ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-009

June 22, 2009

ALBERTA SENIORS AND COMMUNITY SUPPORTS

Case File Number F4040

Office URL: www.oipc.ab.ca

Summary: Under the *Freedom of Information and Protection of Privacy Act* (the “Act”), the Applicant asked Alberta Seniors and Community Supports (the “Public Body”) for his complete file. The Public Body withheld some of the requested information under section 17 (disclosure harmful to personal privacy), section 20 (disclosure harmful to law enforcement), section 24 (advice, etc.) and section 27 (privileged information). The Public Body also determined that some information was excluded from the application of the Act under section 4(1)(a) (information in a court file).

The Applicant requested a review of the Public Body’s decision to withhold information. He also requested a review of its decision to charge fees for services under section 93 of the Act, and alleged that the Public Body failed in its duty to assist him under section 10(1).

The Applicant believed that he should not be charged fees because of a judicial decision requiring the Public Body to provide him with his entire file for any new hearing. Noting that the Act operates independently of other processes governing the disclosure of information, and that the judicial decision did not purport to override the full application of the Act if the Applicant chose to make an access request under it, the Adjudicator found that the Public Body properly estimated the fees to produce a copy of the information requested.

A public body's duty to assist an applicant under section 10(1) of the Act includes the obligation to conduct an adequate search for records, and to inform the applicant in a timely fashion about what has been done to search for the requested records. Although the Public Body initially overlooked some of the requested records, the Adjudicator found that it had conducted an adequate search. However, he found that the Public Body had not informed the Applicant in a timely fashion of what had been done to search for the requested records, especially given that he had written two letters setting out concerns about allegedly missing records. The Adjudicator ordered the Public Body to inform the Applicant more fully about the searches that it had conducted.

The Adjudicator found that some, but not all, of the information requested by the Applicant was excluded from the application of the Act under section 4(1)(a). In particular, he found that an unfiled version of a court record was not information in a court file. The Adjudicator remitted the pages back to the Public Body for it to consider whether the information may be disclosed to the Applicant.

The Adjudicator found that section 17 of the Act applied to some, but not all, of the personal information of individuals that the Public Body withheld. In particular, he found that disclosure of the names, signatures and initials of third parties would not be an unreasonable invasion of their personal privacy, where disclosure of this identifying information would merely reveal that they carried out a work-related function or activity. This was regardless of where the individual worked or in what capacity.

The Adjudicator found that the Public Body did not properly withhold information under section 20 of the Act, as it did not provide any arguments or evidence to explain how the section applied. The Public Body did not establish that disclosure would harm a law enforcement matter, harm the effectiveness of investigative techniques and procedures used in law enforcement, or reveal the identity of a confidential source of law enforcement information.

The Adjudicator found that the Public Body properly applied section 24 of the Act to some, but not all, of the information that it withheld under that section, depending on whether it had established that disclosure could reasonably be expected to reveal advice, etc. under section 24(1)(a) or consultations/deliberations under section 24(1)(b).

The Adjudicator found that the Public Body properly applied section 27 of the Act to all of the information that it withheld under that section, as it was subject to solicitor-client privilege under section 27(1)(a).

The Adjudicator confirmed the decision of the Public Body not to disclose the information that it had properly withheld, and ordered it to disclose to the Applicant the information that it had not properly withheld.

Statutes and Regulations Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(h), 1(n)(i), 1(n)(iv), 3, 3(a), 3(c), 4(1), 4(1)(a), 5, 10(1), 11, 14, 17, 17(1), 17(4)(a), 17(4)(d), 17(4)(g), 17(5), 17(5)(c), 17(5)(e), 17(5)(f),

17(5)(h), 17(5)(i), 20, 20(1)(a), 20(1)(c), 20(1)(d), 24, 24(1), 24(1)(a), 24(1)(b), 24(2)(b), 27, 27(1)(a), 66(2)(a), 71(1), 71(2), 72, 72(2)(a), 72(2)(b), 72(3)(a), 72(3)(c), 93, 93(1), 93(2), 93(3), 93(4), 93(4)(a) and 93(6); *Personal Information Protection Act*, S.A. 2003, c. P-6.5, s. 4(5)(b); *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 186/2008, ss. 12(1), 12(2), 13(1)(d), 13(2), 14(1)(a), 14(3), 14(4) and item 3(a)(i) of Schedule 2; *Alberta Rules of Court*, Alta. Reg. 390/68, ss. 753.12 and 753.13.

Authorities Cited: AB: Orders 96-003, 96-006, 96-017, 96-019, 96-022, 97-003, 97-009, 97-010, 98-003, 99-001, 99-010, 99-013, 99-014, 99-028, 99-038, 2000-005, 2000-008, 2000-011, 2000-014, 2000-015, 2000-021, 2001-013, 2001-016, F2002-010, F2002-024, F2002-028, F2003-001, F2003-002, F2003-004, F2003-005, F2004-008, F2004-015, F2004-022, F2004-026, F2004-032, F2005-004, F2005-009, F2006-028, F2006-030, F2007-005, F2007-007, F2007-013, F2007-021, F2007-029, F2008-006, F2008-009 and P2007-002; *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515. **CAN:** *Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44. **Other:** Office of the Information and Privacy Commissioner (Alberta), *[FOIP] Practice Note 4, Section 4 – Exclusions from the Act* (Edmonton: March 2, 1997); Office of the Information and Privacy Commissioner (Alberta), *FOIP Practice Note 10, Public Bodies' evidence and arguments for inquiries* (Edmonton: December 6, 2004).

I. BACKGROUND

[para 1] By letter dated December 29, 2006, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Seniors and Community Supports (the "Public Body"). He requested "a full, complete and unedited copy of [his] Assured Income for the Severely Handicapped ("AISH") file" for the period of January 1, 2004 to December 29, 2006, and specifically enumerated various types of records that his access request included but was not limited to.

[para 2] The Public Body received the access request on January 2, 2007 and acknowledged its receipt in a letter to the Applicant dated January 3, 2007. By letter dated January 15, 2007, the Public Body gave the Applicant a fee estimate of $162.50 in order for it to provide the requested records, and asked him to submit a deposit of $81.25. The Applicant paid the deposit, by letter dated January 30, 2007, reserving his right to have the payment of fees reviewed by this Office. The Public Body received the deposit on February 2, 2007.

[para 3] In a letter dated February 23, 2007, the Public Body advised the Applicant that it would provide access to some of the requested information. It indicated that it would not provide access to other information, on the basis that the Act did not apply to certain records under section 4(1)(a) (information in a court file) or the information was excepted from disclosure under section 17 (disclosure harmful to personal privacy),

section 20 (disclosure harmful to law enforcement), section 24 (advice, etc.) or section 27 (privileged information).

[para 4] The Applicant picked up the package of information and the remaining fees owing were $25.50, as set out in a letter of March 5, 2007. The Applicant paid the remaining fees, which the Public Body received on March 20, 2007.

[para 5] By letter dated March 12, 2007, the Applicant requested that this Office review the Public Body's fee assessment. By letter dated March 28, 2007, the Applicant also asked for a review of the Public Body's refusal to provide full access to his AISH file.

[para 6] By letter dated August 29, 2007, the Public Body granted the Applicant access to additional information in response to his December 29, 2006 request. It refused to provide access to other information that it had located, on the basis of section 4(1)(a) (information in a court file), section 17 (disclosure harmful to personal privacy) and section 24 (advice, etc.).

[para 7] Mediation of matters relating to the Applicant's December 29, 2006 access request was authorized but was not successful. A written inquiry was therefore set down.

[para 8] By letter dated April 4, 2007, the Applicant asked the Public Body to provide him with access to records relating to his AISH file from December 30, 2006 to April 4, 2007. Also by letter dated April 4, 2007, he advised this Office of this second access request. However, the access request of April 4, 2007 and the records dating between December 30, 2006 and April 4, 2007 are not the subject of the present inquiry. The access request of April 4, 2007 was subsequent to the Applicant's requests for review dated March 12 and 28, 2007, in relation to his access request of December 29, 2006. The Applicant's letter of April 4, 2007 to this Office could not be considered a request for review, as the Public Body had to first be given an opportunity to respond to the second access request.

[para 9] The Public Body provided documentation to this Office showing that it wrote to the Applicant on August 8, 2007, regarding his access request of April 4, 2007. As this Office did not subsequently receive a proper request for review of the Public Body's response to the Applicant's second access request, I have no jurisdiction over that particular matter. The Commissioner considered whether to allow the Applicant to request a late review of his April 4, 2007 access request, by extending the 60-day time limit for delivering a request for review under section 66(2)(a) of the Act. In a letter dated June 1, 2009, the Commissioner declined, as the Applicant had been clearly advised in 2007 how to properly request a review in relation to his access request of April 4, 2007 and he did not do so.

[para 10] In his submissions, the Applicant also raises the Public Body's alleged failure to properly respond to an access request of October 15, 2003 and several other

requests over the past years. Again, the only access request that is the subject of this Order is the access request of December 29, 2006 – although I will sometimes refer below to some of the Applicant's follow-up letters to the Public Body that remain in the context of that same access request.

II. RECORDS AT ISSUE

[para 11] The Applicant indicates that he received 427 pages of records from the Public Body at the time of its first release of information in February 2007, and an additional 152 pages at the time of its second release in August 2007. The Public Body submitted the unsevered versions of these pages *in camera*. The records at issue consist of the information that the Public Body withheld on approximately 110 of them.

[para 12] The Public Body included an index with its submissions, setting out the pages on which information was withheld and the section of the Act on which the non-disclosure was based. I will use the same page references in this Order as those in the index and set of records submitted by the Public Body.

III. ISSUES

[para 13] The Notice of Inquiry, dated November 19, 2008, set out the following issues:

> Did the Public Body properly estimate fees for services under sections 93(1) and (2) of the Act?
>
> Did the Public Body meet its obligations under section 10(1) of the Act (duty to assist)?
>
> Did the Public Body properly apply section 17 of the Act (disclosure harmful to personal privacy) to the records/information?
>
> Did the Public Body properly apply section 20 of the Act (disclosure harmful to law enforcement) to the records/information?
>
> Did the Public Body properly apply section 24 of the Act (advice, etc.) to the records/information?
>
> Did the Public Body properly apply section 27 of the Act (privileged information) to the records/information?

[para 14] In its February 23 and August 29, 2007 letters to the Applicant, the Public Body stated that some of the information requested by the Applicant was excluded from the application of the Act under section 4(1)(a), on the basis that it was information in a court file. As the Applicant's request for review indicated that he was challenging the Public Body's "limited disclosure", I have added the following issue to this inquiry:

Are records excluded from the application of the Act by section 4(1)(a) (information in a court file)?

[para 15] Because the above issue addresses whether I have jurisdiction over records, I will discuss it just prior to my discussion of whether the Public Body properly withheld information under the various sections of the Act. I did not require further submissions from the parties regarding the above issue, as the records speak for themselves.

IV. DISCUSSION OF ISSUES

A. Did the Public Body properly estimate fees for services under sections 93(1) and (2) of the Act?

[para 16] The relevant parts of section 93 of the Act read as follows:

93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.

(2) Subsection (1) does not apply to a request for the applicant's own personal information, except for the cost of producing the copy.

(3) If an applicant is required to pay fees for services under subsection (1), the public body must give the applicant an estimate of the total fee before providing the services.

…

(6) The fees referred to in subsection (1) must not exceed the actual costs of the services.

[para 17] Subsections 93(3) and (6) refer to subsection 93(1). I have included them above because they are also relevant to determining whether a public body properly estimated fees for services.

[para 18] Section 93(1) allows a public body to charge fees for services as provided for in the regulations. The provisions of the *Freedom of Information and Protection of Privacy Regulation* (the "Regulation") that are relevant to this inquiry are as follows:

12(1) This section applies to a request for access to a record that is a record of the personal information of the applicant.

(2) Only fees for producing a copy of a record in accordance with items 3 to 6 of Schedule 2 may be charged if the amount of the fees as estimated by the public body to which the request has been made exceeds $10.

…

13(1) An estimate provided under section 93(3) of the Act must set out, as applicable,

…

(d) the cost to produce a copy of the record,

(2) An estimate for access to a record of the personal information of the applicant need include only the cost of producing a copy of the record in accordance with section 12(2).

…

14(1) Processing of a request ceases once a notice of estimate has been forwarded to an applicant and recommences immediately on the receipt of an agreement to pay the fee, and on the receipt

(a) of at least 50% of any estimated fee that exceeds $150…

…

(3) The balance of any fee owing is payable at the time the information is delivered to the applicant.

(4) Fees, other than an initial fee, or any part of those fees will be refunded if the amount paid is higher than the actual fees required to be paid.

Schedule 2

Freedom of Information and Protection of Privacy Act: Fees Schedule

The amounts of the fees set out in this Schedule are the maximum amounts that can be charged to applicants.

3 For producing a paper copy of a record:

(a) photocopies and computer printouts:

(i) black and white up to 8 1/2" x 14" *$0.25 per page*

[para 19] When an applicant requests a review of a fee estimate, the public body has the burden of proof, as it is in the best position to explain the processes and standards that it used to calculate the fees for services; notwithstanding the public body's burden of proof, however, it is still incumbent, and in the applicant's best interest, to provide arguments and evidence regarding the appropriateness of the fee estimate (Order 99-014 at paras. 9 to 11).

1. Reasons for Judgment relating to the Applicant's AISH file

[para 20] The Applicant believes that he should not have been charged anything for the information that he requested from the Public Body because of Reasons for Judgment dated February 6, 2004. These were given in the context of legal proceedings with the Public Body, and the Applicant referred to them in his access request of December 29, 2006 and subsequent letters.

[para 21] In the Reasons for Judgment, the judge wrote: "For any new hearing, AISH [the Public Body] will ensure that [the Applicant] is provided with his entire file". In his submissions, the Applicant further argues that rules 753.12 and 753.13 of the *Alberta Rules of Court* require the Public Body to provide full and fair disclosure in the context of the legal proceedings. These rules set out the obligation of a government or administrative body to give all relevant material to the court on an individual's application for judicial review of its decision. The Applicant states that, because his entire AISH file should have been disclosed by the Public Body in accordance with the Reasons for Judgment and *Rules of Court*, he should not have been charged any fees when he was effectively obliged to make an access request under the Act.

[para 22] The Public Body responds that it gave the Applicant a copy of his entire file shortly after the Reasons for Judgment were issued and that, because there are no outstanding hearings regarding the Applicant's file, the Public Body did not fail to comply with the Judgment when it responded to the December 29, 2006 access request. The Public Body further argues that any failure to comply with a court order is a matter for the court. In his rebuttal, the Applicant disputes that he was ever given a complete copy of his file following the Reasons for Judgment. He also says that there is a new hearing in the form of an outstanding appeal that is currently "on hold".

[para 23] The possibility that the Applicant may be entitled to his AISH file in the context of his legal proceedings with the Public Body is not relevant to my determination of whether the Public Body properly estimated fees for services under the Act. This is because of sections 3(a) and 3(c), which read as follows

> *3 This Act*
>
> > *(a) is in addition to and does not replace existing procedures for access to information or records,*
> >
> > …
> >
> > *(c) does not limit the information otherwise available by law to a party to legal proceedings,*

[para 24] Section 3 contemplates that access to information or records may be subject to a dual process (Order F2006-028 at para. 11) – including where an individual might also have a right to disclosure under the *Rules of Court* or in the context of

litigation (Order 97-009 at para. 98). In such cases, the Act operates independently (Order 97-009 at para. 98).

[para 25] The foregoing means that a process outside the Act to gain access to information does not preclude the application of the Act – including all of its terms. An individual is entitled to make an access request under the Act despite a process elsewhere, but the access request is subject to the Act once it is made. Unless there is a provision elsewhere that prevails despite the Act under section 5, the provisions of the Act govern – including those regarding fee estimates. While the Applicant in this case has cited Reasons for Judgment and certain rules of the *Alberta Rules of Court*, none of these trump the Act to the effect that he may not be charged fees for services. I do not see any paramountcy provision in the *Rules of Court.* The Reasons for Judgment do not purport to override the provisions of the Act, or indicate that they do not apply in the Applicant's case. In stating that the Public Body must give the Applicant his entire file for any new hearing, the Reasons for Judgment do not restrict the full application of the Act if the Applicant chooses to use it.

[para 26] In permitting fees to be charged in respect of the Applicant's access request – as well as confirming any of the Public Body's decisions to withhold information from him under the Act – this Office is neither violating the Reasons for Judgment nor allowing them to be violated by the Public Body. Access to information under the Act and disclosure in a legal proceeding before a court are two separate matters. This Office does not have the jurisdiction to determine whether a public body is violating a court order, including one allegedly entitling an individual to all information in a file (Order 2000-015 at paras. 34 and 35). Whether or not the Public Body has complied with the Reasons for Judgment is a matter for the court (Order P2007-002 at para. 9, dealing with a comparable issue under the *Personal Information Protection Act*, section 4(5)(b) of which states: "This Act is not to be applied so as to limit the information available by law to a party to a legal proceeding").

[para 27] The Applicant points to distinctions between his case and the facts in Order P2007-002, just cited, but the principle in Order P2007-002 nonetheless applies. The Applicant also states that he cannot easily afford to use the court process, given his limited income and the necessity to engage legal counsel. However, this still does not mean that I have any jurisdiction to order the Public Body to disclose the whole of the Applicant's file under the Reasons for Judgment, whether free of charge or not.

2. The Public Body's fee estimate

[para 28] In its letter of January 15, 2007, the Public Body estimated the fees for services to be $162.50, indicating that the amount was based on photocopying 650 pages at $0.25 per page. The Applicant paid a 50% deposit of $81.25. After processing the Applicant's access request in February 2007, the Public Body charged a balance of $25.50, bringing the total amount paid by the Applicant to $106.75. The Applicant received 427 pages at that time, which corresponds to photocopying at $0.25 per page.

The Public Body did not charge any additional fees when it provided the Applicant with additional records, further to a second search, in August 2007.

[para 29] On review of the applicable provisions of the Act and Regulation, I find that the Public Body properly estimated the fees for services. Section 93(2) of the Act and section 12(2) of the Regulation limit the fees that may be charged when an applicant requests his or her own personal information – as here – to the cost of producing the copy. Item 3(a)(i) of Schedule 2 to the Regulation sets the maximum amount that may be charged for black and white photocopying at $0.25 per page, and this is what the Public Body charged for the 427 pages.

[para 30] Section 93(3) of the Act required the Public Body to give the Applicant a fee estimate, which it did in its letter of January 15, 2007. That letter set out the cost to produce a copy of the requested records, as required by sections 13(1)(d) and 13(2) of the Regulation. Finally, as required by section 93(6) of the Act, the final fees charged by the Public Body did not exceed the actual cost for the services.

[para 31] Here, the initial fee estimate was $162.50, which is greater than the final amount charged. The Public Body explains that it estimates the number of pages by measuring the thickness of the file that has been requested by an applicant. It says that this formula has been found through staff experience to be roughly accurate. However, the true accuracy of the formula varies, in the end, because some files contain a large number of double-sided pages (so the file is thinner) while other files contain a large number of single-sided pages (so the file is thicker).

[para 32] Accuracy is not required in the formulation of what is intended to be an estimate. Only reasonableness is required, and the Public Body's method of estimating the fees for services in the Applicant's case was reasonable. Overestimates and overpayments are expected to sometimes occur, given that section 14(4) of the Regulation states that fees will be refunded if the amount paid is higher than that actual fees required to be paid.

[para 33] I conclude that the Public Body properly estimated fees for services under the Act when it responded to and processed the Applicant's access request.

3. Possibility of a refund of fees

[para 34] If an inquiry relates to a matter other than a decision to give or to refuse to give access to all or part of a record, section 72(3)(c) of the Act permits the Commissioner or his delegate to "confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met." As this inquiry relates to a fee estimate – as well as the Public Body's duty to assist – an order under section 72(3)(c) is available to me.

[para 35] An applicant's eligibility for a fee waiver under section 93(4) of the Act would be an appropriate circumstance in which to order a reduction or refund of fees. It

might have been argued that the Applicant requested a fee waiver when, in his letter of January 30, 2007 to the Public Body, he drew attention to the Reasons for Judgment dated February 6, 2004 and stated that the Public Body should provide him with access to his file without cost. Hypothetically-speaking, the Reasons for Judgment could have been the basis for a fee waiver, as section 93(4)(a) permits a public body to excuse an applicant from paying all or part of a fee if, in the opinion of the head, it is fair to excuse payment for any reason. (The ability to grant a fee waiver because of the Reasons for Judgment should not be confused with the fact that the Judgment did not override the payment of fees under the Act.)

[para 36] For me to be able to grant a fee waiver, however, the Public Body had to first make a decision regarding one. An applicant cannot apply directly to the Commissioner for a fee waiver (Order 2000-008 at para. 12; Order 2000-011 at para. 20). In this case, the Applicant stated in his January 30, 2007 letter that he "reserve[d] the right to have the payment of fees in this matter reviewed by [the Commissioner]." He requested that review on March 12, 2007. In another letter to this Office dated April 16, 2007, the Applicant clearly advised that he was not requesting a fee waiver, but simply a refund of fees paid.

[para 37] Because the Applicant did not ask the Public Body for a fee waiver, I do not have the authority to order a refund of fees on the basis of a fee waiver that should have possibly been granted under section 93(4). I will also not send the matter back to the Public Body for it to consider whether there should be a fee waiver on the basis that it should have considered one – again because the Applicant expressly chose not to ask for a fee waiver.

[para 38] Section 72(3)(c) permits a refund of fees where a time limit is not met, but I do not find that this would be an appropriate basis on which to do so in this inquiry. Apart from the fact that an issue regarding time limits was not set out in the Notice of Inquiry, I would not find, in any event, that the Public Body violated any time limits in such a way as to warrant a refund of fees. Under section 11 of the Act, a public body must make every reasonable effort to respond to an access request not later than 30 days after receiving it. Under section 14(1)(a) of the Regulation, the processing of an access request ceases once a notice of a fee estimate has been forwarded to an applicant and recommences on receipt of the requested deposit. Here, the Public Body received the access request on January 2, 2007, forwarded the fee estimate on January 15, 2007, received the Applicant's deposit on February 2, 2007 and provided him with records on February 23, 2007. Not counting the period of time between the fee estimate and receipt of the deposit, the Public Body took about 34 days to respond to the access request. Although this was slightly outside the 30-day time limit – and it would not appear that there was any extension made under section 14 of the Act – I find that the Public Body made every reasonable effort to initially respond to the Applicant's access request on time, given the size and scope of the request.

[para 39] Finally, it is possible for me to order a refund of the fees that the Applicant paid on the basis that the Public Body did not meet its duty to assist under section 10(1)

of the Act. Section 72(3)(c) permits a refund "in the appropriate circumstances", and refers to the failure to meet a time limit as only one example. Accordingly, a refund might be ordered on the basis of a failure to conduct an adequate search, as another example. In the next part of this Order, I find that the Public Body failed in its duty to assist the Applicant, but not in so serious a way as to warrant a refund of fees. Moreover, the Public Body did not charge the Applicant any fees in respect of the approximately 150 pages of additional records that it later located and provided. In this respect, it has already effectively reduced the fees, which I view as a way of compensating for any failures on its part regarding its duty to assist.

[para 40] Given the foregoing, I will not order a refund of the fees that the Applicant has paid to the Public Body.

B. Did the Public Body meet its obligations under section 10(1) of the Act (duty to assist)?

[para 41] Section 10(1) of the Act reads as follows:

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

[para 42] The Public Body has the burden of proving that it fulfilled its general duty to assist the Applicant under section 10(1) (Order 99-038 at para. 10; Order F2004-008 at para. 10). Having said this, I will limit my discussion of the Public Body's duty to assist to the specific concerns raised by the Applicant in his submissions.

[para 43] The Applicant is concerned about the Public Body's alleged failure to provide him with full access to his AISH file, despite several letters written by him. I will not discuss, in this part of the Order, the Public Body's decisions to withhold information from him. The general duty to assist applicants under section 10(1) does not encompass other, more specific, duties set out under the Act (Order 2000-014 at para. 84). I will instead address whether the Public Body properly applied exceptions to disclosure in the parts of this Order discussing the relevant sections of the Act below.

[para 44] In a letter to the Public Body dated March 27, 2007, following its initial provision of records in response to his access request, the Applicant questioned whether the Public Body had contacted both the Calgary and Red Deer AISH offices to ensure that any and all things relating to his file had been provided to him. He also wondered why certain records – such as portions of faxed documents, an e-mail attachment and the transcript of an appeal hearing – were not in the package provided to him. He also believed that records were missing because of the difference in the number of pages estimated when the fee estimate was provided and the actual number of pages later released.

[para 45] The forgoing concerns raise the adequacy of the Public Body's search for responsive records. A public body's duty to assist an applicant under section 10(1) of the Act includes the obligation to conduct an adequate search (Order 2001-016 at para. 13; Order F2007-029 at para. 50). The Public Body has the burden of proving that it conducted an adequate search (Order 97-003 at para. 25; Order F2007-007 at para. 17). An adequate search has two components in that every reasonable effort must be made to search for the actual records requested, and the applicant must be informed in a timely fashion about what has been done to search for the requested records (Order 96-022 at para. 14; Order 2001-016 at para. 13; Order F2007-029 at para. 50).

1. Adequacy of the Public Body's searches for records

[para 46] The decision as to whether an adequate search was conducted must be based on the facts relating to how a public body conducted a search in the particular case (Order 98-003 at para. 37). In general, evidence as to the adequacy of a search should cover the following points: who conducted the search; the specific steps taken by the public body to identify and locate records responsive to the applicant's access request; the scope of the search conducted; the steps taken to identify and locate all possible repositories of records relevant to the access request; and why the public body believes that no more responsive records exist than what has been found or produced (Order F2007-029 at para. 66).

[para 47] The Public Body explains that, on receipt of an access request, a search of a central client directory is performed to determine the district office having the latest activity in relation to a client's AISH file, and the access request is sent there. According to the Public Body, the office of last activity normally has the client's entire AISH file. The Public Body submitted a copy of an "Urgent FOIP Request for Records" that it sent to the Red Deer AISH office the day after receiving the Applicant's access request. In it, the Public Body told the Red Deer office that the Applicant had previous involvement with the Calgary office, effectively asking it to ensure that that any responsive records there, or ever there, were included. In its August 29, 2007 letter to the Applicant, the Public Body provided the Applicant with some explanations regarding the information that he alleged was missing. Further, in its submissions to this inquiry, the Public Body lists who conducted the searches for responsive records.

[para 48] The Public Body submits that its initial inability to locate records in February 2007 was due to human error, which was apparently the filing of records by date incorrectly. It also says that workload volume and the fact that the Applicant had a large file existing in various areas contributed to the overlooked records. I accept these explanations, but particularly the fact that there was a filing error. An adequate search does not require perfection; a public body is required only to make every reasonable effort (Order 2000-021 at para 68; Order F2008-006 at para. 38). Failing to find records during an initial search does not preclude a finding that a public body made every reasonable effort (Order F2003-001 at para. 40).

[para 49] The Applicant believes that there is inconsistency between the Public Body's suggestion that his file was at the Red Deer office and its statement that his file existed in "various areas". From my review of the Public Body's submissions, it is not clear whether part of the Applicant's file was at the Calgary office at the time of his access request. The Public Body does indicate, in its August 29, 2007 letter to the Applicant, that his current AISH worker confirmed that his entire file had been sent to the individual processing his access request. Whether the Applicant's file was in various areas of the same office, or in different offices, I still find that an adequate search was conducted. Parts of the Applicant's file were in different physical spaces and, because there was misfiling by date, some of the records requested by the Applicant were initially overlooked. If an individual's file is relatively small, I would expect a public body to actually go through all locations. However, where an individual's file is relatively large, it is not unreasonable for a public body to rely on its filing system in order to ascertain the possible locations of the responsive records. While the filing error in this case was unfortunate, the Public Body subsequently remedied its oversight.

[para 50] Given the foregoing, I find that the Public Body made every reasonable effort to search for records responsive to the Applicant's access request. However, I find that it did not inform the Applicant in a timely fashion about what was done to search for the requested records.

2. Timeliness of informing the Applicant about the searches

[para 51] The Public Body acknowledges that a significant period of time elapsed between the Applicant's March 27, 2007 letter alleging missing records, and the Public Body's response and provision of additional records on August 29, 2007. The Public Body explains that the delay was due to its internal review and analysis of the Applicant's various challenges, requests and questions relating to the fee estimate. It also states that it was waiting for the review initiated by this Office in March 2007 to be completed before responding further to the Applicant's access request.

[para 52] While the Public Body apologizes for the delay in responding to the Applicant, I must still find that it did not inform the Applicant in a timely fashion about what was done to search for the requested records. The Public Body had this obligation regardless of the time spent on other matters relating to the access request, or relating to the Applicant generally. Even where there is a review underway by this Office, a public body should take steps to respond to the concerns that gave rise to the review in the first place.

[para 53] The Applicant was not satisfied with all of the Public Body's explanations about the allegedly missing records in its August 29, 2007 letter. He wrote again to the Public Body on September 10, 2007, seeking more answers and clarifications, as well as raising concerns in relation to the additional responsive records that were provided. In short, the Applicant had outstanding concerns about the adequacy of the search for records and I am unable, myself, to ascertain from the records whether those concerns were legitimate or not. It appears that the Public Body has never responded to the

Applicant's September 10, 2007 letter, as it states in its submissions that it simply "re-confirms" its August 29, 2007 response regarding the allegedly missing records.

[para 54] In order to meet its duty to assist the Applicant, the Public Body should respond to the concerns set out in the Applicant's September 10, 2007 letter. While I do not mean to imply that there must be a never-ending dialogue between a public body and an applicant over the adequacy of a search or the inclusiveness of responsive records, the Public Body has not fully responded to the Applicant's concerns about the first search (e.g., allegedly missing appeal hearing transcript) and has not responded to his new concerns about the second search (e.g., allegedly missing records in relation to new pages provided in August 2007). The Applicant is, at a minimum, entitled to know what was done in respect of the second search, and to have his concerns addressed regarding the inclusiveness of the records provided in August 2007. In other words, the Public Body has an obligation to inform the Applicant in a timely manner about what it did in respect of both searches that it conducted.

[para 55] In my view, the Public Body should also clearly confirm with the Applicant that the Calgary office was contacted for responsive records, given his outstanding concern in this regard. Although I am satisfied, on the basis of the Public Body's submissions, that it has conducted an adequate search, it must still directly inform the Applicant of what it has done. Informing (and hopefully assuring) an applicant that an adequate search has indeed been carried out is the very point of the second component of conducting an adequate search for records.

[para 56] I conclude that the Public Body failed to make every reasonable effort to assist the Applicant and to respond to him openly, accurately and completely, as required by section 10(1) of the Act. The failure was as a result of not informing the Applicant in a timely manner about what was done to search for the records provided in February 2007, and not informing him about what was done to search for the records provided in August 2007. I intend to order the Public Body to comply with its duty to assist by responding to the Applicant's September 10, 2007 letter.

C. Are records excluded from the application of the Act by section 4(1)(a) (information in a court file)?

[para 57] Section 4(1)(a) of the Act reads as follows:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *(a) information in a court file…*

[para 58] Section 4(1) is a provision that limits my jurisdiction because, if a record falls within one of the provisions of section 4(1), the Act does not apply and the Public Body has no obligation to provide access to the record (Order F2002-024 at para. 11).

[para 59] The Public Body found that section 4(1)(a) excluded the Act from applying to pages 5-7, 8-16, 436-438 and 441-443 of the records.

[para 60] A copy of a *filed* version of a court record falls under section 4(1)(a), but a copy of an *unfiled* record does not, even if the content is the same as a record that was filed (Order F2007-021 at para. 26). Only a copy of a filed court record is necessarily the same as the information in the court file itself.

[para 61] Here, pages 8-13 of the records are Reasons for Judgment filed February 6, 2004. Pages 14-16 are a Court Order filed February 9, 2004, and pages 441-443 are a copy of the same filed Order. Pages 436-438 are another Court Order filed May 13, 2004. As all of these are copies of filed versions of court records, they are excluded from the application of the Act, and I accordingly have no jurisdiction over them.

[para 62] By contrast, pages 5-7 are an unsigned and unfiled version of a Bill of Costs. As the document is unsigned and unfiled, it is not the same information that might be in a court file. I therefore find that section 4(1)(a) does not apply and the record falls within the purview of the Act. In accordance with *Practice Note 4* of this Office, and because the Public Body did not alternatively apply an exception to disclosure to pages 5-7, I intend to remit these pages back to the Public Body for it to decide whether to disclose them to the Applicant, or withhold them on the basis of an exception to disclosure contained in the Act.

D. Did the Public Body properly apply section 17 of the Act (disclosure harmful to personal privacy) to the records/information?

[para 63] Section 17 of the Act reads, in part, as follows:

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

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party,

…

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

…

(c) the personal information is relevant to a fair determination of the applicant's rights,

…

(e) the third party will be exposed unfairly to financial or other harm,

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

…

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provided by the applicant.

[para 64] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it has withheld. In the context of section 17, the Public Body must establish that the severed information is the personal information of a third party, and may show how disclosure would be an unreasonable invasion of the third party's personal privacy. Having said this, section 71(2) states that, if a record contains personal information about a third party, it is up to the Applicant to prove that disclosure would not be an unreasonable invasion of the third party's personal privacy. Because section 17 is a mandatory exception to disclosure, I must also independently review the information and determine whether disclosure would or would not be an unreasonable invasion of personal privacy.

1. Identities of individuals performing work-related activities

[para 65] The Public Body severed the initials of typists at the bottom of various letters, and the names or initials of the transcribers of various documents. It also severed the names and signatures of individuals it refers to as "non-professional" employees of entities other than those working for a public body. These individuals include physical therapists, federal government employees, individuals associated with a psychological clinic, a privacy rights coordinator, clinical coordinator, contact person for a supply

company, individual working for a medical company, and legal assistant. The Public Body also sometimes severed a pronoun because it indicated an individual's gender.

[para 66] The Public Body disclosed the job title, or similar position description, of the foregoing individuals where this type of information appears in the records. However, it submits that disclosure of identifying information in the form of names, initials, signatures and genders would be an unreasonable invasion of personal privacy. It distinguishes this from the identifying information of whom it calls outside "professionals" (e.g., doctors) involved in the Applicant's file, as the Applicant is aware of their involvement. The Public Body disclosed the identities of such outside professionals, as well as the names of all individuals, regardless of job position, who work for it or other public bodies as defined in the Act.

[para 67] Names and signatures are personal information under section 1(n)(i) of the Act. It is also possible for initials and pronouns to be about identifiable individuals – and therefore be personal information – depending on the number of individuals with the same initials, or of the same gender, working at the same place in the same capacity. In this case, I am prepared to assume that the initials and pronouns are information about identifiable individuals.

[para 68] Where personal information of third parties exists as a consequence of their activities as staff performing their duties, or as a function of their employment, this is a relevant circumstance weighing in favour of disclosure under section 17(5) of the Act (Order F2004-015 at para. 96). It has also been stated that records of the performance of work responsibilities by an individual is not, generally speaking, personal information about that individual, as there is no personal dimension (Order F2004-026 at para 108; Order F2006-030 at para. 10; Order F2007-021 at para. 97). Absent a personal aspect, there is no reason to treat the records of the acts of individuals conducting the business of government – and by extension any body or organization – as "about them" (Order F2006-030 at para. 12). Further, where a name (which constitutes personal information) appears only with the fact that an individual was discharging a work-related responsibility (which is not personal information), the presumption against disclosure under section 17(4)(g) (name plus personal information) does not apply (Order F2004-026 at para. 117). In my view, none of these statements should or do make a distinction based on the nature of an individual's responsibilities, the body or organization for which he or she works, or his or her position within that body or organization.

[para 69] Consistent with the foregoing statements, several Orders of this Office have found that disclosure of the names, titles and signatures of individuals acting in a formal, representative or professional capacity – and by extension initials and genders that would reveal their identity – is generally not an unreasonable invasion of personal privacy. This principle has been applied not only to the identifying information of employees of the particular public body that is a party to the inquiry and employees of other public bodies (e.g., Order F2004-026 at paras. 100, 118 and 120) and to the identifying information of individuals acting in an outside professional capacity, such as

independent lawyers (e.g., Order 2001-013 at paras. 88 and 89; Order F2003-002 at paras. 61 and 62). The principle has also been applied, for instance, to representatives of outside organizations such as employee associations or unions (e.g., Order F2008-009 at para. 89), persons acting on behalf of private third party businesses (e.g., Order 2000-005 at para. 115; Order F2003-004 at para. 265), and individuals performing services by contract (e.g., Order F2004-026 at para. 100, 118 and 120). These latter types of outside individuals were not necessarily "professionals", as the Public Body in this inquiry would call them.

[para 70] Given all of the foregoing, it does not matter who particular individuals are, or for what type of entity they work, in order to find generally that section 17 of the Act does not apply to identifying information that merely reveals that the individuals carried out a work-related function or activity. The Public Body may have taken the view that the typists, transcribers and other employees whose personal information it withheld were not acting for their employers in a "formal", "representative" or "professional" capacity. However, those terms are not intended to be exclusive; every employee of a public body, business or organization may be said to be acting formally or professionally, or representing their employer, when they perform their duties or carry out a function of their employment.

[para 71] There are exceptions to the principle in favour of disclosure of identifying information in the context of work-related activities. For example, there may be unusual circumstances or accompanying information in the records at issue that add a more personal aspect or dimension, or suggest that disclosure of an individual's identity would be an unreasonable invasion of personal privacy. However, I find no such exceptional circumstances here.

[para 72] I have reviewed the records containing the names, signatures, initials and genders that were severed by the Public Body. The records do not contain or reveal any other information that leads me to conclude that there would be an unreasonable invasion of personal privacy if the identifying information were disclosed. The records merely indicate that an individual typed or transcribed a document, sent correspondence, gave information to the Public Body by telephone, performed medical services, or carried out some other function or activity in the context of their work or employment. There was no reason for the Public Body to treat the identifying information of what it calls "non-professional" individuals, and the identifying information of individuals working for entities other than public bodies, differently from that of anyone else where the identifying information merely reveals that the individual carried out a work-related function or activity.

[para 73] I considered the possibility that the third parties would be exposed unfairly to harm if their identifying information were disclosed to the Applicant, which would be a relevant circumstance against disclosure under section 17(5)(e) of the Act. The Public Body submits that some of the employees of outside entities may be exposed to harm because they do not know the Applicant and had no direct involvement with him. The Public Body also cites the relevant circumstances under sections 17(5)(f) and 17(5)(h),

suggesting that some personal information may have been supplied by third parties in confidence, or may unfairly damage their reputation depending on what the Applicant does with the information he receives or to whom he discloses it.

[para 74] With respect to the disclosure of identifying information that merely reveals that an individual carried out a work-related function or activity, I believe that the relevant circumstances under sections 17(5)(e), (f) and (h) will very rarely apply. Barring exceptional situations, individuals generally have no reasonable expectation of confidentiality with respect to their identities in the context of performing their work-related activities, and there will usually be no unfair harm or damage to reputation if the identifying information is disclosed.

[para 75] Of course, it is *possible* for certain individuals to have a reasonable expectation of confidentiality regarding their work-related identities (e.g., police officers, security intelligence personnel) and it is *possible* for certain individuals to suffer harm or damage to reputation if their identities are disclosed to an applicant (e.g., where there is a history of threats, harassment or conflict). However, these types of instances must be seen from the facts of the particular case. A public body should not rely on section 17 of the Act to withhold information that identifies who carried out a work-related function, simply out of an abundance of caution. A public body should have specific reason to conclude that disclosure of a third party's identifying information to the particular applicant would be an unreasonable invasion of personal privacy as a result of factors militating against disclosure.

[para 76] The Applicant submits that disclosure of information about the involvement of third parties in his file, and their opinions concerning his AISH application, is necessary in order for him to challenge their input and opinions. Elsewhere in his submissions, he explains that his entitlement to AISH benefits is currently subject to an appeal. This raises section 17(5)(c) of the Act, in that disclosure of the identities of the individuals involved in the Applicant's file may be relevant to a fair determination of his rights. The Applicant further points out that he has had interpersonal difficulty with some of the individuals involved with his file, although he does not specifically state that these include the individuals whose identities have been withheld from him. The Public Body argues that the third party information would not provide anything useful in terms of a determination of the issues affecting the Applicant.

[para 77] I find that the test that has been established under section 17(5)(c) is generally met in this inquiry, as the Applicant's appeal of his entitlement to AISH benefits is drawn from the concepts of law, as opposed to a non-legal right based solely on moral or ethical grounds; the right is related to a proceeding that the Applicant is contemplating, not one that has already been completed; the personal information of the third parties has some bearing on the determination of the right in question; and the personal information is required in order to prepare for a proceeding or to ensure an impartial hearing (Order 99-028 at para. 32; Order F2002-010 at para. 50). Section 17(5)(c) accordingly weighs in favour of disclosing some of the identifying information of the third parties involved with the Applicant's file. I limit its relevance, however, in

that the Applicant has not shown that he must know the identity of *every* third party for the purpose of his appeal.

[para 78] Despite the limited application of section 17(5)(c) in this inquiry, I still conclude that disclosure of the names, signatures, initials and genders of the third parties discussed in this part of the Order would not be an unreasonable invasion of their personal privacy. This is due to the other relevant circumstance relating to work-related activities. Disclosure of the identifying information would merely reveal that the third parties performed their duties as staff or carried out a task as a function of their employment. I therefore conclude that the Public Body did not have the authority to withhold their personal information under section 17 of the Act.

2. Other personal information

[para 79] On several pages of the records, the Public Body severed employee identification numbers used to access system data. An identifying number or other particular assigned to an individual is personal information under section 1(n)(iv) of the Act.

[para 80] It is arguable that disclosure of the employee identification numbers would not be an unreasonable invasion of the personal privacy of the employees because they merely reveal that the employees accessed the system or recorded data in their work-related capacities. However, I find that there is a greater personal dimension to the identification numbers because, according to the Public Body, they are used to control access to the information on the system and enable audits of user activities and data accessed. An employee is presumably responsible for his or her access code and should keep it confidential. I believe that there is a risk that an employee will be exposed unfairly to harm, under section 17(5)(e) of the Act, if his or her identification number were disclosed, as another person may access or record system data in the employee's name, rendering the employee responsible for the breach or placed in a position to explain whether he or she was the one who accessed or entered the data.

[para 81] Given the foregoing, the identification numbers in this inquiry reveal more than the fact that an employee carried out a work-related function. Unlike a name in a record that reveals a specific employment activity, the employee identification codes may be traced in such a way as to identify an employee in a wide variety of other records and contexts. Finally, I note that the names of the employees who accessed the system were not withheld from the Applicant by the Public Body, so the Applicant is already aware of who carried out the work-related activities that concern him. I conclude that disclosure of the employee identification numbers would be an unreasonable invasion of the personal privacy of third parties and that section 17 therefore applies.

[para 82] The Public Body severed information in various records at issue because they would reveal the reasons for an individual's absence from work. The presumption against disclosure under section 17(4)(d) of the Act (information relating to employment history) applies, as absences are typically recorded in an employee's personnel file,

which is an indicator that information relates to employment history (Order F2003-005 at para. 73). As I do not find any relevant circumstances, under section 17(5), in favour of disclosure of the information about the absences from work in this case, I conclude that the Public Body properly applied section 17.

[para 83] The Public Body properly withheld, under section 17, personal information about a third party at the middle of page 533 of the records. I cannot discuss the information further, as it would reveal the information.

[para 84] On a few pages, the Public Body severed the name of an individual identified as the owner of property that the Public Body states that it mistakenly believed was the Applicant's address. As this individual has nothing to do with the Applicant's AISH file, I see no relevant circumstances in favour of disclosure. The Public Body properly withheld the name under section 17.

[para 85] On pages 325-326, the Public Body severed personal information about the Applicant's family members. There is a presumption against disclosure of some of this information under section 17(4)(a) (information relating to medical history) and section 17(4)(d) (information relating to employment or educational history). Although the Public Body states in its submissions that it did not sever any personal information provided by the Applicant, the information about the Applicant's family members appears to have been provided by him (as the sentences in which the information is found, or surrounding sentences, indicate "he stated" or "he commented"). Under section 17(5)(i) of the Act, the fact that information was originally provided by an applicant is a relevant circumstance in favour of disclosure. I find here that this factor outweighs the presumptions against disclosure. Disclosure of the information that the Applicant provided about his family members – including medical, employment and education information – would not be an unreasonable invasion of their personal privacy.

E. Did the Public Body properly apply section 20 of the Act (disclosure harmful to law enforcement) to the records/information?

[para 86] The Public Body specifically cites sections 20(1)(a) and 20(1)(c) of the Act as the basis for withholding some of the information in the records at issue from the Applicant. Those sections read as follows:

> *20(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 a law enforcement matter,*
>
> …
>
> *(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,*

[para 87] Under section 71(1) of the Act, it is up to the Public Body to prove that the Applicant has no right of access to the information that it withheld under section 20. The Public Body applied section 20(1)(a) and (c) to pages 150-156, 163-167, 168-169, 187-188 of the records, and applied section 20(1)(c) to page 200.

[para 88] The Public Body submits that the information that it withheld relates to law enforcement under section 1(h) of the Act, which reads in part a follows:

> *1(h) "law enforcement" means*
>
> *…*
>
> *(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or*
>
> *(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred;*

[para 89] I am prepared to assume that some of the records at issue relate to law enforcement, within the meaning of section 1(h). I do not need to decide this definitively, as I find that the Public Body has not shown that there would be harm to law enforcement, or harm to its investigative techniques or procedures, if any of the information were disclosed.

[para 90] In order to properly apply section 20(1)(a) (disclosure harmful to a law enforcement matter), the Public Body must satisfy the "harm test" that has been articulated in previous Orders of this Office. Specifically, there must be a clear cause and effect relationship between the disclosure and harm alleged; the harm that would be caused by the disclosure must constitute damage or detriment and not simply hindrance or minimal interference; and the likelihood of harm must be genuine and conceivable (Order 96-003 at p. 6 or para. 21; Order F2005-009 at para. 32). The "harm test" also applies under section 20(1)(c) (disclosure harmful to investigative techniques or procedures) (Order F2004-022 at para. 56; Order F2004-032 at para. 16). Further, with respect to section 20(1)(c), the harm test contained in this exception precludes the refusal of basic information about well-known investigative techniques; the focus in this exception is on the refusal of information about investigative techniques and procedures that relate directly to their continued effectiveness (Order 99-010 at para. 78; Order F2007-005 at para. 9).

[para 91] The "harm test" must be applied on a record-by-record basis (Order F2002-024 at para. 36). In order for a public body to discharge its burden, explicit and sufficient evidence must be presented to show a reasonable expectation of

probable harm; the evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue (Order 96-003 at p. 6 or para. 20; Order F2002-024 at para. 35). The "harm test" – specifically in relation to law enforcement matters under section 20 of the Act – and the requirement for a public body to provide an evidentiary foundation for its assertions of harm were upheld in *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515 (at paras. 6, 59 and 60).

[para 92] In this inquiry, the Public Body has not explained at all how disclosure of information in the records at issue would harm law enforcement under section 20(1)(a), or harm the effectiveness of investigative techniques and procedures used in law enforcement under section 20(1)(c). In its initial submission, it states that it "will not, in this submission, go into details of its investigative techniques but reserves the right to submit arguments *in camera*, or otherwise, during the inquiry rebuttal process." The Public Body did not provide anything further regarding its application of section 20 – in its rebuttal submissions or otherwise.

[para 93] As the Public Body has not provided any evidence to show that section 20 applies to the information that it withheld under that section, I find that section 20 does not apply and the Public Body therefore had no discretion to withhold the information. As stated above, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld. Further, *FOIP Practice Note 10* of this Office states: "It is also not sufficient to provide the Commissioner with records, and leave it up to the Commissioner to figure out from the records the facts upon which he will base his decisions. The Commissioner requires that persons within Public Bodies provide evidence by speaking to the contents of records. […] Public Bodies that do not provide evidence for inquiries risk having decisions go against them for lack of evidence to support their arguments."

[para 94] I reviewed the records to which the Public Body applied section 20 and could not tell, from the records alone, whether there was a causal connection between the disclosure of information and harm to a law enforcement matter, whether any harm would constitute damage or detriment and not mere inconvenience, and whether there was a reasonable expectation that harm would occur. I also could not tell, from the records alone, whether disclosure of information relating to investigative techniques and procedures would harm their continued effectiveness, as opposed to being basic information about well-known investigative techniques.

[para 95] Although the Public Body cited only sections 20(1)(a) and (c) in its response to the Applicant and the index that it prepared, it states in the heading of its submissions on section 20 that disclosure would reveal a confidential source of law enforcement information. This raises the possibility that the Public Body was also applying section 20(1)(d) of the Act, under which access to information may be refused "if the disclosure could reasonably be expected to reveal the identity of a confidential source of law enforcement information."

[para 96] Again, however, the Public Body has not explained what confidential source it was or is trying to protect. My own review of the records to which the Public Body applied section 20 does not show anyone's identity as being a confidential source of law enforcement information. Some pages reveal the names of employees or information provided by outside agencies, but in the absence of submissions from the Public Body, I find that none of these reveal a confidential source of law enforcement information. Other pages arguably contain confidential information that was provided, but whoever provided the information is identified as "anonymous" and the information provided is general enough so as not to be linked to a particular individual. Therefore, I find that no *identity* of a confidential source of law enforcement information is revealed so as to engage section 20(1)(d).

[para 97] Given all of the foregoing, I conclude that the Public Body did not properly apply section 20 of the Act to any of the information that it withheld under that section.

F. Did the Public Body properly apply section 24 of the Act (advice, etc.) to the records/information?

[para 98] The index submitted by the Public Body indicates that it applied sections 24(1)(a) and/or 24(1)(b) of the Act to some of the records at issue. Those provisions read as follows:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body,*
>
> *(ii) a member of the Executive Council, or*
>
> *(iii) the staff of a member of the Executive Council,*

[para 99] Under section 71(1) of the Act, it is up to the Public Body to prove that the Applicant has no right of access to the information that it withheld under section 24.

1. Advice, etc. and consultations/deliberations

[para 100] In order to refuse access to information under section 24(1)(a) of the Act, on the basis that it could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options ("advice, etc."), the information must meet

the following criteria: (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, and (iii) be made to someone who can take or implement the action (Order 96-006 at p. 9 or para. 42; Order F2004-026 at para. 55).

[para 101] Section 24(1)(b) of the Act gives a public body the discretion to withhold information that could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body, a member of the Executive Council, or the staff of a member of the Executive Council ("consultations/deliberations"). A consultation occurs when the views of one or more of the persons described in section 24(1)(b) are sought as to the appropriateness of particular proposals or suggested actions; a deliberation is a discussion or consideration of the reasons for and/or against an action (Order 96-006 at p. 10 or para. 48; Order 99-013 at para. 48). The test for information to fall under section 24(1)(b) is the same as under section 24(1)(a) in that the consultations/deliberations must (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, and (iii) be made to someone who can take or implement the action (Order 99-013 at para. 48; Order F2004-026 at para. 57).

[para 102] Part (2) of the test under both sections 24(1)(a) and (b) is that the information must be directed toward taking an action. The information must relate to a suggested course of action, which will ultimately be accepted or rejected by the recipient (Order 96-006 at p. 8 or para. 39; Order 99-001 at para. 17; Order F2007-013 at para. 108). Taking an action includes making a decision (Order 96-019 at para. 120; Order F2002-028 at para. 29). However, sections 24(1)(a) and (b) of the Act do not protect a decision itself, as they are only intended to protect the path leading to the decision (Order F2005-004 at para. 22; Order F2007-013 at para. 109).

2. The information that the Public Body withheld

[para 103] The Public Body applied section 24(1)(a) of the Act to pages 19-20, 120 and 180 of the records, section 24(1)(b) to pages 168, 210 and 214, and both sections 24(1)(a) and (b) to page 566. In it submissions, its sets out the three-part test for withholding information under section 24(1)(a) and (b) and states, very briefly, that the test was met in the instances where it applied section 24.

[para 104] The Public Body's submissions are lacking in that it has not more specifically explained how information was sought or expected, how providing the information was part of someone's responsibility or position, what specific action or decision the information was directed toward, how the recipient of the information was in a position to take or implement the action or decision, and why the information reveals a decision-making process rather than a decision itself. A public body must do more than simply repeat the applicable tests under a section of the Act and say that they are met – a public body must show *how* the tests are met. Despite the lack of submissions from the Public Body, I was sometimes able to ascertain that the test was met for withholding information under section 24 by reviewing the records themselves.

[para 105] The Applicant submits that section 24(1) of the Act does not apply to the records at issue because any discussions or decisions concerning his eligibility for AISH benefits have long since past. However, information may be withheld under section 24(1) even if a decision has already been made, provided that the information meets the requirements of the section (for instance by showing the path leading to the decision). While I note that section 24(2)(b) renders section 24(1) inapplicable to "a statement of the reasons for a decision that is made in the exercise of … an adjudicative function", the Public Body did not withhold such a statement of reasons for a decision in the package of information provided to the Applicant.

[para 106] Pages 19-20 of the records are a draft letter written on behalf of a Minister to the Applicant. I can surmise that the draft letter was prepared by staff of the Public Body as part of their responsibilities, and given to the Minister so that he may consider whether or not to accept it, sign it and send it to the Applicant. I find that the information therefore reveals advice, etc. under section 24(1)(a).

[para 107] On page 120, the Public Body withheld information under a heading "Recommendation". While a heading does not conclusively describe the nature of the information under it, the information here is indeed a recommendation to the Minister of the Public Body as to how to make a decision in a given situation. I find that the withheld information falls under section 24(1)(a).

[para 108] On page 168, the information that the Public Body withheld under section 24 consists of the last paragraph. The information reveals consultations/deliberations involving employees of the Public Body regarding a decision that could be taken by the Public Body in relation to the Applicant's file. I accordingly find that it falls within section 24(1)(b). Although the substance of the consultations/deliberations does not actually appear on page 168, this is an instance where the topic itself and the identity of the participants, in conjunction with other information known to the Applicant, would reveal the content of the consultations/deliberations that occurred (Order F2004-026 at paras. 71 and 74).

[para 109] Page 180 consists of a briefing on a particular matter, which the Public Body withheld in its entirety. I find that most of the information falls under section 24(1)(a), as it reveals advice, etc. leading to a decision, which decision is found elsewhere in the file and was disclosed to the Applicant. I can tell from the record itself that it was prepared by individuals as part of their responsibilities and directed toward someone who could approve that decision. I considered whether some of the information was merely background facts, but find that the facts are sufficiently interwoven with the advice, and reveal the reasons and rationale for it, so as to also fall under section 24(1)(a) (Order 99-001 at paras. 17 and 18; Order F2007-013 at para. 108). The information that does not fall under section 24(1) consists of the heading and date at the top of the page, as well as the names, signatures and job titles of officials and staff at the bottom. Section 24(1) does not generally apply to records or parts of records that in themselves reveal only that particular persons were involved in the seeking or giving of advice (Order F2004-026 at para. 71).

[para 110] On pages 210 and 214, the Public Body withheld what is the same information on both of these pages. In the absence of more specific submissions from the Public Body, I find that the information does not fall under section 24(1). The information is a comment by a staff member of the Public Body, but I fail to see to whom the information was directed in order for a decision to be made.

[para 111] On page 566, the Public Body withheld two paragraphs of a ministerial backgrounder. I find that the first paragraph falls under section 24(1) but not the second. The first paragraph contains a recommendation and the reasons for it, whereas the second paragraph reveals a decision that appears already to have been taken. Because the second paragraph says that something "will" occur, the information is not directed toward someone for the purpose of making a decision. If a record reveals only that a decision has been made, the record may not be withheld under section 24(1) (Order 97-010 at para. 82; Order F2007-013 at para. 109).

3. The Public Body's exercise of its discretion not to disclose

[para 112] A public body exercising its discretion relative to a particular provision of the Act should consider the Act's general purposes, the purpose of the particular provision on which it is relying, the interests that the provision attempts to balance, and whether withholding the records would meet the purpose of the Act and the provision in the circumstances of the particular case (Order F2004-026 at para. 46).

[para 113] The Applicant argues that it is crucial for him to know how his AISH file was handled and who had involvement in his case, and that there is no evidence that there would be harm if information were disclosed to him. The Public Body submits that disclosure of the information that it withheld under section 24 would cause damage to internal decision-making processes, as staff would feel less able to have frank and candid discussions about program delivery and client management issues.

[para 114] I find that the Public Body has shown that it properly exercised its discretion to withhold the information that I found to fall under section 24(1) of the Act. I therefore conclude that the Public Body properly applied section 24 to this information. Conversely, the Public Body had no discretion to apply section 24(1) to the information that I found did not fall under the section, so it did not properly apply section 24 to this other information.

G. Did the Public Body properly apply section 27 of the Act (privileged information) to the records/information?

[para 115] The index submitted by the Public Body indicates that it specifically applied section 27(1)(a) of the Act to some of the records at issue. That provision reads as follows:

> *27(1) The head of a public body may refuse to disclose to an applicant*

> (a) *information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*

[para 116] Under section 71(1) of the Act, it is up to the Public Body to prove that the Applicant has no right of access to the information that it withheld under section 27. The Public Body applied section 27(1)(a) to pages 26-27, 31-32, 88-89 and 335-336, and it submits that the information on them is subject to solicitor-client privilege.

1. Information subject to solicitor-client privilege

[para 117] To correctly apply section 27(1)(a) of the Act in respect of solicitor-client privilege, a public body must meet the criteria for that privilege set out in *Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821 at p. 837, in that the record must (i) be a communication between a solicitor and client; (ii) entail the seeking or giving of legal advice; and (iii) be intended to be confidential by the parties (Order 96-017 at para. 22; Order F2007-013 at para. 72).

[para 118] As the Public Body provided this Office with copies of the records over which it claims solicitor-client privilege, I was in a position to review their actual content. On applying the forgoing test, I find that the whole of pages 26-27, 31-32 and 335-336 of the records fall within section 27(1)(a).

[para 119] Pages 88-89 consist of a letter from the Applicant's solicitor to the Public Body's solicitor. The original letter that was sent would not itself have been subject to solicitor-client privilege, as it was not between a solicitor and client. However, the Public Body indicates that its solicitor made handwritten notations on the copy of the letter in the Applicant's AISH file. I therefore considered whether this particular copy of the letter may be characterized as a communication that passed at one time between the Public Body, as client, and its solicitor. Privilege also attaches to information passing between a lawyer and his or her client that is provided for the purpose of giving the advice, as part of the continuum of solicitor-client communications (Order F2003-005 at para. 39).

[para 120] Here, the letter was sent directly to the Public Body's solicitor, as typically happens when a solicitor is representing a client, and the letter contemplated a response from the Public Body, which required legal advice from its lawyer once she reviewed it. I do not expect an employee of the Public Body to have to physically pass the letter to the solicitor and specifically ask for advice about it. A confidential communication from the client to the solicitor for the purpose of obtaining legal advice was implicit from the circumstances – being an arrangement where the solicitor would provide legal advice to the Public Body, as necessary, on receipt of letters affecting its legal affairs. Finally, because the handwritten notations of the solicitor directly correspond to the contents of the letter, I find that the letter is part of the continuum of legal advice in this case. I may have decided differently in respect of an unmarked version of the letter, had it been in the file. A letter between two solicitors, without anything indicating that it was actually used

in the seeking or giving of legal advice, would not be covered by solicitor-client privilege.

[para 121] Given the foregoing, I also find that pages 88-89 of the records fall under section 27(1)(a) of the Act.

2. The Public Body's exercise of its discretion not to disclose

[para 122] The Public Body submits that its proper exercise of discretion not to disclose records under section 27 of the Act is demonstrated by the fact that it did not apply the section to other records that it could have. Despite its limited submissions in this regard, I find that it properly exercised its discretion to withhold information subject to solicitor-client privilege under section 27(1)(a). This is due to the importance attached to solicitor-client privilege and an implicit understanding in society that the privilege should not be easily infringed. The Supreme Court of Canada has stated:

> Solicitor-client privilege is fundamental to the proper functioning of our legal system. […] Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible":
>
> > [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. (*R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 35, quoted with approval in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 36)
>
> It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised. […]
>
> [*Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 9]

[para 123] Due to the importance attached to solicitor-client privilege, a public body's decision to withhold information under section 27(1)(a) will be a reasonable exercise of discretion in most cases where the public body or the records themselves establish that this particular privilege applies – even with only a minimum explanation from the public body regarding its exercise of discretion. Having said this, I do not preclude the possibility of a rare case in which it may be apparent from the facts that a public body has not properly exercised its discretion to withhold information subject to solicitor-client privilege.

[para 124] I conclude that the Public Body properly applied section 27 of the Act to the information that it withheld under that section.

V. ORDER

[para 125] I make this Order under section 72 of the Act.

[para 126] I find that the Public Body properly estimated fees for services under sections 93(1) and (2) of the Act. Under section 72(3)(c), I confirm the fees assessed by the Public Body.

[para 127] I find that the Public Body did not meet its duty to assist the Applicant under section 10(1) of the Act. Under section 72(3)(a), I order the Public Body to comply with its duty by responding to the Applicant's letter of September 10, 2007 in which he set out concerns about the adequacy of the Public Body's search for responsive records.

[para 128] I find that pages 8-16, 436-438 and 441-443 of the records are excluded from the application of the Act by section 4(1)(a), as these consist of information in a court file. I therefore have no jurisdiction over them.

[para 129] I find that pages 5-7 of the records are not excluded from the application of the Act by section 4(1)(a). I remit those pages back to the Public Body for it to decide whether to disclose them to the Applicant, or withhold them on the basis of an exception to disclosure contained in the Act.

[para 130] I find that the Public Body properly applied section 17 of the Act to some of the information that it withheld under that section, as disclosure would be an unreasonable invasion of the personal privacy of third parties. This consists of the employee identification numbers used to access system data, the name of the individual identified as the owner of property mistakenly believed to be the Applicant's address, information about the absence of individuals from work, and information about an individual at the middle of page 533 of the records. Under section 72(2)(b), I confirm the decision of the Public Body to refuse the Applicant access to the foregoing information.

[para 131] I find that the Public Body did not properly apply section 17 of the Act to the remaining information that it withheld under that section, as disclosure would not be an unreasonable invasion of the personal privacy of third parties. Under section 72(2)(a), I order the Public Body to give the Applicant access to the information that it severed under section 17, other than that set out in the preceding paragraph.

[para 132] I find that the Public Body did not properly apply section 20 of the Act to any of the information that it withheld under that section, as it did not establish that disclosure could reasonably be expected to harm law enforcement. Under section 72(2)(a), I order the Public Body to give the Applicant access to the information that it withheld under section 20.

[para 133] I find that the Public Body did not properly apply section 24 of the Act to the heading and date at the top of page 180 of the records; the names, signatures and job titles at the bottom of page 180; the information that was withheld under section 24 on pages 210 and 214; and the second paragraph that was withheld on page 566. The Public Body did not establish that disclosure of this information could reasonably be expected to reveal advice, etc. under section 24(1)(a) or consultations/deliberations under section 24(1)(b). Under section 72(2)(a), I order the Public Body to give the Applicant access.

[para 134] I find that the Public Body properly applied section 24 of the Act to the other information that it withheld under that section. Under section 72(2)(b), I confirm the Public Body's decision to refuse the Applicant access.

[para 135] I find that the Public Body properly applied section 27 of the Act to the information that it withheld under that section, as it is subject to solicitor-client privilege. Under section 72(2)(b), I confirm the Public Body's decision to refuse the Applicant access.

[para 136] I order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Wade Riordan Raaflaub
Adjudicator