cause. That thorough, careful analysis and documentation made it possible for the Court to review without difficulty the basis upon which the decision had been made to refuse access or release to the applicant.
>
> I am not in that position with respect to these 182 pages of the record in this case. I do not have before me a page-by-page description of the harm that would be probable from disclosure of each page. In the case of these pages in the record to which only general reference has been made in the affidavits, the deponents have, to all intents and purposes, left the documents to speak for themselves as to how they are linked to the arguments made in the public affidavits and why their disclosure could result in harm to the Government.

In that case, the Court found that the Prime Minister's Office had not met the burden of proof to establish that an exception to disclosure applied. I agree with the reasoning of the Court in that case, and also agree that it is desirable for public bodies to explain how an exception to the Act applies to the information withheld and to support the explanation with evidence. While in some cases, information may speak for itself and require little explanation, in most cases, the public body alone is in a position to speak to the application of an exception. For this reason, section 71 places the burden of proof on a public body to establish that an exception to the right of access applies.

In the present Inquiry, the Public Body has made general statements about the provisions of the Act on which it relies to withhold the records at issue, but has not explained how these provisions apply to the specific information it withheld from the Applicant. In effect, the Public Body has left the information in the records "to speak for itself," as discussed by Rothstein J. in the excerpt above.

Given that sections 21, 24, and 25 of the Act are intended to protect important public interests in withholding information, and given that the role of a public body at an inquiry is, in part, to represent that public interest, I have decided to provide the Public Body an opportunity to provide evidence in relation to the following questions:

1. Which other provinces are relying on the KPMG review in their negotiations with the federal government for policing services?

2. How is the KPMG review, which appears to relate to Alberta, relevant to those negotiations?

3. How would disclosure of the KPMG review harm the negotiations of other provinces and how would that harm result in harm to the intergovernmental relations of the Province of Alberta with the provinces whose negotiations were harmed?

4. What was KPMG retained to provide and what is the scope and purpose of the KPMG review?

5. What information in the KPMG review is information that is subject to section 24(1) and why? How would disclosing the information contained in each record in the KPMG review reveal information that is subject to section 24(1)?

6. Which information, if disclosed, would result in the harms contemplated by section 25 and how would disclosure result in those harms?

Any additional evidence the Public Body chooses to provide is to be shared with the Applicant, unless the evidence specifically addresses information contained in the records at issue or an exception to disclosure under the Act would apply to the evidence. Information that the Public Body would be required to disclose to the Applicant under section 12 of the Act, and which does not disclose information contained in the records at issue and to which an exception of the Act would not apply, will not be accepted *in camera*.

[para 6] On February 13, 2009, the Public Body provided exchangeable submissions and these were shared with the Applicant. The Public Body also provided *in camera* submissions and evidence which I did not accept for reasons set out in Decision F2009-D-001.

[para 7] The Public Body sought judicial review of my decision not to accept its *in camera* submissions.

[para 8] On November 3, 2010, the Court of Queen's Bench of Alberta dismissed the judicial review application of Decision F2009-D-001 in an order. In dismissing the application, the Court ordered the following:

1. the application for judicial review is dismissed on the following terms:

(a) the Applicant is given leave to resubmit its submissions to the Adjudicator, whether in the form of "in camera" submissions or not or a combination thereof, all such submissions to be provided by Friday, November 19, 2010;

(b) the Adjudicator shall issue his or her decision of whether to accept those submissions by Friday, December 17, 2010;

(c) there shall be no judicial review of the decision referred to in (b);

(d) the Adjudicator shall issue his or her final decision in the Inquiry by Friday, January 28, 2011;

(e) if the Adjudicator refers to the substance of any portion of "in camera" submissions as provided by the Applicant, in his or her final decision, he or she shall refer to them in "in camera" reasons, those "in camera" reasons only to be provided to the Applicant;

> (f) any judicial review of the Adjudicator's final decision(s), including any "in camera" reasons as described in (e), shall be according to the timeframe provided by s. 74 of the *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000 c.F-25;
>
> This dismissal is without prejudice to the respective positions of the parties except the timeliness of the judicial review against interim decision F2009-D-001…

[para 9] On November 19, 2010, the Public Body submitted additional exchangeable submissions and *in camera* submissions and exhibits. The Public Body provided its reasons for believing an exception to disclosure under the FOIP Act applied to its *in camera* submissions.

[para 10] On November 26, 2010, I accepted the Public Body's exchangeable and *in camera* submissions. In its exchangeable submissions, the Public Body requested that I reconsider Order F2009-027, a decision that was released following its judicial review application. Given the length of time that had elapsed since the parties had provided their most recent submissions, I provided both the Applicant and the Public Body the opportunity to provide any final arguments and to bring to my attention any recent cases they considered relevant. I also directed the parties to *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* 2010 SCC 23, a recent decision of the Supreme Court of Canada, as I considered paragraphs 62 and following could have some application to the inquiry.

II. RECORDS AT ISSUE

[para 11] The records at issue consist of a briefing noted dated April 30, 2007 (records 2 – 4) and a report entitled "Review of the Provincial Police Services Agreement" (the KPMG Review) (records 5 – 42). Record 1 was released to the Applicant.

III. ISSUES

[para 12] The Notice of Inquiry dated September 5, 2008 states the following issues:

1. Are the records excluded from the application of the Act by section 4?
2. Did the Public Body properly apply section 24 of the Act ("advice") to the records?
3. Did the Public Body properly apply section 25 of the Act (economic interests of a public body) to the records?

[para 13] In its submissions, the Public Body confirmed that it no longer takes the position that section 4 applies, but raised the issue of whether section 21(1)(a) applies to the records. The Applicant challenged the late raising of section 21(1)(a), but also made arguments in relation to its application.

[para 14] The Applicant argues that section 32 requires the head of the Public Body to release the records, regardless of whether an exception to disclosure applies.

[para 15] I will therefore consider the following issues in this Inquiry:

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

Issue B: Did the Public Body properly apply section 25 of the Act (economic interests of a public body) to the records?

Issue C: Can the Public Body raise the issue of section 21(1)(a) at this point in the proceedings? If so, has the Public Body established that section 21(1)(a) applies to the records?

Issue D: Does section 32 of the Act require disclosure of the records at issue?

IV. DISCUSSION OF ISSUES

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

[para 16] Section 24 creates an exception to the right of access in relation to "advice from officials". It states, in part:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(b) consultations or deliberations involving*
> *(i) officers or employees of a public body,*
> *(ii) a member of the Executive Council, or*
> *(iii) the staff of a member of the Executive Council,*
>
> *(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,…*
>
> *(2) This section does not apply to information that…*
>
> *(d) is a statistical survey…*

[para 17] In Order 96-006, the former Commissioner established a test to determine whether information is advice, recommendations, analyses or policy options within the meaning of section 24(1)(a). He said:

> Accordingly, in determining whether section 23(1)(a) [now section 24(1)(a)]will be applicable to information, the advice, proposals, recommendations, analyses or policy options ("advice") must meet the following criteria.
>
> The advice should:
>
> i. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
> ii. be directed toward taking an action,
> iii. be made to someone who can take or implement the action.

The three part test adopted by the former Commissioner in Order 96-006 is intended to assist parties to identify information meeting the requirements of section 24(1)(a). This test recognizes that the purpose of section 24(1) is to protect the decision making processes of public bodies from interference before and after the decision is made.

[para 18] The word "analysis" is not defined in the FOIP Act. According to the *Canadian Oxford Dictionary*, 2nd Edition, "analysis" means "a detailed examination of the elements or structure of a substance, or the statement of the results of this examination". This definition was adopted in Order 97-007. The former Commissioner said:

> "Analyses" is defined in the *Concise Oxford Dictionary*, 9th edition, (New York: Oxford, 1995) as: *a detailed examination of the elements or structure of a substance etc.; a statement of the result of this.*
>
> While there is some discretion exercised in choosing which facts are gathered, without more, a compilation of facts is not an analys[i]s. Gathering pertinent factual information is only the first step that forms the basis of an analys[i]s. It is also the common thread of "advice, proposals, recommendations, or policy options" because they all require, as a base, a compilation of pertinent facts.

"Advice" then, is the course of action put forward, while "analyses" refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals, and policy options as to a course of action.

The KPMG Review

[para 19] The KPMG Review contains a title page, (record 5), an index, (record 6), a review containing chapters, (records 7 - 27), a summary (records 28 – 31) an appendix documenting methodology (records 32 – 37) and a bibliography (records 38 – 42). The review portion contains headings, statistics and surveys, in addition to a discussion of the provincial police services agreement between Alberta and the federal government. The Public Body withheld the entire KPMG review on the basis of sections 24(1)(a), (b), and (c).

[para 20] In Order F2008-028, the Adjudicator noted that the contents of the records at issue are sometimes sufficient evidence that section 24 applies to them. He said:

> As with information falling under other sections of the Act, such as section 22 (Cabinet confidences) and 27 (privileged information), I was often able to ascertain from the records themselves – in conjunction with the Public Body's broad submissions – that information fell under section 24(1). For example, I can infer that certain information was sought or expected from officers and employees of the Public Body acting in their various roles, that it was directed toward formulating and drafting Bill 27 and its regulations, and that it was provided to the Minister of the Public Body, who can act on the information by taking proposals to Cabinet and ultimately introducing, enacting and implementing legislation on behalf of government. In other instances, however, I required more specific submissions from the Public Body as to the nature of the action that was to be taken or the decision that was to be made.

In that case, the Adjudicator was able to find that some information was a proposal developed by or for a public body, in the absence of submissions, because the record clearly established the information to be such. Similarly, in *Canada (Information Commissioner) v. Canada (Prime Minister)* [1992] F.C.J. No. 1054*), supra,* Rothstein J. noted that records can sometimes "speak for themselves" and require little explanation.

[para 21] As noted above, the Public Body applied sections 24(1)(a), (b), and (c) to the entire KPMG review. In its initial submissions, the Public Body made the following argument:

> The Public Body submits that the decision to deny access to the record under section 24(1)(a), (b), and (c) of the Act was properly applied. The advice, analyses, deliberations, positions, plans or other instruction was, as delineated in IPC Order 96-006 at page 9:
>
> a) sought or expected, or be part of the responsibility of a person by virtue of that person's position;
> b) directed toward taking an action, including making a decision; and
> c) made to someone who can take or implement the action
>
> The Public Body submits that it correctly relied on sections 24(1)(a), 24(1)(b) and 24(1)(c) and determined that none of the limitations under section 24(2) applied to the record at issue.

However, the Public Body did not point to the particular information in the KPMG review or the briefing note it considered would reveal information subject to sections 24(1)(a), (b), or (c).

[para 22] The Public Body offered the following evidence to establish that the KPMG review contains information that would reveal information subject to section 24(1). The affidavit provided by the Public Body dated November 12, 2008 states:

> I have been informed and do verily believe that the record in question is being used by the Solicitor General and Minister of Public Security in making decisions regarding the negotiations with the Department of Public Safety Canada for a provincial police services agreement.

The affiant does not divulge the source of his information in the affidavit, or his reasons for swearing that he believes this information to be true. The Public Body also made subsequent statement in its supplemental submissions stating that the KPMG review was

obtained on behalf of other provinces to be given to the Contract Advisory Committee for its use in negotiations with the federal government. That the KPMG review was provided to an entity known as the Contract Advisory Committee is supported by the first paragraph of the briefing note. The statement in the affidavit that the Minister is negotiating a new PPSA directly with Public Safety Canada appears contradicted by the assertion that the KPMG review was provided to the Contract Advisory Committee so that it could negotiate with the federal government. The Public Body has therefore created some uncertainty in its submissions as to who is responsible for negotiating a new provincial police services agreement and why the KPMG review was created.

[para 23] The KPMG review itself indicates that the information it contains is intended for the Solicitor General and Minister of Public Security and is intended to answer questions the Solicitor General asked in relation to the value of the current provincial police services agreement and whether it could be improved. It is therefore consistent with information to be used by the Minister in making decisions regarding a new provincial police services agreement. In addition, the excerpt from the RFP quoted by the Public Body in its submissions indicates that the Public Body retained KPMG to answer questions it had relating to the value received for services under the provincial police services agreement. Having reviewed the KPMG review, I find that the most logical explanation for its creation is that the Minister required the information it contains to assist him in determining whether the existing provincial police services agreement could be improved. As Minister, he is authorized to take action to improve the provincial police services agreement for Alberta.

[para 24] That information has the potential to be used in making determinations does not, in and of itself, necessitate a finding that the information reveals advice, proposals, recommendations, analyses or policy options developed by or on behalf of a public body under section 24(1)(a), consultations or deliberations of officers or employees of a public body under section 24(1)(b), or positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta under section 24(1)(c).

[para 25] The Public Body made the following statement about its approach to applying section 24(1)(a) in its initial submissions:

> The Public Body submits that the facts in the record are so intertwined with the advice, findings and recommendations that to disclose any part of the record, other than the information already released on November 5, 2007 to the Applicant would reasonably be expected to reveal the contents of the advice or recommendations, or allow the reader to infer the advice or recommendations related to a course of action or decision in negotiating a new PPSA.

It appears from these submissions that the Public Body is acknowledging that some of the information it withheld under section 24(1) from the KPMG review is not subject to section 24(1), given the suggestion that facts in the record are "intertwined" with information revealing advice and recommendations. Regardless, the Public Body did not point out the information to which it was referring in this submission.

[para 26] As this point required clarification, I requested further evidence from the Public Body to support its arguments in relation to the application of section 24(1) and to clarify what information it considered subject to section 24(1). I asked the Public Body the following questions:

> What information in the KPMG review is information that is subject to section 24(1) and why? How would disclosing the information contained in each record in the KPMG review reveal information that is subject to section 24(1)?

[para 27] In response to my question as to what information in the KPMG Review the Public Body considered revealed information subject to section 24(1), the Public Body made the following argument in its exchangeable submissions of March 31, 2009:

> The Public Body submits that the information in the record at issue was generated expressly for the purpose of providing positions, plans or criteria during the decision making process related to the negotiating of a new PPSA. As noted above, the information in the record at issue contains analyses and recommendations on factors that are central to determining the terms to be negotiated in a contract for police services. The findings provide an analysis of the current arrangement and the recommendations for future negotiations.
>
> The criteria sections at pages 10, 15, 21, 26 of the record while not providing advice, would reveal information that would identify the specific advice sought. In addition, as these sections introduce the purpose of the section and provide context for the Findings and Recommendations, the criteria sections reveal the actual advice that was provided.
>
> The Public Body submits that section 24(1) of the Act does not require that the information itself be the advice, but rather information that would reveal the advice. That the criteria sections reveal the advice that follows is seen when wording of the criteria sections is considered in the context of the Findings and Recommendations that follows.
>
> In the analysis of the services provided by the R.C.M.P. the first paragraph of section 4.1 on page 10 of the record provides the scope of what is being reviewed and hints at the advice that will be provided. The second paragraph identifies the advice being sought, the context of the advice and what was looked at to determine the advice. It is submitted that the information and the tone of the wording contained in the criteria section is linked to the second recommendation, which is advice, on page 14 of the record, and suggestive of the findings about performance measures on page 13. For these reasons it is submitted that the criteria section is subject to section 24(1) of the Act.
>
> Criteria section 5.1 on page 15 of the record provides background for the analysis of the achievement of objectives and also provides hints as to the Findings and Recommendations to follow. Specifically the first paragraph foretells the Findings on page 11 of the record and the second paragraph suggests the issues and [implies] the advice that is identified in recommendation 3 on page 20 of the record. For these reasons it is submitted that the criteria section is subject to 24(1) of the Act.
>
> Similarly the wording in the criteria section 6.1 on page 21 of the record suggests the Findings and Recommendations to follow by referring to the importance of the information being complete and accurate and consistency and completeness of cost information. For this reasons it is submitted that the criteria section is subject to section 24(1) of the Act.
>
> The criteria section 7.1 is directly linked to the Findings and Recommendations. For this reason it is submitted that the criteria section is subject to 24(1) of the Act.

[para 28] The excerpt above contains the Public Body's only submissions in the inquiry directly addressing the contents of the records at issue and its application of section 24(1)(a) and (c) to them. Although this argument appears under the heading "Section 24(1)(c)" in the Public Body's submissions, it contains arguments that appear to relate better to its application of section 24(1)(a). I will therefore consider the Public Body's arguments in relation to both section 24(1)(a) and section 24(1)(c). As the application of section 24(2) precludes application of section 24(1) to information, I will consider whether section 24(2) applies to any of the information in the KPMG review prior to considering whether provisions of section 24(1) apply.

[para 29] Although the Public Body initially applied section 24(1)(b) to withhold the entire KPMG review, it restricted its submissions relating to the application of section 24(1)(b) to the briefing note. I therefore assume that it no longer relies on section 24(1)(b) to withhold the KPMG review.

[para 30] The Public Body's argument does not make specific reference to records 28 – 31. However, as these records are essentially a summary of information contained in records 10 – 27, I assume that the Public Body's arguments in relation to records 10 – 27 are intended to apply equally to records 28 – 31. The Public Body makes no argument in relation to records 5 – 9 and 32 – 42. As these records contain the title page, index, an executive summary, a description of KPMG's approach and evaluation criteria, and the bibliography – information that I find does not obviously fall under section 24(1)(a) or (c) in any event – I infer from the lack of evidence and submissions on its application of section 24(1) to these records that it does not consider section 24(1) to apply to them and does not rely on this provision to withhold them.

Section 24(2)

[para 31] Section 24(2) prevents the head of a public body from applying section 24(1) to certain types of information. For example, information that is a statistical survey cannot be withheld under section 24, even if it reveals information otherwise meeting the requirements of section 24(1).

[para 32] I find that section 24(2)(d) prevents the Public Body from applying section 24(1) to specific portions of the KPMG review. Section 24(2)(d) states that section 24(1) does not apply to information that is a "statistical survey".

[para 33] The *Canadian Oxford Dictionary* defines "statistics" as

> …the science of collecting and analyzing numerical data, especially in or for large quantities, and usually inferring proportions in a whole from proportions in a representative sample. Any systematic collection or presentation of such facts…

[para 34] "Statistical" is defined as "of or relating to statistics".

[para 35] "Survey" is defined as "a general and comprehensive discussion, description, view, consideration, or treatment of something."

[para 36] I agree with the following analysis of the Adjudicator in Order F2008-008:

> I also note the following definitions of a statistical survey in manuals prepared to assist in the interpretation and application of the Act, or of comparable legislation:
>
> > "Statistics" is the science of collecting and analyzing numerical data and the systematic presentation of such facts. "Statistical surveys" are general views or considerations of subjects using numerical data. [Government of Alberta, *Freedom of Information and Protection of Privacy: A Guide*, p. 175.]
> >
> > "Statistical survey" refers to a specific study of a condition, situation or program, by means of data collection and analysis. [Government of British Columbia, *FOIPPA Policy and Procedures Manual*, online.]
> >
> > A "statistical survey" is a record showing the collection, analysis, interpretation and presentation of aggregate data in relation to a topic or issue which is the object of study, for example, a poll. [Government of Ontario, *The Manual (Access and Privacy)*, online.]
>
> On review of the foregoing definitions, and for the purpose of section 24(2)(d) of the Act, I conclude that a "statistical survey" is a collection, interpretation and presentation of numerical data relating to the study of a topic, issue, situation or program.

[para 37] I adopt the definition proposed by the Adjudicator in Order F2008-008 and find that a statistical survey within the meaning of section 24 is information that is "a collection, interpretation and presentation of numerical data relating to the study of a topic, issue, situation or program."

[para 38] I find that section 24(2)(d) applies to the information appearing on the top half of record 13 until the heading in the middle of this record.

[para 39] I also find that section 24(2)(d) applies to the information on Records 16, 17, 18, 19, and Record 20 until the heading "5.3 Recommendations" as this information consists of the collection, interpretation, and presentation of numerical data relating to the study of a topic, issue, situation, or program. The survey methodology, presentation and analysis and interpretation of the data, all form part of a statistical survey within the meaning of section 24(2)(d).

[para 40] I also find that section 24(2)(d) applies to Record 23 and to the information on Record 24 to the heading "6.3 Recommendations", as the information on these records is a statistical survey. The information contained in these records consists of the collection, interpretation, and presentation of numerical data relating to the study of topic, issue, situation, or program, all of which form part of a statistical survey within the meaning of section 24(2)(d).

Section 24(1)(a)

[para 41] As discussed above, section 24(1)(a) authorizes a public body to withhold information revealing advice, proposals, recommendations, analyses or policy options developed by or for a public body.

[para 42] In Order F2004-026, the Commissioner stated the following:

> 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.

While the Public Body has withheld all the headings, subheadings, marginal notes, and page numbers from the KPMG review and the briefing note, it did not make any arguments in relation to the headings, subheadings, or page numbers. On review of the headings, subheadings and page numbers, I find that the headings, subheadings, and page numbers do not reveal anything substantive about information subject to section 24(1). Consequently, I find that section 24(1) does not apply to the headings, subheadings, or page numbers. I will address the marginal notes below.

[para 43] I find that the disclosing the information appearing under the heading "Recommendations" on records 14, 20, 24, 25, and 27, would reveal recommendations developed for the Public Body.

[para 44] I understand the Public Body to argue in relation to records 10, 15, 21, and 26 that the information they contain is not advice or recommendations, but would reveal information of this nature appearing elsewhere in the KPMG review for the purposes of section 24(1)(a). In my view, the information to which the Public Body refers on records 10, 15, 21 and 26 is analysis, as it provides an examination or evaluation of facts that forms the basis for the recommendations. I also find that the remaining information in records 10 – 27, other than the headings, the information I have been found to be a statistical survey, and the recommendations, is analysis, as it is an evaluation or examination of facts forming the basis of recommendations. As the marginal notes reveal substantive information about the analysis and recommendations appearing on records 10 – 27, I find that section 24(1)(a) applies to this information as well.

[para 45] As I find that the information on records 10 – 27, other than the headings and the statistical survey information, is subject to section 24(1)(a), it follows that I find that the information summarizing this information on records 28 – 31 is also subject to section 24(1)(a).

Section 24(1)(c)

[para 46] As I have found that section 24(1)(a) applies to the information on records 10 – 27, other than the statistical survey information and the headings, and as I have found

that the provisions of section 24(1) cannot apply to the statistical survey information and the headings, I need not consider whether section 24(1)(c) applies to this information.

Records 2 – 4: The Briefing Note

[para 47] The Public Body argues the following in relation to the briefing note under the heading "Section 24(1)(b)(i)" in its exchangeable submissions of March 31, 2009 :

> The Public Body submits that the briefing note qualifies as "consultation" because the briefing note contains the views and recommendations of an employee of the Public Body, who is responsible by virtue of the employee's position for providing advice to the Minister responsible for taking action on provincial policing services, and the views and recommendations provided were regarding the Review and the negotiations for a new PPSA. The Minister has the statutory responsibility to make decisions regarding policing services and the negotiating of contracts for policing services and the record was prepared for the Minister to make a decision regarding the Review and the negotiations for a new PPSA.
>
> As a result, notwithstanding the application of section 24(1)(a) of the Act to the entire record at issue, the Public Body submits that section 24(1)(b) of the Act also applies to the briefing note.

[para 48] Other than to state that section 24(1)(a) applies to the briefing note in the passage cited above, the Public Body did not make any arguments in relation to the application of section 24(1)(a) to the briefing note. However, as the Public Body clearly takes the position that section 24(1)(a) applies to the briefing note, I will consider whether section 24(1)(a) applies, in addition to section 24(1)(b).

Section 24(1)(a)

[para 49] Following the heading "Background", until the heading "Recommendations," the briefing note contains information that I find to be in keeping with a status report or background information. The heading, "Background," is an accurate description of the information following the heading. Even though the briefing note also contains recommendations, these are unrelated to the information in the background. I find that the information in the background is not directed at taking an action or making a decision, but is provided as a status report or as background information only. However, the Background does reveal information from the KPMG review which I consider to be analyses and recommendations for the purposes of section 24(1)(a).

[para 50] I find that section 24(1)(a) does not apply to the first two paragraphs of the briefing note, as these paragraphs do not reveal information from the KPMG review, but does apply to the remaining information in the background as it reveals analysis and recommendations from the KPMG review. The recommendations in the briefing note speak to recommended courses of action, is sought or expected by virtue of the person's position, and is made to someone who can carry out or implement the action.

[para 51] The information including and following the heading "contact person" on Record 4 does not reveal information falling under section 24(1)(a). Rather, this

information reveals only the identity of the individual who prepared the briefing note and the identities of employees of the Public Body who received copies of the briefing note. Consequently, section 24(1)(a) does not apply to that information.

Section 24(1)(b)

[para 52] In Order 96-006, the former Commissioner considered the meaning of "consultations and deliberations" in section 24(1)(b). He said:

> When I look at section 23 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. Again, this is consistent with Ontario and British Columbia. I therefore believe 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.

[para 53] I find that section 24(1)(b) does not apply to the briefing note. While the Public Body argues that the briefing note is a consultation, the briefing note does not indicate that its author was consulted or asked as to her views as to the appropriateness of particular proposals or suggested actions or that the briefing note was written for that reason. Moreover, the briefing note does not indicate that she was presented with proposals or suggested actions and asked to discuss them. Rather, the briefing note provides background information followed by recommendations. I have already found the background information, but for the first two paragraphs, and the recommendations to be subject to section 24(1)(a).

Section 17

[para 54] I also find that it would not be an unreasonable invasion of personal privacy to disclose the information following the heading "contact person" in the briefing note. In Order F2004-026, the Commissioner said at paragraph 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 55] I agree with this reasoning, and find that disclosing business contact information would not give rise to an unreasonable invasion of personal privacy in this case.

Conclusion

[para 56] To summarize, I find that sections 24(1)(a) applies to the information on records 10 – 27 and 28 - 31, but for the headings and page numbers, and information I find subject to section 24(2)(d).

[para 57] I find that section 24(2)(d) applies to the information appearing on record 13 until the heading in the middle of this page. In addition, I find that section 24(2)(d) applies to information on records 16, beginning with Figure 2, and to records 17, 18, 19, and on Record 20 until the heading "5.3 Recommendations," and to Record 23 and to the information on Record 24 to the heading "6.3 Recommendations". Consequently, I find that section 24(1) does not apply to that information.

[para 58] In regard to the briefing note, I find that section 24(1)(a) applies to the information following the first two paragraphs of the background, and to the recommendations, in the briefing note. I find that sections 24(1)(a) and (b) do not apply to the remainder of the briefing note.

[para 59] For all these reasons, I find that section 24(1) applies only to portions of the KPMG review and the briefing note.

Exercise of Discretion

[para 60] For the reasons that follow, I find that the Public Body did not properly apply its discretion when it withheld information from the KPMG review under section 24(1)(a). Therefore, pursuant to my authority under section 72(2)(b), I will order it to reconsider its decision to withhold the KPMG review.

[para 61] In the affidavit of November 12, 2008, the affiant addressed how the Public Body had exercised its discretion to withhold information under section 24(1) and stated:

> I have been informed and do verily believe that in coming to a decision regarding disclosure of the records at issue that all the relevant circumstances were considered. Specifically the Solicitor General and Public Security's desire to be open and accountable to the public by providing a right of access to records weighed against the following considerations:
> …
> a) that the disclosure of the record would harm the Minister's deliberative process;
> b) that there is a reasonable expectation that the release of the record would:
>
> I. jeopardize negotiations regarding a new provincial police services agreement for Alberta;
> II. increase costs for the police services;
> III. harm intergovernmental relations; and
> IV. place the Solicitor General and Public Security in a vulnerable negotiation position…

The affiant, who did not make the decision under review, does not explain the source of his information or explain why he believes it to be true.

[para 62] In the Public Body's submissions of October 31, 2009, the Public Body argues the following in relation to its exercise of discretion under section 24(1):

> At this point in time, a new contract for policing services has not been finalized. The information requested in this instance is in itself sensitive, as it provides analyses of the current police services and recommendations for future negotiations for police services. Disclosure of the information in the record in advance of a new contract could permit third parties, the Public Safety Canada or both, to interfere with the negotiation process. Disclosure of the information may harm the Public Body's deliberative process in the future as staff would be reluctant to seek analysis, provide advice or both on a current contract in evaluating services or in preparation for negotiations of a new contract. The Public Body submits that the deputy head of the Public Body properly considered all applicable factors in exercising discretion to withhold the record in its entirety.

[para 63] This argument implies that disclosing the information in the KPMG review would harm negotiations, as disclosure would enable the Department of Public Safety Canada to discover the contents of the KPMG review and interfere with Alberta's negotiations. However, this argument is not supported by the briefing note and its later submissions, which both indicate that the KPMG review was provided to the Contract Advisory Committee. According to the Provincial Police Service Agreement, this committee includes two federal members.

[para 64] In its submissions of February 13, 2009, the Public Body presented new submissions in relation to its exercise of discretion that differ in their factual basis from those it presented on October 31, 2008. These submissions state:

> At this point in time, a new contract for policing services has not been finalized. The information requested in this instance is in itself sensitive, as it provides analyses of the current police services and recommendations for future negotiations for police services. Disclosure of the information in the record in advance of a new contract could permit third parties to interfere with the negotiation process, and harm the Public Body's deliberative process in the future as staff would be reluctant to seek analysis, provide advice or both on a current contract in evaluating services or in preparation for negotiations of a new contract.
>
> Furthermore, as the record was provided in confidence to other provinces and the RCMP, disclosure of all or part of the record could and in all likelihood would, negatively affect the negotiations of other provinces and the RCMP and will affect the Province of Alberta's relations with these other provinces and the RCMP which is an agent of the federal government.

[para 65] These submissions suggest that concern that Public Safety Canada will discover the contents of the KPMG review and interfere with negotiations is not the reason that the Public Body exercised its discretion to withhold the KPMG review, despite the Public Body's arguments of October 31, 2008. Rather, the later submissions indicate that the federal government is aware of the contents of the KPMG review.

[para 66] In contrast, a letter written to me by an employee of the Public Body on January 28, 2009 to request an adjournment states:

> Alberta Solicitor General and Public Security (SGPS) recognizes that a key purpose of the *Freedom of Information and Protection of Privacy Act* is openness and transparency. While SGPS fully supports this purpose, SGPS made assurances to the Royal Canadian Mounted Police (RCMP) that the record, which is the subject of Inquiry F#4189, would be kept confidential.

> With a view to disclosure, SGPS is in discussions with the RCMP to determine whether the RCMP is open to changing its position on the release of information contained in the record. [My emphasis]
>
> To facilitate discussions with the RCMP, we are asking your leniency in granting an extension until March 6, 2009 for the provision of the requested additional evidence and submissions.

[para 67] This letter states that the Public Body "supports the purpose of openness and transparency" relation to the records at issue, and that it wrote to the RCMP "with a view to disclosure".

[para 68] In its exchangeable submissions, the Public Body submitted a letter written to the RCMP from an acting assistant deputy minister to a deputy commissioner of "K" Division of the RCMP, that confirms that the Public Body sought the RCMP's consent to disclose the records at issue. This letter states:

> Please find attached a copy of a letter received from the Office of the Privacy Commissioner … relative to the KPMG review of the Provincial Police Services Agreement (April 2007). This matter dates back to June 18, 2007 when the initial request was received under the FOIP Act for disclosure of this document. To date, our department has relied on section 21 – Disclosure Harmful to Intergovernmental Relations; Section 24 – Advice from Officials; and Section 25 – Disclosure Harmful to Economic and Other Interests of a Public Body, to exclude the Report from disclosure in its entirety.
>
> This request for disclosure has now reached the inquiry state. The Office of the Privacy Commissioner is seeking further information to establish that an exception applies or that harm to government will result from disclosure. After seeking Alberta Justice legal advice on this matter, our department is requesting your assistance in advancing one of two options:
>
> 1) obtain consent from the RCMP to waive the confidentiality expectation, and release the Report in its entirety; or
> 2) obtain confirmation that the RCMP objects to the release of the Report, and a detailed explanation of the harm that would result if all or a portion of the Report were to be disclosed.
>
> For your convenience I have included a copy of Practice Note 1 from the Office of the Information and Privacy Commissioner, in applying "harms" tests.
>
> You will note that the [OIPC] has requested a departmental response by February 13, 2009. We have requested an extension but in the event that this extension is not granted, we will be required to respond by that date. In recognition of the timelines involved, I understand an advance meeting on this issue took place January 27, 2009 involving our two offices, with [a superintendent] and a [a director] in attendance along with other staff. The information provided in this letter, along with relevant attachments, was shared at that meeting and a good discussion took place on a proposed approach…
>
> Thank you for your timely assistance provided by your staff on this matter to date and I look forward to your response on this matter.

[para 69] These letters were written after the Public Body made its initial submission regarding its exercise of discretion, and the existence of the letter makes it clear that the Public Body, by consulting with the RCMP "with a view to disclosure", was acting on its stated desire to be transparent, and that it was the position of the RCMP against disclosure (which had been made known earlier, as evidenced by the phrase

"changing its position") that constituted the impediment to the fulfillment of this purpose. Moreover, that the Public Body consulted with the RCMP regarding its intent to disclose the records at issue is supported by its letter to the RCMP of January 28, 2009 and Exhibit F of the Public Body's *in camera* submissions.

[para 70] I note that the Public Body provided the RCMP with two options: it could agree to the disclosure of the KPMG review or it could object to the disclosure of the KPMG review and explain how withholding the KPMG review would result in the harms contemplated by the FOIP Act. In my view, the options given to the RCMP in the letter of January 28, 2009 support the conclusion that the Public Body was prepared to disclose the KPMG review to the Applicant on the basis that it did not foresee any harm to itself or the Government of Alberta in doing so, certainly not harm contemplated by section 24(1), and that the only factor it considered in withholding the KPMG review was the position of the RCMP.

[para 71] *In camera* exhibits B and D also support a finding that concern over the position of the RCMP regarding disclosure of the KPMG review has always been the purpose of the Public Body in withholding information from the records under section 24(1), even though this purpose was not referenced in its decision to withhold information from the records, or in its initial submissions.

[para 72] The position of the RCMP is a consideration that is irrelevant to the exercise of discretion under section 24(1). As the Commissioner has said in earlier orders, the exercise of discretion under a particular exception in the FOIP Act is to have regard to the purposes for the exception (Order F2004-026).

[para 73] In *Ontario (Public Safety and Security) v. Criminal Lawyers Association,* 2010 SCC 23, the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion. The Court noted:

> The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.
>
> In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:
>
> > In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis in original]
>
> Decisions of the Assistant Commissioner regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness (see *Ontario (Minister of*

> *Finance) v. Higgins* (1999), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).
>
> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).
>
> In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.
>
> The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above.
>
> Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

[para 74] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

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

In addition, the fact that the Court remitted the issue of whether the Head of the Public Body had properly exercised discretion to withhold information indicates that a failure by the Commissioner to consider whether a head properly exercised discretion is a reviewable error.

[para 75] While this case was decided under Ontario's legislation, in my view, it has equal application to Alberta's legislation. Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

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

[para 76] In Order 96-017, the former Commissioner reviewed the law regarding a Commissioner's authority to review the head of a public body's exercise of discretion and concluded that section 72(2)(b), (then section 68(2)(b)), was the source of that authority. He commented on appropriate applications of discretion and described the evidence necessary to establish that discretion has been applied appropriately.

> A discretionary decision must be exercised for a reason rationally connected to the purpose for which it's granted. The court in *Rubin* stated that "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act..."
>
> The court rejected the notion that if a record falls squarely within an exception to access, the applicant's right to disclosure becomes solely subject to the public body's discretion to disclose it. The court stated that such a conclusion fails to have regard to the objects and purposes of the legislation: (i) that government information should be available to the public, and (ii) that exceptions to the right of access should be limited and specific.
>
> In the court's view, the discretion given by the legislation to a public body is not unfettered, but must be exercised in a manner that conforms with the principles mentioned above. The court concluded that a public body exercises its discretion properly when its decision promotes the policy and objects of the legislation.
>
> The Information and Privacy Commissioners in both British Columbia and Ontario have also considered the issue of a public body's proper exercise of discretion, both in the context of the solicitor-client exception and otherwise. In British Columbia, the Commissioner has stated that the fundamental goal of the information and privacy legislation, which is to promote the accountability of public bodies to the public by creating a more open society, should be supported whenever possible, especially if the head is applying a discretionary exception (see Order No. 5-1994, [1994] B.C.I.P.C.D. No. 5)…
>
> …
>
> In Ontario Order 58, [1989] O.I.P.C. No. 22, the Commissioner stated that a head's exercise of discretion must be made in full appreciation of the facts of the case and upon proper application of the applicable principles of law. In Ontario Order P-344, [1992] O.I.P.C. No. 109, the Assistant Commissioner has further stated that a "blanket" approach to the application of an exception in all cases involving a particular type of record would represent an improper exercise of discretion.
>
> I have considered all the foregoing cases which discuss the limits on how a public body may exercise its discretion. In this case, I accept that a public body must consider the objects and purposes of the Act when exercising its discretion to refuse disclosure of information. It follows that a public body must provide evidence about what it considered.

[para 77] In that case, the Commissioner found that the Public Body had not made any representations or provided any evidence in relation to its exercise of discretion. Further, he determined that the head must consider the purpose of the exception in the

context of the public interest in disclosing information when exercising discretion. As the head of the Public Body had not provided any explanation for withholding information, the Commissioner ordered the head to reconsider its exercise of discretion to withhold information under a discretionary exception.

[para 78] Similarly, in Order F2004-026, the Commissioner said;

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

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

[para 79] As discussed above, the purpose of section 24(1) is to enable public bodies to make sound decisions by enabling them to seek advice in confidence, free from interference, harassment, and second-guessing when they make decisions regarding potential courses of action. There is nothing in the provision that extends to upholding the position of another body on the question of disclosure, such as taking into account the position of the RCMP.

[para 80] Thus I must require the head of the Public Body to make a new decision regarding the information I have found to be subject to section 24(1) in the records at issue, and exercise its discretion without reference to the irrelevant consideration of the RCMP's position as to whether the record should be disclosed.

[para 81] I find that the letters of January 28, 2009 are a stronger indicator of the Public Body's purpose for withholding the record under section 24(1) than the earlier "standard-form" explanations that it gave in its submissions and affidavit, and which are in conflict with one another. Moreover, I find that the letters of January 28, 2009 and the Public Body's *in camera* exhibits A through D are better evidence of the Public Body's purpose in withholding information from the records at issue than is the affidavit of November 12, 2008, which was prepared by an employee who did not make the initial decision to withhold information from the records, and does not provide the source of his information regarding the factors considered in exercising discretion. As noted above, exhibits B and D support a finding that the Public Body's purpose in withholding information from the records at issue, as evidenced in its correspondence of January 28, 2009, is consistent and has not changed over time.

[para 82] Since the Public Body has already indicated in the letter to me of January 28, 2009, that disclosure was desirable from its standpoint in order to achieve openness and transparency, and has requested the RCMP to change its position to further that purpose, as evidenced by its letter of January 28, 2009 to the RCMP, I find that the Public Body was not concerned that withholding was necessary to achieve the purposes for which withholding of records is permitted under section 24(1). In other words, I find that the Public Body was not concerned that its decision making or planning processes would be harmed by disclosure of the KPMG review.

[para 83] While both positions of the Public Body with regard to reliance on section 24(1) have been stated to me, i.e. that it is concerned that disclosure of the KPMG review may harm its deliberative process, and alternatively, that it seeks to disclose the KPMG but cannot because it requires the approval of the RCMP, I find that the one supported by the evidence of the Public Body's actions (the communications with the RCMP with a view to disclosure) is the more compelling. The Public Body's submissions of February 13, 2009 and March 31, 2009, which were created following the letter of January 28, 2009, and its exhibits, indicate that the RCMP was provided a copy of the KPMG review and that the relationship between the Public Body and the RCMP could potentially deteriorate if the information is disclosed. This submission supports my finding that the letter of January 28, 2009 is a better reflection of the facts and the reasons for the Public Body's exercise of discretion than the affidavit of November 12, 2008, which makes no reference to the views of the RCMP regarding disclosure.

[para 84] As the Public Body withheld the information in the briefing note on the basis that it reflects the recommendations and analyses in the KPMG review, which it is prepared to disclose, but for the objections of the RCMP, I find that it must reconsider its decision to withhold this information as well.

[para 85] Therefore, it is reasonable to expect that in re-exercising its discretion, if inappropriate considerations, such as the position of the RCMP, are not taken into account, and appropriate considerations, such as the Public Body's desire for transparency, are considered, the Public Body will now exercise its discretion in favour of disclosure, or if it does not, that it will explain the inconsistencies in its accounts of its exercise of discretion that I have found in the materials before me. Moreover, in keeping with the principles established in *Ontario (Public Safety and Security)* regarding exercise of discretion, in the event that it decides to exercise its discretion in favor of withholding information under the provisions of section 24(1), the Public Body must provide adequate reasons based in fact to support its decision that any applicable interests in withholding information under section 24(1) outweigh the right of access. Any new decision it makes regarding its exercise of discretion would be reviewable by the Commissioner.

Issue B: Did the Public Body properly apply section 25 of the Act (economic interests of a public body) to the records?

[para 86] Section 25 creates an exception to the right of access in situations where disclosure of information would result in harm to economic and other interests of a public body. It states, in part:

> *25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information…*
>
> *(c) information the disclosure of which could reasonably be expected to*
>
> *(i) result in financial loss to,*
> *(ii) prejudice the competitive position of, or*
> *(iii) interfere with contractual or other negotiations of, the Government of Alberta or a public body…*

[para 87] In Order 96-016, the former Commissioner considered the meaning of section 25(1)(c), (then section 24(1)(c). He said:

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

[para 88] Section 25 recognizes that there is a public interest in withholding information that could harm the economic interests of the Government of Alberta or a public body or the Government of Alberta's ability to manage the economy. Sections 25(1)(a) – (d) contain a non-exhaustive list of information, the disclosure of which could be reasonably expected to harm the economic interests of the Government of Alberta or a public body, or the Government of Alberta's ability to manage the economy.

[para 89] A public body must establish a link, through evidence, between the disclosure of the information it seeks to withhold and a reasonable expectation of harm to the Government of Alberta's or its own economic interests in order to establish that section 25(1)(c) applies.

[para 90] As noted above, the Public Body withheld portions of the briefing note and the entire KPMG Review on the basis of section 25. In its initial submissions, it provided the following argument:

> The Minister can reasonably anticipate added costs and a compromised negotiating position in negotiating a new PPSA if Public Safety Canada knew the Minister's negotiating position and priorities before a new PPSA is signed. There is a reasonable expectation that the harm the disclosure of the record will cause is immediate and great as it will significantly compromise the Minister's ability to negotiate the PPSA and could impair relations between the parties…
>
> Disclosing the record at issue would reasonably be expected harm the Public Body's economic interest since disclosure would undermine the Minister's negotiations, likely increase costs, negatively impact the Minister's ability to negotiate new terms in the PPSA and harm relations with Public Safety Canada and others.

[para 91] The Public Body's affidavit evidence states the following:

> I have been informed and do verily believe that the deputy head in exercising his discretion not to disclose the entire record, decided that the probable harmful effect that the disclosure of the record would have on the deliberative process, financial costs, negotiations and intergovernmental relations outweighed the Applicant's right of access.
> …
> I have been informed and do verily believe that in coming to a decision regarding disclosure of the records at issue that all the relevant circumstances were considered. Specifically the Solicitor General and Public Security's desire to be open and accountable to the public by providing a right of access to records weighed against the following considerations:
>
> … that there is a reasonable expectation that the release of the record would:… increase costs for the police services… place the Solicitor General and Public Security in a vulnerable negotiation position…

As the affiant does not explain the basis for his beliefs that disclosing the KPMG review and the briefing note would increase costs for police services or undermine the Solicitor General's negotiating position I am unable to attach any weight to the affiant's statements. Moreover, I note that this evidence is at odds with the Public Body's letter of January 28, 2010 to the RCMP, which indicates that Public Body would be prepared to disclose the KPMG review if the RCMP did not object to such disclosure.

[para 92] As I was not satisfied that the Public Body had established a direct or indirect link between the disclosure of the KPMG review and harm to the economic interests of the Government of Alberta or itself through its evidence or argument, I gave it the opportunity to provide further evidence in relation to the following question:

> Which information, if disclosed, would result in the harms contemplated by section 25 and how would disclosure result in those harms?

[para 93] The Public Body made the following argument in its supplemental submissions of February 13, 2009:

> The Public Body submits that the disclosure of any information in the record would result in harm to the economic interests of the Public Body and interfere with the negotiations of a new PPSA.

[para 94] In its supplemental submissions of March 31, 2009, the Public Body stated:

> Disclosure of any of the information in the record would result in the harms set out above.
>
> In addition, the RCMP provided confidential information to be used in the Review with the expectation that the results of the Review would be kept confidential. Disclosing the record would be contrary to the agreement between the Public Body and the RCMP and detrimental to [the] relationship between the parties.

[para 95] The Public Body also argues:

> Furthermore, as the record was provided in confidence to the Other Provinces, disclosure of all or part of the record would likely have a negative impact on the negotiations of the Other Provinces with the RCMP. Furthermore, disclosure of the Review would likely have an adverse effect on the [relationship] between the Government of Alberta, the RCMP and the Other Provinces, as assurances were made to both that the Review and the information supplied in order to produce it would be kept in the strictest of confidences.

[para 96] I understand the Public Body to argue, in relation to the other provinces, that because the Public Body supplied the KPMG review to other provinces with the expectation that they would not disclose it, disclosing it would likely harm the negotiations of those provinces, which would, in turn, harm the relationship between those provinces and the Government of Alberta, which would, in turn result in economic harm to the Government of Alberta or the Public Body. However, the Public Body has not established that other provinces require the Public Body to keep the KPMG review in confidence, or that other provinces are relying on the KPMG review to the extent that its disclosure would harm their negotiations, or that if harm to their negotiations resulted, that the Government of Alberta's negotiations with them would be harmed. Moreover, it has not explained the nature of the harm it envisions could reasonably be expected to result in relation to the negotiations, or what it is about the information in the KPMG review that could be expected to have this effect.

[para 97] In its submissions of March 31, 2009, the Public Body acknowledges that all parties presently negotiating the new provincial police services agreement have been provided with copies of the KPMG review. Consequently, it is unclear how disclosing the information in the KPMG review could harm the Government of Alberta's negotiations or negotiating position, or those of other parties, given that they are all aware of the information it contains. As the former Commissioner noted in Order 96-016, cited above, section 25(1) authorizes a Public Body to withhold information if disclosure of the *information* would result in harm to the economic interests of the Government of Alberta or the public body. In the case before me, all parties to the negotiations are aware of the information the Public Body seeks to withhold and the Public Body has not explained

how harm would result if the KPMG review is disclosed, or explained the nature of the harm. Having reviewed the KPMG review, I find that there is nothing in it that would obviously be expected to result in harm to negotiations, or to result in any other harm contemplated by section 25 of the FOIP Act. Consequently, I cannot find that disclosure of the information is likely to harm the negotiations between these parties, as argued by the Public Body.

[para 98] In its submissions of March 31, 2009, the Public Body argues:

> Furthermore, disclosure of the Review would likely have an adverse effect on the [relationship] between the Government of Alberta, the RCMP and the Other Provinces, as assurances were made to both that the Review and the information supplied in order to produce it would be kept in the strictest of confidences.

[para 99] Had the other provinces supplied the KPMG review to the Government of Alberta in confidence, I would agree that harm could be presumed to result from disclosure. However, that harm is recognized by section 21(1)(b) of the FOIP Act and not section 25. In any event, there is no evidence that the other provinces supplied information to the Public Body in confidence or imposed conditions of confidence on the Public Body, or that disclosing the information in the KPMG review would reveal such information. From the Public Body's arguments, I find that any expectation of confidence in relation to the information it gave to the other provinces was its own.

[para 100] In its submissions of March 31, 2009, in answer to my question as to what information, if disclosed, would result in the harms contemplated by section 25, and how disclosure would result those harms, the Public Body also argues:

> In addition, the RCMP provided confidential information to be used in the Review with the expectation that the results of the Review would be kept confidential. Disclosing the record would be contrary to the agreement between the Public Body and the RCMP and detrimental to [the relationship] between the parties.
>
> At this point in time, a new contract for policing services has not been finalized. The information requested in this instance is in itself sensitive, as it provides analyses of the current police services and recommendations for future negotiations for police services. Disclosure of the information in the record during ongoing negotiations for a new contract could permit third parties to interfere with the negotiation process, and harm the Public Body's deliberative process in the future as staff would be reluctant to seek analysis or provide advice on a current contract in evaluating services or in preparation for negotiations of a new contract.
>
> Furthermore, as the record was provided in confidence to the Other Provinces, disclosure of all or part of the record would likely have a negative impact on the negotiations of the other Provinces with the RCMP.

[para 101] I understand the Public Body to argue that the RCMP supplied information to KPMG for its use in preparing the review on the basis of an agreement between the Public Body and the RCMP that the KPMG review itself would not be disclosed.

[para 102] The Public Body reasons that disclosing the KPMG review would harm the relationship between the Government of Alberta and the RCMP because it would be contrary to an agreement between the Public Body and the RCMP. Moreover, it reasons that disclosing the KPMG review would permit interference by third parties to negotiations between the provinces and the RCMP.

[para 103] The Public Body has not explained in its exchangeable submissions or its *in camera* submissions who the third parties are that it envisions interfering with negotiations should the KPMG review be disclosed, or how disclosure of the KPMG review would enable these third parties to interfere with negotiations between the provinces, the federal government, and the RCMP.

[para 104] I find that the Public Body has established through its evidence that the RCMP objects to disclosure of the KPMG review; however, its evidence fails to establish that the Public Body and the RCMP ever entered a formal agreement to withhold the KPMG review, or that such an agreement was in existence at the time the RCMP supplied information for KPMG's use. I make this finding based on exhibits A through D of the Public Body's *in camera* submissions. I therefore find that the Public Body has failed to establish that it would be in breach of an agreement with the RCMP should it disclose the KPMG review.

[para 105] However, the Public Body may be concerned that because the RCMP has not consented to disclosure of the KPMG review, that the act of disclosing the KPMG review, as opposed to the information it contains, would interfere with negotiations between the Public Body and the RCMP. However, as the former Commissioner noted in Order 96-016, the wording of section 25(1) implies that it is the specific information itself that must be capable of causing the harm, if that information is disclosed. The Public Body has not established, through its exchangeable submissions or its *in camera* evidence, that the harm to negotiations with the RCMP that it envisions would result from disclosure of information in the KPMG review. Certainly it has not pointed to any information in the KPMG review itself or explained how disclosing the information would have the effect of interfering with negotiations, and the KPMG review itself is silent in that regard.

[para 106] I find that the Public Body has not established that any of the harms it argues would befall negotiations are likely to result in the event that the KPMG review is disclosed. As a result, I find that the Public Body has not established that section 25(1)(c), or any other provision of section 25 applies to the information in the KPMG review.

[para 107] The Public Body also applied section 25(1)(c) to withhold the briefing note. The Public Body did not provide specific arguments, evidence, or explanation to establish that section 25(1)(c) applies to the briefing note. I infer from its arguments in relation to the KPMG review that the Public Body is concerned that the briefing note describes information contained in the KPMG review. However, as I have found that

section 25 does not apply to the KPMG review, it follows that I find that section 25 does not apply to any references to the KPMG review in the briefing note.

Issue C: Can the Public Body raise the issue of section 21(1)(a) at this point in the proceedings? If so, has the Public Body established that section 21(1)(a) applies to the records?

[para 108] As discussed above, section 21 addresses the situations in which disclosure of information is harmful to intergovernmental relations. It states, in part:

> *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…*
>
> *…*
>
> *(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.*

[para 109] The Public Body raised the issue of whether section 21(1)(a) applies to the briefing note and to the Review for the first time in its initial submissions. These submissions state:

> Section 21 of the Act 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…

In order to establish the requisite "harm," the Public Body must establish that:

a) there is a clear cause and effect relationship between the disclosure and harm which is alleged;
b) the harm caused b the disclosure must constitute "damage" or "detriment" to the matter and not simple hindrance or minimal interference; and
c) the likelihood of harm must be genuine and conceivable.

As previously noted, the record at issue contains information relating to police services rendered by the RCMP and specific advice regarding contractual negotiations for such services. This information is not only essential to the bargaining position of the Government of Alberta, but to the bargaining position of the other Provinces within Canada who may be contracting police services with the RCMP. As a result, there is a genuine and conceivable likelihood that disclosure of the record would resulting significant harm not only to relations between the Government of Alberta and the RCMP (an agency of the Government of Canada) but also with the Governments of other Provinces.

[para 110] The Public Body argues the following in support of the late raising of this discretionary exception:

In past cases, the Commissioner has declined to allow parties to raise new issues at inquiry where the effect would be to create delay, or prejudice a party, or allow a broad after-the-fact justification for an earlier exercise of discretion. In this case, the Public Body submits that raising section 21 at this stage is not a "broad after-the-fact justification", but one that is directly tied to the reasons behind the exercise of discretion in relation to sections 24 and 25, as discussed above.

The Public Body further submits that the test for raising new exceptions at the inquiry state should really be whether the Applicant is prejudiced in any way by the raising of the exception and whether there is sufficient reason to justify withholding the record from disclosure to outweigh such prejudice.

[para 111] The Applicant made the following submission in rebuttal:

The respondent's argument under Section 21 is distinct from the ones previously employed while citing exemptions under other sections of the Act, it … constitutes a broad, after-the-fact justification for exempting the records from disclosure. Thusly, it should not be considered.

Furthermore, alleging disclosure of the records threatens the well-being of relations between the Government of Alberta and 10 additional provincial/territorial contract policing clients is a significant, far-reaching claim that is very much prejudicial and places an unfair onus on the applicant to address it at this late stage in the process. For that reason as well, an exemption under Sec. 21 should not be considered.

As a general, concluding comment on this particular subject, the applicant would like to point out that the respondent has not produced a single precedent (historical, legal, or other) to support this assertion. Instead, it has simply put forth testimony from a government official –as proof. The applicant respectfully submits that (the government official's) affidavit – though no doubt sworn in good faith and representative of his honest view of the issue – amounts to little more than a rhetorical repetition of the respondent's arguments, with little backing in fact.

[para 112] In Order F2005-009, the Commissioner considered the approach of this Office when a public body raises a discretionary exception for the first time in its submissions. He said:

> In Order 96-010, the former Commissioner said that he would not allow the late raising of a discretionary exception if it resulted in delays or worked to the prejudice of a party. In Order 2001-008, he allowed the late raising of a discretionary exception in a public body's submission, as there was no delay or prejudice to a party, and the public body had the burden of proof. For these same reasons, I am prepared to allow the late raising of section 20(1)(d) in this case.

[para 113] In addition, I note that in *Rubin v. Canada (Clerk of the Privy Council)* [1993] F.C.J. No. 203, the Federal Court rejected the argument that an exception to disclosure cannot be raised during an inquiry. Rothstein J. noted:

> The *Access to Information Act* has as its purpose the creation of a right of access to information under government control. Exemptions are recognized but they are limited and specific. Under section 4, the right of access is made "[s]ubject to this Act". The right is thus not absolute.

The Court decided that as the right of access is subject to exceptions, it was appropriate to consider the exceptions, even if they were not applied initially in the decision under review. Similarly, the right of access to information created by sections 2 and 6 of the FOIP Act is subject to limited and specific exceptions, section 21(1)(a) being one of them.

[para 114] I find that there is no prejudice to the Applicant in this case, as the Applicant is aware that the Public Body has raised an argument in relation to section 21, and has addressed those arguments and provided a rebuttal. Further, the late raising of the issue has not resulted in delay. Had I found that the Applicant was prejudiced by the late raising of the issue, in the sense that the Applicant did not have adequate opportunity to make his case in relation to the Public Body's application of section 21, I would have provided the Applicant with further time to prepare a response to avoid prejudice to the Applicant.

[para 115] The purpose of exceptions is to protect a public interest that is served by withholding information. Section 21(1)(a) protects the public interest in ensuring that relations between the Government of Alberta and another government are not harmed by the disclosure of information. Harm to intergovernmental relations of the Government of Alberta affects not only a public body and an applicant, but the citizens of Alberta. As a result, it is important to consider the application of this exception once it is raised, even if a public body does not raise it from the beginning. In my view, it is important to ensure that a public interest protected by the FOIP Act, and to which the right of access is subject, is not defeated simply because a public body did not raise the issue earlier.

[para 116] For these reasons, I find that the Public Body is not precluded from applying section 21(a) at the inquiry stage and will consider the issue of whether the Public Body properly applied this provision to the information in the records at issue.

[para 117] In Order F2006-006, the Adjudicator commented as to what must be established for the exception in section 21(1)(a) to apply:

> The fact that the Public Body's relationship with the local government body is critical, and that the latter provides vital information, may establish the importance of the intergovernmental relationship, but it does not establish a reasonable expectation of harm to that relationship if information were disclosed. Under other sections of the Act, the "harm" test requires a clear cause and effect relationship between the disclosure and the alleged harm, the disclosure must cause harm and not simply interference or inconvenience, and the likelihood of harm must be genuine and conceivable (Order F2004-014 at para. 42)…

I agree with the approach adopted by the Adjudicator in Order F2006-006. I will therefore consider whether there is a cause and effect relationship between the projected harm to intergovernmental relations and the disclosure of the information, whether the projected harm is in fact harm and not inconvenience, and whether there is a reasonable likelihood that the projected harm would result if the information were disclosed.

[para 118] The Public Body's arguments in relation to the application of section 21(1)(a) are essentially the same as its arguments in relation to the application of section 25, absent the projection of harm to the economic interests of the Government of Alberta. In its supplemental submissions of February 13, 2009, the Public Body argued the following:

> The harm to intergovernmental relations of the Province of Alberta and other provinces arises in two ways. First the Review was provided to the other provinces on a confidential basis and the disclosure of the record would breach that confidentiality and damage relations with the other provinces.
>
> Secondly disclosure of the information in the record may harm the negotiations of other provinces. If the disclosure harms other provinces' negotiations then this will likely harm the relations between the Public Body and these other provinces. Additionally, the Public Body would like to emphasize that harm to intergovernmental relations is not only between the Province of Alberta and the other provinces, but also between the Province of Alberta and the RCMP.

[para 119] As I understand its arguments from February 13, 2009, the Public Body relies on the expectations of confidentiality it imposed on other provinces to establish that harm would result to the negotiations of the other provinces if it disclosed the information. I reject that argument. It does not follow from the fact that the Public Body has asked the other provinces not to disclose the KPMG review without its authorization that the other provinces require the KPMG review to be withheld or that relations with these provinces and the Government of Alberta would be harmed if the Government of Alberta disclosed the KPMG review or authorized its disclosure.

[para 120] The Public Body has provided no evidence to establish that other provinces are relying on the KPMG review in their negotiations. In addition, it has not explained what kind of harm could reasonably be expected to result to those negotiations, or how harm to negotiations would result in harm to the intergovernmental relations between the other provinces, the federal government, the RCMP and the Public Body should the KPMG review be disclosed. Finally, the Public Body has not made any arguments in relation to the specific information in the KPMG review and explained how

disclosure of the information would result in harm to negotiations and then any consequent harm to intergovernmental relations.

[para 121] In its supplemental submissions of March 31, 2009, the Public Body stated:

> The contract under negotiation is a comprehensive all-for-one agreement between Public Safety Canada (the federal government), the Public Body and the Other Provinces. As a result, the Other Provinces would suffer the same harm as the Public Body, were the Review to be disclosed and this would likely cause harm to intergovernmental relations between the Other Provinces and the Public Body.

[para 122] As the Public Body has not established the nature of the harm it envisions would result to the Public Body, or its likelihood, if the KPMG review were to be disclosed, I am unable to conclude that the other provinces would reasonably be expected to be exposed to harm if the KPMG review is disclosed, as the Public Body argues. As any harm the Public Body envisions to the intergovernmental relations of the Government of Alberta is contingent on its theory that the negotiations of the other provinces, the RCMP and the federal government will be harmed by disclosure of the KPMG review, and as I have found that the Public Body has not established any likelihood that this kind of harm would result, I am unable to conclude that the intergovernmental relations of the Province of Alberta could reasonably be expected to be harmed if the KPMG review is disclosed.

[para 123] It may be that the Public Body is concerned that the act of disclosing the KPMG review would harm its own relations with the RCMP because the RCMP has not consented to the disclosure of the KPMG review. However, assuming that harm to its own relations with the RCMP would amount to harm to the Government of Alberta's relations with the RCMP for the purposes of section 21(1)(a), it is, as noted above, disclosure of the information in the records, rather than the act of disclosure itself that must be reasonably be expected to result in harm to intergovernmental relations. It would be necessary for the Public Body to point to information that, if disclosed, would result in harm to intergovernmental relations with the RCMP and to explain how and why, given that the evidence of the KPMG review itself is silent on this point. However, the Public Body has not done so, in either its exchangeable or its *in camera* submissions.

[para 124] In my view, section 21(1)(a) should not be interpreted as applying to harm to intergovernmental relations resulting from a decision to disclose information. Section 21(1)(a) grants the head of a public body discretion to withhold or disclose information that could reasonably be expected to harm relations between the Government of Alberta and a member of a list of entities. Section 21(1)(a) would not grant a head this discretion if the legislature intended this provision to encompass situations in which the act of disclosure itself would be reasonably expected to result in harm. Rather, section 21(1)(b), which is mandatory, addresses the situation in which the act of disclosure itself would result in harm to intergovernmental relations.

[para 125] The Public Body also withheld the briefing note under section 21(1)(a). The Public Body did not provide argument, evidence, or explanation to establish that section 21(1)(a) applies to the briefing note. I infer that the Public Body withheld the briefing note under section 21(1)(a) because it refers to the KPMG review. However, as I have found that the Public Body has not established that section 21(1)(a) applies to the KPMG review, it follows that I find that it has not established that section 21(1)(a) applies to any references to the KPMG review in the briefing note.

[para 126] For the reasons above, I find that the Public Body has not established that section 21(1)(a) applies to the records at issue.

Section 21(1)(b)

[para 127] Section 21(1)(b) applies to information supplied in confidence to the Government of Alberta by a government or agency of a government listed in section 21(1)(a). The Public Body did not apply section 21(1)(b) to withhold information from the Applicant and has not made arguments or submitted evidence pointing to information that it believes was supplied in confidence to the Government of Alberta by a government or an agency of a government listed in section 21(1)(a), or explained how such information would be revealed if the KPMG review is disclosed.

[para 128] However, in its submissions of November 19, 2010, the Public Body requested that I reconsider Order F2009-027, a decision in which I found that records created by an RCMP detachment under the authority of the *Police Act*, and provided to the Minister of Justice and Attorney General under the *Police Act,* did not amount to an intergovernmental transfer of information for the purposes of section 21(1)(b). I said:

> In this case, the information in the records at issue was created by RCMP officers, acting as police officers within the meaning of section 1(k)(ii) of the *Police Act*, employed by a police service as defined under section 1(l)(iv) of the *Police Act*. The authority to collect and exchange this information is provided by the *Police Act* and not by federal legislation. Further, under section 2 of the *Police Act*, a police service acts under the direction of either the Solicitor General and Public Safety or the Minister of Justice and Attorney General when carrying out official duties. Consequently, the exchange of information between an RCMP detachment and the Minister of Justice and Attorney General under the *Police Act* is intragovernmental in nature, rather than intergovernmental. I find that when the RCMP supplied information to the Public Body, it acted as an entity representing the Government of Alberta, and acted under the direction of the Government of Alberta.

The Public Body objects to this analysis. However, it is unclear from its arguments why it considers F2009-027 relevant to this inquiry. This case addresses the application of section 21(1)(b) and applies in circumstances where an RCMP officer acts under the authority of the *Police Act*, which is not the case in the present inquiry. As noted above, the Public Body has never made a decision to withhold information from the records at issue under section 21(1)(b) and has not pointed to information in the KPMG review, either in its exchangeable submissions, or its *in camera* submissions and exhibits, to explain how disclosing the KPMG review would have the effect of revealing information supplied in confidence to the Government of Alberta by the RCMP in any capacity.

[para 129] Record 8 and Appendix B of the KPMG review document the sources used by KPMG to prepare the review. The KPMG review indicates that it is based on publicly available data and the sources the KPMG review cites in the bibliography are publicly available. For example, record 10 contains information about the RCMP; however, the sources of this information are clearly the Provincial Police Services Agreement and the Public Body's Annual Business Plan. Consequently, while this information is about the RCMP, it was not supplied by the RCMP, in confidence or otherwise.

[para 130] Having read the KPMG review and reviewed the Public Body's arguments and evidence, I find that the Public Body has failed to establish that the review contains any information that would reasonably be expected to reveal information supplied in confidence by the RCMP to the Government of Alberta. I do not discount the possibility that the RCMP provided information to KPMG for its use; however, there is no evidence before me that information of this kind is contained in the KPMG review, or would be revealed by disclosing the KPMG review. As a result, I am unable to conclude that the records contains information subject to section 21(1)(b).

[para 131] It may be that the Public Body believes that section 21(1)(b) applies because the RCMP has not consented or agreed to the disclosure of the KPMG review. However, consent to disclosure is only relevant to the operation of section 21(3) of the FOIP Act. The application of section 21(3) is contingent on the application of section 21(1)(b), which has not been established in this inquiry.

Issue D: Does section 32 of the Act require disclosure of the records at issue?

[para 132] As I have found that the Public Body's evidence does not establish that sections 21 and 25 apply to the KPMG review, I need not consider whether section 32 of the Act "overrides" the Public Body's application of these provisions.

[para 133] As I have found that some of the information withheld by the Public Body under section 24(1) is not subject to section 24(1), and as I have ordered the Public Body to reconsider its decision to withhold the remaining information under section 24, I need not consider whether section 32 requires the Public Body to disclose this information at this time.

V. ORDER

[para 134] I make this Order under section 72 of the Act.

[para 135] I order the head of the Public Body to give the Applicant access to the following records or parts of records:

1. All information on records 5 - 9, information on record 13 until the heading in the middle of this page, information on record 16 beginning with Figure 2 through to

record 20 until the heading "5.3 Recommendations", and information contained on record 23 and on record 24 to the heading "6.3 Recommendations", all information on records 32 - 42
2. The first two paragraphs of the briefing note and the information following the heading "Contact Information" in records 2 - 4
3. All headings and page numbers from the KPMG review
4. All headings and page numbers from the briefing note

[para 136] I order the head of the Public Body to reconsider the decision to withhold the remaining information from the KPMG review and the briefing note under section 24(1).

[para 137] I impose the following term on the head of the Public Body in reconsidering the decision to withhold information from the KPMG review under section 24(1):

- I require the head of the Public Body to exercise discretion either to disclose the information it has withheld under section 24(1), or to withhold it under section 24(1) without reference to the irrelevant consideration of the RCMP's position as to whether the record should be disclosed.

The new exercise of discretion, if it is in favor of withholding the information from the records, would be reviewable by this office should the Applicant request review of it, as it would be a new decision regarding access. In keeping with the Supreme Court of Canada's decision in *Ontario (Public Safety and Security)*, any such review would require consideration of whether the new exercise of discretion was made without consideration of irrelevant factors and whether the new decision contains sufficient reasons supporting the exercise of discretion.

[para 138] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

_____
Teresa Cunningham
Adjudicator