

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-046

December 23, 2010

CITY OF CALGARY

Case File Number F4489

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (the “Act”), the Applicant asked the City of Calgary (the “Public Body”) for records regarding pension and other payments made to certain senior officials after their retirement, records regarding benefits paid to another senior official, and records regarding the settlement and expenses incurred following the termination of another senior official’s contract of employment. The Public Body withheld some of the requested information under section 17 (disclosure harmful to personal privacy), section 24 (advice, etc.), section 25 (disclosure harmful to economic interests of a public body) and section 27 (privileged information, etc.).

The Applicant wanted access to information about pension payments made to the senior officials in respect of employment prior to January 1, 1992, as he said that other management employees did not receive payments for the same period. However, the pension-related amounts, as found in the records at issue, consisted of lump sums without any discrete amount or background calculations for the period prior to January 1, 1992.

Under section 17(2)(e) of the Act, a disclosure of personal information is not an unreasonable invasion of a third party’s personal privacy if the information is about the third party’s discretionary benefits as an officer or employee of a public body. The Adjudicator found that particular pensions and retirement allowances of some of the senior officials were discretionary benefits. However, he found that the information at issue, namely the dollar amounts paid and dates of payments, did not fall within the

category of information contemplated by section 17(2)(e). In the Adjudicator's view, section 17(2)(e) captured only more general information about the nature of the pension plan and retirement allowances, who was entitled to them and the formulas for their calculation, which had already been revealed to the Applicant.

The Applicant alternatively argued that disclosure of the personal information of the senior officials was desirable for the purpose of subjecting the Public Body's approval and administration of the pension plan, and the payments made under it, to public scrutiny under section 17(5)(a). However, because the information withheld by the Public Body would not actually assist in publicly scrutinizing its activities, the Adjudicator found that section 17(5)(a) did not apply. He also found that the Applicant had not shown that public scrutiny of the dollar amounts of the pension payments and retirement allowances was required. As only presumptions and factors against disclosure remained, the Adjudicator concluded that disclosure of the personal information of the senior officials would be an unreasonable invasion of their personal privacy under section 17 of the Act, and confirmed the Public Body's decision to withhold the information. There was one exception in relation to a small amount of information in the records at issue.

The Adjudicator found it unnecessary to review the Public Body's application of section 24 of the Act, as the information at issue under that section was properly withheld under section 17. The Adjudicator also found it unnecessary to review the Public Body's application of section 25, as it indicated that it was prepared to release the information to which it applied that section. Finally, the Adjudicator found it unnecessary to review the Public Body's application of section 27, as it had already disclosed to the Applicant, elsewhere in the records, all of the responsive information to which it applied that section.

Statutes and Regulation Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(n)(i), 1(n)(vii), 2(e), 17, 17(1), 17(2), 17(2)(e), 17(2)(f), 17(2)(h), 17(4), 17(4)(d), 17(4)(g), 17(5), 17(5)(a), 17(5)(c), 17(5)(e), 17(5)(f), 17(5)(g), 24, 24(1)(d), 25, 25(1)(b), 27, 59(4), 67(1)(a)(ii), 71(2), 72, 72(2)(a), 72(2)(b) and 72(4); *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 217(3); *Supplementary Accounting Principles and Standards Regulation*, Alta. Reg. 313/2000, ss. 1 and 2.

Authorities Cited: AB: Orders 97-002, 97-011, 2001-020, F2003-002, F2004-015, F2004-028, F2005-016, F2007-025 and F2008-031; *University of Alberta v. Pylypiuk*, 2002 ABQB 22.

I. BACKGROUND

[para 1] In a letter dated January 7, 2008, the Applicant asked the City of Calgary (the "Public Body") for information under the *Freedom of Information and Protection of Privacy Act* (the "Act"). The requested information may be summarized as follows:

1. records showing the individuals, including their names and position titles, who gave the authority to individuals in Employee Services, including their names and position titles, to issue two particular cheques to two retired senior City employees;
2. records showing that both the Mayor and City Treasurer were informed by and gave their approval to Employee Services to allow the replication of their signatures on the two cheques, by what appeared to be a rubber stamp, and records identifying the custodian of the rubber stamp and blank cheques;
3. records associated with the approvals related to the issuing of the two above-mentioned cheques as well as a third cheque, including accounts payable vouchers, cheque requisitions, pension retroactivity calculations, names and position titles of individuals involved in the approval process, and the accounts used as the funding sources for the cheques;
4. records showing any additional payments, not previously disclosed to the Applicant, made to any of four retiring commissioners/executive officers after their retirement dates, including the records associated with the approvals of the cheques (as set out in item 3 above) and a copy of a cheque in a particular amount to one of these individuals;
5. records describing benefits other than vacation amounts paid to a retired City Auditor (i.e., overcap payout, retirement bonus, deferred compensation payment, etc.) and the names and position titles of the individuals who approved these other benefits; and
6. a copy of a former Chief Executive Officer's employment contract with the City, the records showing the amount of his final settlement, and the records showing any additional expenses, not previously disclosed to the Applicant, incurred by the City to prematurely terminate the employment contract.

[para 2] On March 17 and April 8, 2008, the Public Body released some of the requested information to the Applicant, withholding the rest under section 17 (disclosure harmful to personal privacy), section 24 (advice, etc.), section 25 (disclosure harmful to economic interests of a public body) and section 27 (privileged information, etc.).

[para 3] By letter dated May 5, 2008, the Applicant requested a review of the Public Body's response to his access request. The Commissioner authorized a portfolio officer to investigate and try to settle the matter. This was not successful, and the Applicant requested an inquiry by letter dated September 5, 2008. A written inquiry was set down.

[para 4] This Office sent letters to six individuals or their representatives, inviting them to participate in the inquiry as affected parties under section 67(1)(a)(ii) of the Act. These individual are the former senior officials of the Public Body, about whom the Applicant requested information. Four of the letters were returned as undeliverable by the post office, and this Office could not locate an alternate address for delivery. One

individual did not respond. The sixth individual indicated that he did not wish to participate in the inquiry.

II. RECORDS AT ISSUE

[para 5] With its initial submissions, the Public Body submitted a copy of records numbering up to page 167. By letter dated November 5, 2010, it submitted an additional page 168, which it located when preparing a response to clarifications that I had sought. The Public Body disclosed some of the information in the foregoing records to the Applicant but withheld other information. Because some of the withheld information is not responsive to the Applicant's access request – as noted by the Public Body on the records and/or in an index that it prepared, or else found by me later in this Order in relation to item 6 of the Applicant's access request – the records at issue consist of the information that the Public Body severed on approximately 45 of the pages that it submitted.

[para 6] Despite the Public Body's indication that information at the bottom of page 2 and on page 3 is not responsive to the Applicant's access request, I find that it is. While I agree with the Public Body that the information is not responsive to item 1 of the Applicant's access request, which is summarized above, it is responsive to item 3. In item 3, the Applicant requested “[a]ll the records associated with the approvals related to the issuing of [three specific] cheques”. Two of these cheques are the same ones mentioned in item 1. While item 1 requested only the identities of the individuals who gave authority to issue the cheques, item 3 requested additional information, which included specifically enumerated types of records, but expressly did not limit the records falling within the category of “records associated with the approvals”. I find that pages 2 and 3 are records associated with the approvals related to the issuing of the two particular cheques.

[para 7] There are no records at issue in relation to part 2 of the Applicant's access request. The Public Body indicates that the responsive information is found on pages 4 to 20. All of the information on those pages was disclosed to the Applicant.

[para 8] In response to a request from this Office for clarification as to what specific information he was seeking from the Public Body, the Applicant raised concerns, in a letter dated June 17, 2009, about the adequacy of the Public Body's responses to items 1, 2 and 5 of his access request. He wrote that he was not provided with all of the information that he had requested, or that the information provided was unsatisfactory. He said that he did not receive information identifying the individuals who approved the two cheques set out in item 1 of his access request, information about the rubber stamp set out in item 2, and information identifying the individuals who approved the other benefits paid to the retired City Auditor set out in item 5. The Public Body subsequently responded to the Applicant's concerns, in a letter dated June 30, 2009. It pointed out the records in which the information requested by the Applicant was located, and answered some of his questions arising from the records released to him.

[para 9] Regardless, the Applicant did not raise the adequacy of the Public Body's search for responsive records in his request for review, or his request for inquiry. In fact, his request for review was extremely narrow in that he was, at first, concerned only with the severing of dates in the records at issue. Following the Applicant's request for inquiry, in which he referred to the general question of public scrutiny, the Notice of Inquiry set out issues in such a way as to permit a review of the Public Body's decisions to withhold other information from the Applicant, and not just the dates. The Applicant was in a position to question the adequacy of the Public Body's search for responsive records far earlier than he did. I decline to address the issue, given that the Applicant raised it at a late stage in the process, and the scope of the inquiry has already been broadened to his benefit.

[para 10] For the same reason, I decline to address the Applicant's concerns about the adequacy of the Public Body's response to item 3 of his access request, which was for all records associated with the approvals to issue three particular cheques, including but not limited to accounts payable vouchers, cheque requisitions and pension retroactivity calculations. At the same time, I note that there are additional records among those before me that are responsive to item 3, apart from those noted by the Public Body. In response to a letter from this Office seeking clarification about the records, the Public Body advised, by letter dated June 15, 2009, that only five pages were responsive to item 3 of the access request, being pages 21 to 24 of the records submitted. However, pages 93, 94 and presumably 47 are also responsive. Pages 93 and 94 are records associated with the approvals to issue two of the cheques, and page 47 is a record associated with the approval to issue what I presume to be the third cheque.

[para 11] Finally, when discussing item 4 in his letter of June 17, 2009, the Applicant asked for copies of cheques reflecting certain commuted value payouts. However, his access request of January 7, 2008 did not ask for the cheques themselves; it asked only for information relating to the approvals to issue what are apparently three of those cheques. It appears that the Applicant previously obtained severed copies of some or all of the cheques, or was otherwise aware of their existence, and that he is now requesting or re-requesting copies of those cheques. I cannot address the cheques themselves, as they did not form part of the access request that has proceeded to this inquiry, and they do not appear in the records before me.

III. ISSUES

[para 12] The Notice of Inquiry, dated March 12, 2009, set out the following issues:

Does section 17 of the Act (disclosure harmful to personal privacy) apply 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 25 of the Act (disclosure harmful to economic interests of a public body) to the records/information?

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

[para 13] The Applicant alleges that the Public Body issued certain payments without the approval of City Council. He raises the possibility that offences have been committed by way of misappropriation of public funds and breach of public trust. He accordingly asks the Commissioner to exercise his discretion under section 59(4) of the Act, which allows the Commissioner to disclose to the Minister of Justice and Attorney General information relating to the commission of an offence against an enactment of Alberta or Canada if the Commissioner considers there is evidence of an offence.

[para 14] The Commissioner has delegated to me the authority to hear this inquiry, but he has not delegated to me the authority to exercise discretion on his behalf under section 59(4). Having said this, I have drawn the Commissioner's attention to the Applicant's allegations that offences may have been committed.

IV. DISCUSSION OF ISSUES

A. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the records/information?

[para 15] Section 17(1) of the Act states:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[para 16] In the context of section 17, the Public Body must establish that the information that it has withheld is the personal information of a third party, and may present argument and evidence to show how disclosure would be an unreasonable invasion of the third party's personal privacy. If a record does contain personal information about a third party, section 71(2) states that 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 sets out a mandatory exception to disclosure – and section 2(e) provides for independent reviews of the decisions of public bodies – I must also independently review the personal information in the records at issue and determine whether disclosure would or would not be an unreasonable invasion of personal privacy.

1. Do the records consist of the personal information of third parties?

[para 17] The Public Body explains that the Applicant's request involves the personal information of four former commissioner/executive officers of The City of Calgary (the "Commissioners"); their successor, a former Chief Executive Officer, which

single position replaced the Board of Commissioners in approximately 2000 (the “CEO”); and a former City Auditor (the “City Auditor”). I will sometimes refer to these six individuals, collectively, as the “Senior Officials”.

[para 18] With respect to the personal information of the Senior Officials, the Public Body relied on section 17 of the Act to withhold names, birthdates, addresses, job titles, employee identification numbers, retirement dates, payment dates, payment amounts, hours and earnings, years of service, pension information and background calculation information. On review of the Applicant’s access request, however, I noted that he did not appear to request all of this information, nor did he seem to be concerned with all of it in his submissions. I therefore arranged for this Office to write to the Applicant to clarify the specific information to which he wanted access.

[para 19] The Applicant replied that he did not require employee identification numbers, so they are not at issue. He further indicated that he did not require hours or earnings, except in relation to the calculation of certain payments. The information at issue is accordingly limited in this way. On my review of his access request and response to this Office’s request for clarification, I also find that the Applicant did not request and does not want any birthdates or addresses. They are therefore not at issue.

[para 20] Rather, the Applicant indicates that he wants the payment dates and amounts, the names or job titles identifying the Senior Official who received the particular payment, and the background calculations for pension payments made to the Senior Officials in respect of employment prior to January 1, 1992 (as will be explained later). I find that all of this is the personal information of the Senior Officials, as defined under section 1(n) of the Act. The information is recorded information about identifiable individuals, in that it reveals their names, job titles, when they received payments and how much they received. Some of the foregoing is expressly personal information under section 1(n)(i) (an individual’s name) and section 1(n)(vii) (information about an individual’s financial or employment history).

[para 21] The Applicant says that the Public Body severed certain dates in the records at issue because they were in proximity of the retirement dates of the Senior Officials. He argues that the general timeframe of a retirement should not be subject to section 17(1), as it is not a specific day, month and year. While the Applicant says at one point that he is seeking the month and year of retirement of the Senior Officials, he clarifies at another point that he is not actually requesting disclosure of any retirement dates *per se*, but rather the dates of payments. The Applicant appears to be arguing that, unlike exact birthdates or exact retirement dates, the dates of payments to the Senior Officials are not their personal information to which section 17(1) can apply.

[para 22] Here, the Public Body withheld payment dates, amounts and the identity of the recipient on various pages, such as on copies of cheques with the accompanying payment stub. In a different case, a payment date, in and of itself, might not be anyone’s personal information if the payment date is all that is disclosed among the information withheld on a particular record. Here, however, the Public Body indicates that the Senior

Officials retired at different times and accordingly received their payments close to those different times. Therefore, each payment date will serve to identify the Senior Official to whom a payment was made, and therefore constitutes his personal information. Disclosure of the payment date will reveal when the Senior Official was paid, and in conjunction with a payment amount, how much he was paid.

[para 23] The Applicant alternatively argues that disclosure of the payment dates would not be an unreasonable invasion of the personal privacy of the Senior Officials, which I discuss below.

[para 24] On page 2 of the records, the Public Body withheld not only payment dates, but the dates that e-mails were sent. I find that the dates that the e-mails were sent are nobody's personal information. The fact that an employee of the Public Body sent a business-related e-mail on a particular date is not personal information, and section 17(1) therefore cannot apply to it. This is notwithstanding that the date of the e-mail might be in proximity of a payment date, as the date of the e-mail does not actually reveal the payment date. I considered whether the content of the e-mail correspondence, apart from the payment date, was the personal information of any Senior Official such that disclosure of the date of the e-mail might reveal personal information about him. I decided otherwise, as the e-mail content is about the Public Body's processes, which again is nobody's personal information. Given the foregoing, I intend to order the dates of the e-mails on page 2 to be disclosed to the Applicant.

2. Is disclosure of any of the personal information not an unreasonable invasion of personal privacy under section 17(2)?

[para 25] Section 17(2) of the Act reads, in part, as follows:

17(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council,

...

(h) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body,

...

[para 26] The Public Body says that it considered the application of section 17(2)(h), but found that it did not apply because that section applies to discretionary benefits other than in an employment context. I agree that section 17(2)(h) is not applicable here, as that section applies to third parties, not to employees. In this inquiry,

the payments at issue under section 17 include those made to the Commissioners and City Auditor. Although they had retired from the Public Body when they received the payments, the payments were within the employment context, meaning that section 17(2)(h) does not apply (see Order F2003-002 at para. 30; Order F2005-016 at para. 41). Section 17(2)(e) is accordingly the relevant section that is possibly applicable to the amounts paid to the Commissioners and City Auditor.

[para 27] In relation to the CEO, the Applicant requested a copy of his employment contract. As the CEO negotiated that contract in the context of an employment relationship, section 17(2)(e) is also the section that is possibly applicable to any amounts at issue in that contract. The Applicant also requested records showing the amount of the CEO's final settlement and any additional expenses incurred by the Public Body to prematurely terminate the employment contract. Section 17(2)(h) can sometimes apply to information in the context of a settlement between a public body and former employee, on the basis that the former employee negotiates the agreement not in his or her capacity as an employee, but as a litigant or potential litigant, meaning that he or she is a third party vis-à-vis the public body under section 17(2)(h) (Order F2007-025 at paras. 26 and 27).

[para 28] In this inquiry, however, most of the information at issue in relation to the settlement between the Public Body and the CEO was withheld under section 27, so I discuss the information later in this Order. While the Public Body did apply section 17 to some information about the CEO's pension benefits in the Release and Settlement Agreement between those parties, I characterize the pension benefits as arising out of the pre-existing employment relationship, rather than being a new entitlement negotiated for the purpose of the settlement. I therefore find that section 17(2)(e), not section 17(2)(h), is the section that is possibly applicable to information about the CEO's pension benefits.

[para 29] In deciding whether disclosure of any of the records at issue is not an unreasonable invasion of personal privacy of third parties under section 17(2)(e), I will review the payment information requested by the Applicant under the three headings that follow.

(a) *Pension payments "with additional retroactivity"*

[para 30] In item 3 of his access request, the Applicant asked for records associated with the approvals to issue three particular cheques, and he specifically included pension retroactivity calculations. The three cheques apparently reflected commuted value payouts in relation to pensions given to three of the Commissioners. The Applicant did not request the same information in relation to the fourth Commissioner, as he referred to only three cheques. The cheques themselves are not at issue in the inquiry, but the commuted values are, as they appear in the "records associated with the approvals". The Applicant did not request, in item 5 or 6 of his access request, pension retroactivity calculations relating to any benefits paid to the City Auditor or CEO. I discuss payments made to those two individuals later in the Order.

[para 31] The Applicant explains that the pension information that he has requested relates to the Public Body's overcap pension plan (the "OCPP"). Material submitted by the Public Body, from its website, describes the OCPP as follows:

Introduction

The City of Calgary's Overcap Pension Plan (OCPP) is an extension of The City's Supplementary Pension Plan (SPP). The OCPP restores the pension value that has been lost as a result of the Canada Revenue Agency's (CRA) limit on pensionable earnings. Pensionable earnings are capped at a salary of \$122,222.00 in 2009.

Eligibility

You will be enrolled in the OCPP if:

- *your base position is rated at an eligible Exempt Salary Level (currently the eligible level is Level G and above), and*
- *you are contributing to the SPP and the LAPP [Local Authorities Pension Plan].*

Contributions

The OCPP is a non-contributory plan. This means that The City of Calgary pays for the plan in its entirety.

Benefits

The OCPP provides for a benefit of 2 per cent of the average of your best five consecutive years of pensionable earnings that exceed the current CRA maximum limit (\$122,222.00 in 2009). The OCPP benefit will apply to eligible service after the later of January 1, 1992 and the date of hire with The City of Calgary.

You must be vested to receive a benefit under the OCPP. Vesting occurs at age 55 with completion of two years of membership in the plan.

[para 32] On my review of the records at issue, I saw no references to the OCPP. Therefore, on September 3, 2010, I wrote to the Public Body seeking clarification regarding the records at issue and the way in which they relate to what the Applicant calls the OCPP.

[para 33] In its response of November 5, 2010, the Public Body writes:

The Public Body has created the attached document entitled Pension Terminology for ease of reference. The Applicant has referred in their

[sic] submissions to an “Overcap Pension” as it relates to the Commissioner’s [sic]. There was no Overcap Pension as defined in the Pension terms that relates to the Commissioners. The benefit received by the Commissioners is set out in Attachment 4 of the Applicants Rebuttal submission. This Agreement had been provided to the Applicant by the Public Body pursuant to a previous release. The Public Body refers to this benefit as the Executive Pension Plan (EPP) as this plan combined certain aspects of what are now the Public Body’s current Overcap Pension (OCP) and Supplementary Pension Plans (SPP). The main difference between the EPP and the current plans, was that was that [sic] what is now termed the SPP was retroactive to the date of hire and did not require employee contributions.

[...]

The EPP is separate from and does not include the Local Authorities Pension Plan (LAPP). The EPP was a historical plan within The City of Calgary.

The EPP provided a benefit to individuals enrolled in the plan over and above the LAPP benefits.

[para 34] Attachment 4 to the Applicant’s rebuttal submission, mentioned in the above excerpt, is a severed copy of an agreement dated January 30, 2001, in which an unidentified Commissioner is entitled to “supplementary pension benefits”. The Applicant says that all four Commissioners had this same agreement. He argues that the agreement is really in respect of the OCP.

[para 35] The Public Body says that the pension arrangement known as the EPP was approved by City Council on March 22, 1999. It attached a copy of the minutes of the meeting, which I reproduce later in this Order. In a reply dated November 19, 2010, the Applicant notes that the Council minutes do not refer to any EPP. He then writes:

As the applicant, it has always been my position that the inquiry was confined to records and documents related specifically to the OCP and Council’s approval and funding of the plan. What I am now presented with is yet another communication from the Public Body which again fails to provide Council’s approval of that plan. In addition, based on [the Public Body’s] letter of 2010 November 5, a second pension plan has now been identified as the EPP, which although [it is] mentioned as being approved by [the Public Body] and the former City Auditor, there is no evidence suggesting that it received Council approval.

[para 36] There is obviously a discrepancy in the terminology used by the parties. While the Applicant believes that the Commissioners participated in an OCP, the Public Body says that they participated in an EPP. Reference has also been made to a

Supplementary Pension Plan (“SPP”) in which the Commissioners participated. Regardless of the name of the actual pension plan or plans, the Applicant is effectively seeking, as will be discussed, information regarding pension amounts paid to the Commissioners for service prior to January 1, 1992. When I reproduce the submissions of the Applicant below, I will use his reference to the OCPP, but it should be taken to refer to whatever pension plan the Commissioners were actually participating in.

[para 37] The Applicant submits that the payment information that he has requested is about a discretionary benefit because the Commissioners who retired between 1999 and 2001 received additional OCPP payments, whereas lower level management members did not. He writes that the four Commissioners “apparently... received their OCPP payments retroactive to their dates-of-hire, several years or, in some cases, decades prior to 1992”, whereas the plan normally grants payments only in respect of service after January 1, 1992 (as set out in the description of the OCPP plan above). The Applicant argues that the OCPP “with additional retroactivity” is a discretionary benefit, as the additional retroactivity was applied at the sole discretion of the Public Body’s administration. The Applicant considers the pension payments in respect of service after January 1, 1992 to be non-discretionary, which I will assume to be the case for the moment.

[para 38] The Public Body explains that what it calls the EPP was effectively replaced by what is now the OCPP and SPP. It further writes:

The current Supplementary Pension Plan is a separate pension plan from the Overcap Pension. Both the SPP and OCPP are available to all eligible employees of the Public Body. Eligibility for these plans is based on level of income as per Canada Revenue Agency rules and employment category/position. The Public Body’s current Overcap Pension does not involve employee contributions however the Public Body’s current SPP does involve employee contributions.

While the Public Body states that the pension plans are available to all eligible employees, thereby suggesting that payments under them are non-discretionary, this does not squarely address what the Applicant refers to as the pension arrangement “with additional retroactivity”, which he says was granted to the Commissioners.

[para 39] As reproduced above, the Public Body states that “the difference between the EPP and current plans [OCPP and SPP] was that ... what is now termed the SPP was retroactive to the date of hire.” In other words, the Public Body is saying that the payments made to the Commissioners, in respect of employment prior to January 1, 1992, were not under the equivalent of what is now the OCPP.

[para 40] Whatever their proper characterization, it is clear that some of the amounts found in the records at issue consist of a portion in respect of the Commissioners’ service prior to January 1, 1992, which is the information that the Applicant is effectively seeking and which he argues to be about a discretionary benefit.

However, the relevant amounts are commuted values, which are lump sums reflecting both the entitlements that the Applicant argues to be discretionary (i.e., an additional retroactive payment for employment prior to January 1, 1992) and the entitlements that he considers to be non-discretionary (i.e., a payment for employment between January 1, 1992 and the date of the Commissioner's retirement). The Public Body further explains:

A commuted value is a lump sum amount that reflects the present value of future benefits. The calculation used by an actuary to determine a commuted value payment or monthly payment involves a number of factors including the interest rates at the time, birthdates, salaries, gender and mortality tables. Some individuals whose records are at issue chose a commuted value payment as opposed to receiving a monthly pension benefit. At the time the commuted value payouts were made an actuary provided the City with an all inclusive one number total payout. Where monthly pension benefits were involved the actuary did not differentiate between values or amounts for pre and post 1992 employment. Therefore the Public Body does not have a record that distinguishes values/amounts paid for pre January 1, 1992 employment and amounts paid for post January 1, 1992 employment.

[para 41] The Applicant disputes the Public Body's claim that it has no records that distinguish between the amounts paid to Commissioners for service before and after January 1, 1992. He says that he had a telephone conversation with the Public Body's actuary in August 2003, during which he discussed the pension payments made to one of the Commissioners, and the actuary advised him that the Public Body did its own calculations. The Applicant prepared a "Memo to File" at the time, which states that, when asked about the retroactivity calculations, the actuary became "very defensive" and "increasingly nervous", and emphasized that he had "no involvement with the amount finally paid out" to the particular Commissioner being discussed.

[para 42] Based on the records before me – and the Public Body's answer above in response to my September 3, 2010 request for it to delineate between amounts paid in respect of the Senior Official's employment before and after January 1, 1992 – it would appear that the Public Body is not in possession of the pension retroactivity calculations that the Applicant is seeking. The Applicant is effectively alleging that the Public Body is being untruthful, and I realize that the actuary gave him the impression that the Public Body did its own pension calculations, at least for one of the Commissioners. However, in the face of the competing assertions between the Public Body and the actuary – the former of which is direct and the latter of which is hearsay – I believe that the Public Body does not have the retroactivity calculations.

[para 43] The result is that there are no records setting out what the Applicant considers to be the discretionary component of the pension payments made to the Commissioners. There is no relevant information in relation to the "additional retroactivity" of the pension payments to which section 17(2)(e) possibly applies.

[para 44] Still, the Applicant submits that, where a payment has both a discretionary component and non-discretionary component, all of the payment information should be disclosed if no distinction can be made between the two components. I disagree. Where an amount contains both a discretionary and non-discretionary component, the amount does not fall under section 17(2)(e) of the Act. Disclosure of the global amount will not indicate the amount that is discretionary, and which is the only amount to which section 17(2)(e) possibly applies. I say “possibly” because I discuss below the extent to which section 17(2)(e) captures dollar amounts paid in relation to a discretionary benefit.

(b) *Retirement allowances, pension payments and other amounts given to the Commissioners*

[para 45] The Applicant himself says that the pension amounts paid to the Commissioners in respect of service after January 1, 1992 are not discretionary benefits. He believes that only the amounts paid for the period prior to January 1, 1992 were paid at the discretion of the Public Body’s administration, in that they were given to the Senior Officials but not to lower level management. He also says that the retirement allowances given to the Commissioners (although not to the City Auditor, as later discussed) are non-discretionary benefits because they were approved by City Council on March 22, 1999.

[para 46] The minutes of March 22, 1999 indicate that City Council carried a motion to adopt certain recommendations of the Committee of the Whole, which were to:

- 1. Approve the plan to introduce the over-cap pension as a way to meet the City’s obligation to all City staff, employed prior to 1992 whose pension accruals are limited by the current pension cap.*
 - 2. Approve the Provincial MEPP (Management Employees Pension Plan) formula for pension calculation for Commissioners retiring within the next 24 months.*
 - 3. Authorize the Finance Department to establish a “Pooled” fund to finance Recommendations 1 and 2. Funds currently on reserve for this purpose [are] to be transferred to the “pool”.*
- [Recommendation 4 of the Committee of the Whole was not included.]*
- 5.(A) Defer the decision on an adjustment to the salary grid until such time as the Organizational Review finalizes its review and makes recommendations concerning the future macro structure of the City.*
 - (B) Approve a retiring allowance of 2 weeks/year to a maximum of 10 months for the Commissioners who retire in the next 24 months, and authorize the allocation of specific amounts to the Personnel Committee of Council.*

6. Instruct Administration to bring back a report on the implications of the over-cap pension and MEPP formula (Recommendations 1 & 2) on the rest of the members of Senior Management.

[para 47] As for the retirement allowances given to the Commissioners, the Public Body submits that these do not constitute a discretionary benefit, as they are an entitlement that all eligible employees of the Public Body receive. It cites Order F2003-002 where it was stated that “discretionary” means that there is a choice given to a decision-maker as to whether or how to exercise a power (at para. 23). The Public Body says that it did not exercise a choice as to whether or not to give the retirement allowance. For the purposes of section 17(2)(e) of the Act, I also note that Order F2003-002 stated that “benefit” means, among other things, a favourable or helpful factor or circumstance, or an advantage (also at para. 23).

[para 48] First, the retirement allowance paid to the Commissioners was a helpful factor or circumstance, or an advantage, and therefore constitutes a benefit. Second, despite the submissions of both the Applicant and the Public Body, I find that City Council chose to give the retirement allowance to the Commissioners of its own accord, and did not have to do so. The retirement allowance was therefore discretionary. The minutes of March 22, 1999 indicate that the retirement allowance was recommended by the Committee of the Whole, rather than based on some sort of mandatory requirement or a pre-existing scheme. The Public Body suggests that a benefit is not discretionary if given to all who are eligible for it, but the fact that four Commissioners – rather than three, or two, or one – were made eligible for the retirement allowance does not make it any less discretionary, in my view. The key is whether or not the benefit was granted on the basis of a choice exercised by the decision-maker. For clarity, I point out that City Council, and not just employees of the Public Body’s administration, make decisions on behalf of the Public Body, being the City of Calgary.

[para 49] Given the foregoing, I find that the retirement allowances given to the Commissioners are discretionary benefits of the Commissioners as officers or employees of the Public Body. I return below to whether the information at issue actually falls within the category of information set out in section 17(2)(e), and is therefore about those discretionary benefits within the meaning of the section.

[para 50] While I find that the retirement allowances approved by City Council on March 22, 1999 constitute discretionary benefits, I make no comment on whether any regular or pre-existing retirement allowance to which the Commissioners may have been entitled constitutes a discretionary benefit, as there is no relevant information before me.

[para 51] As for the pension payments given to the Commissioners, I also find that they constitute discretionary benefits of the Commissioners as officers or employee of the Public Body under section 17(2)(e). The payments were under a pension arrangement that the Public Body describes as follows in its “Pension Terminology” document:

Executive Pension Plan (EPP) – describes the pension arrangement for the Commissioners that was approved by Council March 22, 1999 (see attached Minutes p. 23 – Public Document). It is a closed plan (no new members allowed). This plan was intended to be the same as the MEPP (see definition below) and was a predecessor to the OCPP and SPP plans. The difference was that in the EPP, there were no employee contributions for the piece associated with the SPP, and the SPP service was credited to their hire date.

Management Employees Pension Plan (MEPP) – is the provincial pension plan for Managers within the Government of Alberta. The MEPP formula was used to calculate the OCPP benefits for the Commissioners who retired within 24 months of 1999 March 22, as approved by Council.

MEPP provides an annual retirement pension based on the following formula:

2.0% X years of pensionable service X highest average salary (5 years)

[para 52] I see above that the terms EPP and OCPP are, once again, being used in a confusing fashion, in that the Public Body calls the Commissioners' pension arrangement the "EPP", then says that the MEPP formula was used to calculate their "OCPP" benefits. Regardless of the name of the pension plan, as well as the fact that the City Council minutes do not refer to an EPP, the Commissioners' pension arrangement constitutes a benefit, in that it was a favourable or helpful factor or circumstance, or an advantage. I also find that the pension arrangement was discretionary, as it was approved by City Council following a recommendation of the Committee of the Whole rather than pursuant to a requirement, and it was over and above whatever regular or pre-existing pension plan the Commissioners were entitled to up to that point.

[para 53] I make no comment on whether the Commissioners' regular or pre-existing pension plan or plans constitute discretionary benefits under section 17(2)(e), as that information is not at issue in the inquiry. Here, the pension payments issued to the Commissioners – which appear on pages 1, 47, 93 and 94 of the records – are only in respect of the pension arrangement approved on March 22, 1999 and that I have found to constitute a discretionary benefit. In its letter of November 5, 2010, the Public Body states that the EPP is the pension arrangement that was approved on March 22, 1999, and that, on records 47, 93 and 94, "payments described as commuted value reflect payments pursuant to the Executive Pension Plan (EPP)". By tracing the information on those pages, I find that the information on page 1 also reveals the pension payments in question.

[para 54] The pension payments at issue do not include the commuted value on page 54, as that payment was to an individual who is not one of the Senior Officials. This Office contacted the Public Body to determine why the particular individual's

information was in the records, and the Public Body explained that his information was incorrectly included because he was misidentified at the time as an executive officer when, in fact, he is not.

[para 55] Although I find that the foregoing pensions and retirement allowances to which the Commissioners were entitled constitute discretionary benefits under section 17(2)(e) of the Act, I find that the specific information that is at issue in this inquiry – being the dollar amounts of the pension payments, the dollar amounts of the retirement allowances, and the dates that the pension payments and retirement allowances were paid – do not fall within the category of information contemplated by section 17(2)(e). My interpretation of the section is that it captures only more general information about these discretionary benefits.

[para 56] Order 2001-020 (at para. 20) stated that one of the purposes of section 17(2)(e) is to allow the release of information about the employment benefits of public employees, allowing a degree of transparency in relation to the compensation and benefits provided to public employees; the general reference to “benefits” rather than to specifically identified benefits in section 17(2)(e) indicates that the legislative intention was to capture a range of discretionary benefits that flow from the employment relationship. I note that, while section 17(2)(e) captures a range of discretionary benefits, its objective is to permit a “degree” of transparency, as opposed to disclosure of everything there is to know about a public official’s discretionary benefits.

[para 57] Section 17(2)(e) states that it is not an unreasonable invasion of the personal privacy of officers and employees of public bodies if one discloses information about their “classification, salary range, discretionary benefits or employment responsibilities”. Given the set of information listed, it is my view that section 17(2)(e) is intended to permit the disclosure of relatively general information about the employment, pay and entitlements of public officials. Reference is made to “classification” as opposed to job title, to “salary range” as opposed to salary, and to “employment responsibilities” as opposed to work-related activities actually carried out. In keeping with the nature of the information listed, I believe that information about “discretionary benefits”, within the meaning of section 17(2)(e), includes the name and nature of the discretionary benefit, which officers and employees are entitled to it, and as was found in Order F2003-002 (at para. 24), the formula or mechanism for calculating the benefit. However, the information contemplated by section 17(2)(e) does not normally include details such as the dollar amount of the discretionary benefit paid to a particular individual. I say “normally” because, as I hypothesize below, there may be times when the discretionary benefit is simply a dollar amount without any reference to a formula, or reference to the formula will necessarily reveal the dollar amount.

[para 58] My interpretation that section 17(2)(e) captures relatively general information flows not only from the nature of the series of information listed in that provision. Unlike other provisions of section 17(2) – namely sections 17(2)(f) and 17(2)(h) – section 17(2)(e) does not use the term “details”.

[para 59] In Order 2001-020, the former Commissioner reviewed information in what he called a “severance agreement” or “severance package”, and wrote that he thought that the Legislature contemplated that “precise sums and details” of this particular benefit could be disclosed under what is now section 17(2)(e) (see para. 20). In Order F2004-028 (at para. 19), an Adjudicator likewise found that “precise sums of the severance payments” were properly disclosed.

[para 60] I do not know what “precise sums” actually appeared in the agreements at issue in the previous inquiries. If there were dollar amounts set out in the agreements, as opposed to a formula or mechanism for calculating the amount of the benefit, it is possible that the dollar amount was, in and of itself, the only available information about the discretionary benefit. Unique amounts paid as a result of a specific employee’s severance might fall under section 17(2)(e) on the basis that the precise sum is essentially all that there is about the nature of the discretionary benefit being conferred. To disclose merely the fact that an individual received an unspecified sum of money would not achieve the degree of transparency intended by section 17(2)(e).

[para 61] In the present inquiry, conversely, the nature of the pension plan and retirement allowance to which the Commissioners were entitled, and the fact that the Commissioners are the individuals who were entitled to them, is sufficiently conveyed through the descriptions of the pension plan and retirement allowance, and the formulas for calculating them. This achieves the degree of transparency intended by section 17(2)(e), and the Applicant has already received this information by way of the Council minutes of March 22, 1999 and other information conveyed by the Public Body. I realize again that there was some confusion as to the name and nature of the pension plan to which the Commissioners were entitled, but I believe that this has now been clarified by way of the Public Body’s submissions in the inquiry. In any event, disclosure of the dollar amounts paid to the Commissioners will not provide any further clarification as to the nature of the pension benefit.

[para 62] As for the date that a discretionary benefit is paid to an individual, I also find that this information is normally too specific to fall within the category of information set out in section 17(2)(e). Section 17(2)(e) contemplates disclosure of the existence and nature of the discretionary benefit, and who is entitled to it, but not the dates that the benefits are paid. Here, the Applicant has effectively asked for information regarding lump sum pension payouts issued to the Commissioners as commuted values. The Public Body submits that the manner in which the pension entitlements were paid to the Commissioners – that is by way of a lump sum commuted value as opposed to a monthly payment – reflects a personal financial choice that does not fall under section 17(2)(e). I agree. Disclosure of the dates of the pension payments would reveal which Commissioners opted to receive their pension benefits as a commuted value, given that the dates of the payments are in proximity of their retirement dates. This particular aspect of the discretionary benefit given to the Commissioners does not, in my view, fall within section 17(2)(e).

[para 63] Even apart from the foregoing, I believe that disclosure of the date that a discretionary benefit is paid to a third party is normally a detail that does not fall within the scope of section 17(2)(e). Here, with respect to the retirement allowances paid to the Commissioners, it is already known that they were payable on retirement, which is the aspect of the timing of the discretionary benefit that falls under section 17(2)(e). The specific date on which a particular Commissioner was sent a cheque does not fall under section 17(2)(e), as such disclosure is not necessary to achieve the degree of transparency intended by the section. To frame this point and the ones made above differently, section 17(2)(e) permits disclosure of the fact that an identifiable public employee is entitled to a particular type of discretionary benefit based on a particular formula and given in a particular timeframe, but it does not normally permit disclosure of the fact that the individual received a particular dollar amount on a particular date.

[para 64] While I find that the payment dates in this inquiry do not fall under section 17(2)(e), I do not preclude the possibility of a future case in which the date of a benefit payment falls under section 17(2)(e) such that disclosure of the date is not an unreasonable invasion of personal privacy. As with a dollar amount that is all that is available to be known about the nature or size of a discretionary benefit, there may be instances where the date of the payment is all that is available to be known about the timing of the discretionary benefit.

[para 65] I have said above that information about who is entitled to a discretionary benefit falls under section 17(2)(e). In making this comment, I have noted that other Orders from this Office found, by contrast, that the names of third parties receiving a discretionary benefit did not fall under section 17(2)(e) (Order 2001-020 at paras. 45 and 46; Order F2003-002 at para. 26; Order F2004-028 at para. 19). However, in my view, the information identifying an individual as the recipient of a discretionary benefit is precisely the information contemplated under section 17(2)(e), the disclosure of which is not an unreasonable invasion of personal privacy. The identifying information is what makes the information in question about an identifiable third party, and therefore what gives rise to third party personal information to be considered under section 17 in the first place. Having said this, the Applicant in this inquiry is already aware of the identities of the Commissioners who were entitled to the pension arrangement and retirement allowance set out in the Council minutes of March 22, 1999. Further, the names of the Commissioners who were employed by the Public Body at the time are publicly known. The minutes of March 22, 1999 therefore already reveal the identities of the individuals entitled to the discretionary benefits in question, which is the information captured by section 17(2)(e).

[para 66] While I have discussed that certain information does not fall within the categories of information about “classification, salary range, discretionary benefits or employment responsibilities” under section 17(2)(e), this does not mean that the information cannot be disclosed on consideration of the relevant circumstances under section 17(5). For instance, while information about work-related activities that have actually been carried out by a public official do not fall under section 17(2)(e), several Orders of this Office have found that information about work-related activities may

nonetheless be disclosed without contravening section 17(1). Similarly, it is possible for the relevant circumstance regarding public scrutiny to apply to the dollar amount of a discretionary benefit paid, and even an individual's exact salary, in such a way that disclosure would not be an unreasonable invasion of personal privacy. I discuss the Applicant's submissions regarding public scrutiny later in this Order.

[para 67] In item 4 of his access request, the Applicant asked for records showing any "additional payments" made to the four Commissioners, not previously disclosed to him. According to the Public Body in its letter of June 15, 2009, the corresponding records at issue appear on pages 25 to 60. These pages contain information about a variety of types of payments. I have already made findings in respect of the retirement allowances revealed on these pages, as there was relevant and sufficient information before me.

[para 68] As for the other payments made to the Commissioners, which are reflected as various sub-amounts on payment stubs and as line items in charts, the names or types of payments were disclosed to the Applicant by the Public Body. However, he did not argue that any of these payments are in respect of a discretionary benefit. He focused his argument on the payments made in respect of the Commissioners' employment prior to January 1, 1992, which has already been discussed. In the absence of argument or evidence as to how the other payments revealed on pages 25 to 60 constitute discretionary benefits, I find they do not. Under section 71(2) of the Act, the Applicant has the burden of proving that disclosure would not be an unreasonable invasion of a third party's personal privacy – and therefore that section 17(2)(e) applies – and he has failed to discharge that burden. Further, my own independent review of the information in the records at issue, along with the evidence before me, does not enable me to decide whether any of the additional payments made to the Commissioners constitute discretionary benefits.

(c) *Payments to the City Auditor and CEO*

[para 69] In item 5 of his access request, the Applicant asked for records describing other benefits paid to the City Auditor, apart from vacation amounts, and he specifically mentioned "Overcap payout, retirement bonus, deferred compensation payment, etc." The corresponding information at issue appears on page 61 of the records, and the Public Body reiterated in its letter of June 30, 2009 that all of the other benefits paid to the City Auditor appear on that page. Page 61 contains amounts for "Vacation owing", "Stat Holiday payout", "Retirement Vacation Bonus" and "Retirement Allowance", which terms were disclosed to the Applicant. (In its June 15, 2009 letter to this Office, the Public Body also referred to page 62 as being responsive to item 5 of the Applicant's access request, but that page relates to the CEO.)

[para 70] As for the Applicant's specific request for the City Auditor's "Overcap payout" and "deferred compensation payment", page 61 does not refer to any of the amounts on the page using those terms.

[para 71] The Applicant does not argue that the City Auditor's vacation payout or statutory holiday payout is a discretionary benefit, and in fact, he did not request information about the City Auditor's vacation amounts in his access request. I considered that the Applicant may have intended to have access to the retirement vacation bonus on page 61, even though it is about vacation, given that he specifically enumerated "retirement bonus" in his access request. I also note that he submits:

Upon his retirement in 2006, the City Auditor appears to have received a bonus of approximately \$250,000 included in a larger amount reported as "vacation and other benefits" in the annual financial report. Surely so large an individual bonus, for which we know to be a precedent, should have been identified as such.

I take the Applicant's reference to "bonus" above to be to a large sum issued to the City Auditor, and not the relatively small retirement vacation bonus appearing on page 61. In any event, I have insufficient evidence, in relation to the retirement vacation bonus paid to the City Auditor, to find that it is a discretionary benefit within the meaning of section 17(2)(e) of the Act. I do not know whether the Public Body chose to give it to him, as opposed to being required to give it.

[para 72] As for the retirement allowance paid to the City Auditor, the Applicant specifically argues that it is discretionary. However, while I have evidence before me about the retirement allowances paid to the Commissioners, I have insufficient evidence before me to conclude that the retirement allowance given to the City Auditor was a discretionary benefit. I realize that the Applicant submits that the City Auditor's retirement allowance was discretionary precisely because it was not one of those approved by City Council on March 22, 1999. However, the absence of authority in the records before me does not mean that there is no authority somewhere else to give the City Auditor his retirement allowance, which may or may not be pursuant to a mandatory requirement. Because I have no information about the source or origin of the City Auditor's retirement allowance, I have no idea whether the Public Body was required to give the benefit to him, or simply chose to give it when it did not have to. Further, even if the City Auditor's retirement allowance constitutes a discretionary benefit, it is probable that the dollar amount of the payment would not fall under section 17(2)(e), given my earlier interpretation of the information that falls within the scope of that provision. As for the date that the City Auditor received his retirement allowance, this does not appear on page 61.

[para 73] In item 6 of his access request, the Applicant asked for records showing the amount of the final settlement and additional expenses incurred in relation to the CEO's termination of employment, but the Public Body withheld most of the responsive information under section 27 of the Act. I therefore discuss it later in this Order.

[para 74] There is a small amount of information responsive to item 6 of the Applicant's access request that the Public Body withheld under section 17. This is the information about the CEO's pension benefits in his Release and Settlement Agreement,

which I referred to earlier. The Public Body gave the Applicant access to the descriptions of the pension benefits that the Public Body gave to the CEO and the formulas for calculating the payments, but withheld a monthly dollar amount. For the reasons set out earlier, I find that the dollar amount does not fall within the general category of information about discretionary benefits within the terms of section 17(2)(e), even assuming that the CEO's pension entitlements given by the Public Body were discretionary benefits.

[para 75] In item 6, the Applicant also asked for a copy of the CEO's employment contract. Most of it was released to him. In the CEO's Employment Agreement, as well as the Release and Settlement Agreement, the Public Body withheld some additional information about the CEO's pension entitlements under section 17. However, the information relates to a pension offered by the CEO's previous employer, being a private organization. As section 17(2)(e) refers only to discretionary benefits of an individual in his or her capacity as an officer, employee or member of a public body, or as staff of a member of the Executive Council, the section cannot apply to the foregoing pension information of the CEO.

3. Presumptions against disclosure under section 17(4) and relevant circumstances regarding disclosure under section 17(5)

[para 76] I have found that none of the records fall within the scope of section 17(2)(e), under which disclosure of certain information is not an unreasonable invasion of the personal privacy of third parties. In respect of all of the personal information of the Senior Officials at issue in this inquiry, I must therefore go on to consider the other provisions of section 17.

[para 77] Sections 17(4) and 17(5) of the Act read, in part, as follows:

17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(d) the personal information relates to employment or educational history,

...

(g) the personal information consists of the third party's name when

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

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

...

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

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

...

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

...

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

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

(g) the personal information is likely to be inaccurate or unreliable,

...

[para 78] I find that there are presumptions against disclosure of the personal information of the Senior Officials under section 17(4)(d) (personal information relating to employment history) and/or section 17(4)(g) (name appearing with or revealing other personal information).

[para 79] Even where presumptions against disclosure arise under section 17(4) of the Act, all of the relevant circumstances under section 17(5) must be considered in determining whether a disclosure of personal information would constitute an unreasonable invasion of a third party's personal privacy.

(a) Some of the relevant circumstances

[para 80] The Public Body submits that disclosure of some of the personal information in the records at issue would expose the Senior Officials unfairly to financial or other harm within the terms of section 17(5)(e) of the Act. I fail to see how disclosure of any of the records at issue would result in harm, let alone "unfair" harm. I therefore find that section 17(5)(e) does not apply.

[para 81] The Public Body submits that disclosure of some of the pension information of the CEO was supplied in confidence under section 17(5)(f), which would be a relevant circumstance against disclosure. The Public Body describes the information as "information related directly to a third party's financial planning and overall financial situation". While it is possible that the CEO supplied this information to the Public Body in confidence, I have insufficient evidence to find that to be the case here. I therefore find that section 17(5)(f) does not apply.

[para 82] The Public Body explains, elsewhere in its submissions, that when some of the cheques appearing in the records at issue were issued to the Commissioners, the Public Body was undergoing a reorganization of its administration and used temporary and inaccurate job titles on the payment stubs. Because the job titles are inaccurate or unreliable, I find this to be a relevant circumstance under section 17(5)(g) that weighs against disclosure.

[para 83] A third party's refusal to consent to the disclosure of his or her personal information is a factor weighing against disclosure (Order 97-011 at para. 50; Order F2004-028 at para. 32). This Office could locate only one of the Senior Officials, who indicated that he did not wish to participate in the inquiry but that he did not want his name disclosed to the other parties or in the Order. Because the other Senior Officials or their representatives could not be located, or did not respond, I will also take into account their inability to consent or object, in the course of the inquiry, to disclosure of their personal information appearing in the records at issue (Order F2008-031 at para. 125).

[para 84] The Public Body says that it considered whether, but did not find that, disclosure of any of the personal information at issue was relevant to a fair determination of the Applicant's rights, which would be a relevant circumstance in favour of disclosure under section 17(5)(c) of the Act. I agree that there is no basis on which to find that the records are relevant to a fair determination of the Applicant's rights.

(b) *The relevant circumstance regarding public scrutiny*

[para 85] The Applicant submits that disclosure of the records at issue is warranted under section 17(5)(a) of the Act because it is desirable for the purpose of subjecting the activities of the Public Body to public scrutiny. He writes:

The Applicant is one member of a group of retired City management staff that has uncovered what initially appears to be a complex pension arrangement. However, upon closer examination, this pension arrangement appears to be nothing more than a deferred compensation plan that rewards top officials with large payments shortly after their retirement. These payments are not identified in the annual financial statements and have therefore avoided public disclosure. The group has been diligently working on this investigation for the past eight (8) years... During their investigation, which necessitated more than a dozen (12) FOIP access requests as well as a review and inquiry by the Alberta Privacy Commissioner, the group discovered several unexplained irregularities with the so-called OCPP [overcap pension plan] developed and implemented by top officials with immediate benefit to themselves.

[para 86] As for the "unexplained irregularities", the Applicant raises various issues regarding the implementation and administration of the pension payments made to the Senior Officials. He says that the OCPP was first mentioned in the Public Body's 2003

annual report, even though it came into effect on February 1, 2000, which he says suggests that the Public Body wanted to maintain the secrecy of the payouts. He submits that one Commissioner received a payout in 1999 even before the plan came into effect. He argues that there was a lack of financial control in issuing the payment to another Senior Official, citing e-mails that he says show that there were insufficient backup calculations and a reluctance to expose the calculations to the Public Body's external auditor. He provided a copy of another e-mail suggesting that the entitlements for another Senior Official were switched from an existing monthly payment to a commuted value, which he says is unorthodox. He also questions why the cheque to that Senior Official was apparently post-dated. He says that the pension agreement of one Commissioner was authorized by his subordinate, and that the Commissioner authorized the pension agreements of his fellow Commissioners, all of which he argues was improper because the agreements lacked City Council approval. The Applicant adds that there are excessive overhead costs in administering the plan by the outside administrator.

[para 87] The Applicant then goes on to write as follows:

The above issues and serious questions have been take to City Council, the [subsequent] City Auditor, the External Auditor and the Chief Financial Officer without any credible explanation or forthcoming action to address, or in some cases, even acknowledge our concerns. ... At the very least, The City's procedures for approval of personal compensation at retirement should be thoroughly investigated since there are clearly no safe guards in place.

[para 88] The Applicant also cites an e-mail, dated November 3, 1999, in which the City Treasurer apparently stated: "...I have reviewed all previous Council's decisions on T2 (Supplementary Pension) and T3 (OCPP) and found no definitive decisions being made. There is, however, one decision which approved these concepts in principle and asked Admin to bring forward (a report) with financial impacts". I take the reference to decisions "in principle" to be to the decisions set out in the Council minutes of March 22, 1999. The Applicant questions whether the pension payments issued to the Senior Officials, the criteria for calculating the amounts, the source of the funding and the budget were properly approved by City Council. He adds that the report requested by City Council regarding the plan's financial impacts has never been produced. In his correspondence of June 17, 2009 to this Office, the Applicant stated that "the single most important issue is that the Public Body, after repeated requests, has provided no record(s) showing the legislative authority (i.e. City Council) that approved either the Overcap Pension Plan (OCPP) or the appropriation of any funds for the plan."

[para 89] By contrast, the Public Body says that the pension arrangement in question was properly approved by City Council. It submits that the need for public scrutiny has not been established, arguing that it has already disclosed a substantial amount of information such that the release of further information is not desirable for the purpose of public scrutiny.

[para 90] In order for public scrutiny to be a relevant circumstance, there must be evidence that the activities of the Public Body have been called into question, which necessitates the disclosure of personal information in order to subject the activities of the Public Body to public scrutiny (Order 97-002 at para. 94; Order F2004-015 at para. 88). In determining whether public scrutiny is desirable, I may consider whether more than one person has suggested that public scrutiny is necessary; whether the Applicant's concerns are about the actions of more than one person within the Public Body; and whether the Public Body has not previously disclosed sufficient information or investigated the matter in question (Order 97-002 at paras. 94 and 95; Order F2004-015 at para. 88). However, it is not necessary to meet all three of the foregoing criteria in order to establish that there is a need for public scrutiny (*University of Alberta v. Pylypiuk* at para. 49). What is most important to bear in mind is that the desirability of public scrutiny of government or public body activities under section 17(5)(a) requires some public component, such as public accountability, public interest or public fairness (*University of Alberta v. Pylypiuk* at para. 48; Order F2005-016 at para. 104).

[para 91] The Applicant raises several concerns about the Public Body's administration of the pension plan or plans in which the Senior Officials participated, and about payments issued to them under it. In order for personal information to be disclosed on the basis of public scrutiny, disclosure of it must be necessary in order to subject the activities of the Public Body to public scrutiny. In other words, section 17(5)(a) militates in favour of disclosing only the personal information that is required for public scrutiny to be achieved.

[para 92] Here, I find that disclosure of most of the records at issue would not aid in public scrutiny. The information that the Public Body withheld from the Applicant, in the records submitted to me, reveals very little, if anything, about approvals and processes, or the way in which the pension plans are administered by the Public Body or the outside plan administrator. The Applicant requested information about approvals in items 1 to 3 of his access request, but most of the responsive information in the records before me was disclosed to him. I realize that the Applicant considers the Public Body's response to him to be deficient, but I am only in a position to determine whether the records before me should be disclosed on the basis of public scrutiny. I also realize that the Applicant takes the position that the Council minutes of March 22, 1999 did not properly authorize all aspects of the pension arrangements involving the Senior Officials, but disclosure of the records at issue will not shed any further light on the extent to which the pension arrangements were authorized.

[para 93] I do, however, find that disclosure of some of the information on the bottom of page 2 and on page 3 of the records is desirable for the purpose of subjecting the activities of the Public Body to public scrutiny. I explained earlier that this information is responsive to the Applicant's access request. In particular, it is about the approvals to issue the two cheques identified by the Applicant in item 3 of his access request. Even more particularly, the information is about the source and method of paying particular pension amounts. In my view, the Applicant has sufficiently called these details into question, in that there appears to be very little information about the

funding and budget regarding the pension payments, even if the scheme was generally approved by City Council on March 22, 1999. The Applicant has established that other individuals are concerned about the financial details of the pension arrangement, such as the City Treasurer who made comments in the e-mail discussed above. I find that there is a public component, in that the process behind issuing the pension payments to the Commissioners, as reflected on pages 2 and 3, concerns public accountability (*University of Alberta v. Pylypiuk* at para. 48; Order F2005-016 at para. 104).

[para 94] Apart from his concerns about the Public Body's pension plan administration, the Applicant submits that disclosure of the payment amounts issued to the Senior Officials is, in and of itself, desirable for public scrutiny. He writes:

Surely the public interest in full disclosure is not in question? Historically there has been material interest on the part of the taxpayer in these unusual one-time payments to senior officials. For example, the Calgary Health Region (CHR) was ordered by Auditor General Fred Dunn to publicly disclose similar one-time, post-retirement payments to their senior officials. Since The City of Calgary and the CHR both operate using public funds, disclosure requirements should be consistent to ensure the taxpayer is made aware of all one-time, post-retirement payments to all senior officials.

[para 95] The mere fact that the Senior Officials received post-retirement payments and the possibility that taxpayers might be interested in knowing the amounts are insufficient to establish that the amounts require public scrutiny. The Public Body states that, pursuant to section 217(3) of the *Municipal Government Act*, it has disclosed financial information as it pertains to the third parties who held the position of Chief Executive Officer – which I take to include the CEO as well as the Commissioners, as the parties in this inquiry also referred to the latter as the executive officers, and they were the Public Body's administrative heads before the single position of CEO was created. The Public Body further notes that section 1 of the *Supplementary Accounting Principles and Standards Regulation* requires it to disclose the benefits of chief administrative officers and designated officers. In the case of designated officers – one of whom was the City Auditor according to the Public Body – the benefits are to be disclosed as total or aggregate figures that include the benefits of all designated officers. Further, while section 2 of that Regulation requires the Public Body to include “base pay, bonuses, overtime, lump sum payments, honoraria and other direct cash remuneration” in the total figure respecting salaries, it does not require each sub-amount to be disclosed separately.

[para 96] In the absence of additional argument and evidence from the Applicant as to why it is desirable to publicly scrutinize the dollar amounts of the payments at issue in this inquiry, I find that public scrutiny has been sufficiently achieved by way of the disclosure requirements set out in the *Municipal Government Act* and *Supplementary Accounting Principles and Standards Regulation*.

[para 97] Given the foregoing, I find that the circumstance regarding public scrutiny under section 17(5)(a) of the Act is relevant only to disclosure of some of the information on pages 2 and 3 of the records. No other relevant circumstances in favour of disclosing the personal information of the Senior Officials have been drawn to my attention, and I find that there are none.

4. Weighing the presumptions and relevant circumstances

[para 98] For most of the personal information of the Senior Officials that is at issue in this inquiry, I have found only presumptions and relevant circumstances weighing against disclosure. I therefore conclude that disclosure would be an unreasonable invasion of the personal privacy of the Senior Officials under section 17(1) of the Act, and that the Public Body properly withheld the information.

[para 99] As for the information at the bottom of page 2 and on page 3 of the records, I find that the relevant circumstance under section 17(5)(a), regarding public scrutiny of the Public Body's process of paying pension amounts, outweighs the applicable presumptions and relevant circumstances against disclosure. There are exceptions, in that there is the name of an individual on page 3 (appearing before the words "but his was through"), the disclosure of which is not desirable for the purpose of subjecting the activities of the Public Body to public scrutiny. The individual appears to be another employee of the Public Body who received a pension payment, but public scrutiny may be achieved without disclosing his name. I also find that the payment dates revealed on pages 2 and 3 are not required in order to publicly scrutinize the source and method of payment. However, the dates of the e-mails may not be withheld under section 17. For reasons set out earlier in this Order, those dates are nobody's personal information.

[para 100] Although I find that disclosure of the foregoing information would not be an unreasonable invasion of the personal privacy of third parties under section 17 (with the exceptions just noted), the Public Body considered the information at the bottom of page 2 and on all of page 3 to be non-responsive to the Applicant's access request. I explained earlier in this Order that the information on those pages is indeed responsive. I therefore intend to order the Public Body to give the Applicant access to it, subject to any other exceptions to disclosure on which the Public Body may choose to rely. If the Public Body withholds the information from the Applicant on the basis of another exception, he may request a review.

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

[para 101] The Public Body specifically relied on section 24(1)(d) of the Act to withhold some of the information requested by the Applicant. That section reads 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

...

(d) plans relating to the management of personnel or the administration of a public body that have not yet been implemented,

[para 102] The Public Body applied section 24(1)(d) to only the inaccurate job titles of some of the Senior Officials, which appear on certain payment stubs. As I concluded above that these inaccurate job titles were properly withheld under section 17, it is not necessary for me to decide whether they were also properly withheld under section 24.

C. Did the Public Body properly apply section 25 of the Act (disclosure harmful to economic interests of a public body) to the records/information?

[para 103] The Public Body specifically relied on section 25(1)(b) of the Act to withhold some of the information requested by the Applicant. That section reads as follows:

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

...

(b) financial, commercial, scientific, technical or other information in which a public body or the Government of Alberta has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value;

[para 104] In its submissions, the Public Body states that it applied section 25 to records involving its “financial accounts and routing information”. I see from the records submitted that the information consists, for instance, of bank account information at the bottom of cheques issued by the Public Body.

[para 105] The Public Body states that, on further review, it is prepared to release the information that it withheld under section 25. I accordingly find it unnecessary to address the above issue, and expect the Public Body to release to the Applicant the information to which it applied section 25.

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

[para 106] Section 27 of the Act reads, in part, 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,*

...

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

[para 107] The Public Body relied on section 27 to withhold information from the Applicant in response to his request for “the record(s) showing the amount of [the CEO’s] final settlement with The City of Calgary” and for “the records showing any additional expenses (i.e. legal and any other expenses not included in previous records being requested) incurred by The City of Calgary to prematurely terminate [the CEO’s] employment contract”.

[para 108] As for the Applicant’s request for the “amount of [the] final settlement”, I find that all of the responsive information has already been disclosed to him, or was properly withheld under section 17 of the Act. First, the Applicant received a copy of the Release and Settlement Agreement between the CEO and the Public Body, and the amount of the “termination payment” was disclosed. Information about how this amount was calculated has also been disclosed to the Applicant on page 101 of the records, as the Public Body decided, in the course of the inquiry, to release that page. Information about a “non-taxable settlement” with the former CEO was disclosed to the Applicant on page 76 and 98 of the records. Finally, although the Public Body withheld dollar amounts in relation to the CEO’s pension benefits in the Release and Settlement Agreement, this information was properly withheld by the Public Body under section 17, as found earlier in this Order.

[para 109] As for records showing any “additional expenses” incurred to terminate the CEO’s employment contract, the Public Body submitted 56 pages *in camera*, which consist of letters between lawyers, and lawyers’ bills of account. However, the Public Body already created and released to the Applicant a record showing amounts in relation to legal expenses that it incurred, which correspond to the amounts reflected on almost all of the 56 pages. This record that was created is page 112.1, under Tab 2 of the Public Body’s submissions, and I find that it sufficiently responds to most of the Applicant’s request for the additional expenses incurred.

[para 110] Two of the 56 pages submitted *in camera* contain responsive information not reflected on page 112.1. However, the information on those two pages is reflected on page 76 and 98 of the records, which were already disclosed to the Applicant and sufficiently responds to the remainder of his request for the additional expenses incurred.

[para 111] The result is that the information on the 56 pages submitted by the Public Body is either not responsive to the Applicant’s access request (e.g., itemized descriptions of legal advice and services shown on the bills of account), or the Public

Body has already provided the responsive information (i.e., the amounts in relation to its legal expenses on page 112.1, and the amount reflected on pages 76 and 98). In my view, disclosure of the responsive information another time would serve no purpose.

[para 112] I note that the Applicant asked for the “records” showing the additional expenses just discussed, and I therefore considered whether his intention was to obtain copies of all of the original records in which the additional expenses are found. However, my interpretation of his access request is that he was interested in receiving the amounts, not each and every record where the amounts appear. Even though the amount reflected on page 76 and 98 appears in the 56 pages submitted *in camera*, the amount has already been disclosed to the Applicant twice, being once on each of those two pages. With respect to the Public Body’s legal expenses, page 112.1 already includes that name of the Public Body, the date that each lawyer’s bill was sent, each invoice number, and the total billed on each invoice. If I were to order the Public Body to disclose the foregoing information exactly as it appears in the lawyer’s letters and bills of account, the Applicant would receive the same information already disclosed to him, although it would be dispersed on a number of otherwise blank or redacted pages. I fail to see the utility in that exercise.

[para 113] Given the foregoing, I find that there is no information for me to address under section 27 of the Act.

V. ORDER

[para 114] I make this Order under section 72 of the Act.

[para 115] I find that some of the information withheld by the Public Body is not responsive to the Applicant’s access request, or that the Applicant has now indicated that he does not want access to the information. This information is therefore not at issue.

[para 116] As for the information that is at issue, I find that section 17 of the Act applies to most of the information that the Public Body withheld under that section, as disclosure would be an unreasonable invasion of the personal privacy of third parties. Under section 72(2)(b), I confirm the decision of the Public Body to refuse the Applicant access to the information at issue that it withheld under section 17, with the exceptions noted in the next two paragraphs.

[para 117] I find that section 17 of the Act does not apply to the dates of the e-mails that the Public Body withheld on the upper portion of page 2 of the records, as they are nobody’s personal information. Under section 72(2)(a), I require the Public Body to give the Applicant access to the dates of the e-mails on the upper portion of page 2.

[para 118] I also find that section 17 of the Act does not apply to the information that the Public Body considered to be non-responsive to the Applicant’s access request, but is actually responsive, on the lower portion of page 2 and on all of page 3 of the records, except for the payment dates on both pages (but not the dates of the e-mails), and the

name of the individual appearing before the words “but his was through” on page 3. Disclosure of the foregoing information is desirable for the purpose of subjecting the activities of the Public Body to public scrutiny, and this relevant circumstance outweighs the presumptions and relevant circumstances against disclosure, such that disclosure would not be an unreasonable invasion of the personal privacy of third parties. Under section 72(2)(a), I require the Public Body to give the Applicant access to the information on the lower portion of page 2 and on page 3 that I have found not to fall within the exception to disclosure under section 17. However, under section 72(4), I specify that this is subject to any other exception to disclosure on which the Public Body may choose to rely.

[para 119] I make no finding as to whether the Public Body properly applied section 24 of the Act (advice, etc.) to the records/information, as I have found that the information to which the Public Body applied section 24 was properly withheld under section 17.

[para 120] I make no finding as to whether the Public Body properly applied section 25 of the Act (disclosure harmful to economic interests of a public body) to the records/information, as the Public Body has indicated that it is willing to disclose to the Applicant the information to which it applied section 25.

[para 121] I make no finding as to whether the Public Body properly applied section 27 of the Act (privileged information, etc.) to the records/information, as the Public Body has already disclosed to the Applicant, elsewhere in the records, all of the responsive information that it withheld under that section, and disclosure of the same information again would serve no purpose.

[para 122] 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