ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2010-022

February 11, 2011

UNIVERSITY OF CALGARY

Case File Number F4833

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), the Applicant asked her former employer, the University of Calgary (the "Public Body"), for information held by various other employees, a Wellness Centre and a doctor associated with the Wellness Centre. The Public Body provided some of the requested information, but withheld other 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 Public Body did not provide information from the Wellness Centre or doctor, instead advising the Applicant to request the records directly from the Wellness Centre. The Public Body also stated that a number of documents contained information that it did not consider to be responsive to the access request.

The Applicant requested a review of the Public Body's non-provision of information to her, including information that it decided to withhold, information from the Wellness Centre and doctor, information of employees that she believed to exist but was not accounted for, and information that the Public Body considered non-responsive to her access request.

The Adjudicator found that, generally speaking, the Public Body had no duty to search for and provide records held by the Wellness Centre and the doctor associated with it, as the records were not in the custody or under the control of the Public Body under sections 4(1) and 6(1) of the Act. The Adjudicator noted an exception regarding a particular

category of records set out in the services agreement between the Public Body and the third party that operated the Wellness Centre.

As for the remaining information requested by the Applicant, the Adjudicator found that the Public Body did not meet its duty to assist her under section 10 of the Act, as it failed to make every reasonable effort to search for the requested records, and failed to inform the Applicant about what was done to search for them. He ordered the Public Body to perform its obligations in these respects.

The Adjudicator found that the Public Body did not properly apply section 24 or 25 to any of the information that it withheld under those sections, as it failed to provide sufficient argument or evidence to justify its application of those sections. He ordered the Public Body to disclose the information to the Applicant, with the exception of information that it was required to withhold under section 17.

The Adjudicator found that disclosure of some of the personal information of third parties in the records at issue would be an unreasonable invasion of their personal privacy under section 17, and he therefore confirmed the Public Body's decision to withhold it, or required it to be withheld. The Adjudicator found that other information withheld by the Public Body under section 17 was not subject to that section, so he ordered the Public Body to disclose the information to the Applicant.

At the time of issuing the Order, the Adjudicator was not in a position to decide the issue of whether the Public Body properly applied section 27 of the Act to the records withheld under that section.

Statute Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(e), 1(h), 1(h)(ii), 1(n), 2(e), 4, 4(1), 6, 6(1), 6(2), 10, 10(1), 10(2), 11, 17, 17(1), 17(2), 17(2)(e), 17(4), 17(4)(b), 17(4)(d), 17(4)(f), 17(4)(g), 17(5), 17(5)(c), 17(5)(i), 24, 24(1), 24(1)(a), 24(1)(b), 24(1)(c), 24(1)(d), 25, 25(1), 25(1)(a), 25(1)(b), 25(1)(c), 25(1)(d), 27, 27(1)(a), 56(2), 67(1)(a)(ii), 71(1), 71(2), 72, 72(2)(a), 72(2)(b), 72(2)(c), 72(3)(a), 72(4) and 92(1)(g).

Authorities Cited: AB: Orders 96-006, 96-012, 96-019, 97-003, 97-020, 98-003, 99-001, 99-013, 99-021, 99-028, 99-032, 99-038, 2000-014, 2001-016, F2002-006, F2002-014, F2002-028, F2003-001, F2003-005, F2004-008, F2004-015, F2004-026, F2005-004, F2005-030, F2006-022, F2006-024, F2006-028, F2006-030, F2007-013, F2007-022, F2007-028, F2007-029, F2008-008, F2008-012, F2008-020, F2008-028, F2008-031, F2009-001, F2009-022, F2009-023, F2009-027 and F2009-030; External Adjudication Order No. 5 (2004); *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593; *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89.

Policies Cites: AB: Office of the Information and Privacy Commissioner (Alberta), *Adjudication Practice Note 2 – Evidence and Arguments for Inquiries* (Edmonton: January 2010); Office of the Information and Privacy Commissioner (Alberta), *Solicitor-Client Privilege Adjudication Protocol* (Edmonton: October 24, 2008).

I. BACKGROUND

[para 1] The Applicant is a former employee of the University of Calgary (the "Public Body"). She was employed at the Public Body's campus in Doha, Qatar, beginning in September 2007. She ceased employment following certain events and a dispute with the Public Body that occurred between April and September 2008.

[para 2] On October 20, 2008, the Applicant made twelve requests to access information under the *Freedom of Information and Protection of Privacy Act* (the "Act"). She asked the Public Body for information in records held by various individuals, and a Wellness Centre, for the period from August 1, 2007 to October 20, 2008. One individual was a doctor associated with the Wellness Center. The others individuals were officers and employees of the Public Body from various areas (Administration, Human Resources, External Affairs, Marketing Services and the Harassment Office). While the information requested from each individual and the Wellness Centre varied somewhat, the Applicant's overall request was for information pertaining to her, as found in e-mail correspondence, files, letters, records of discussion, third party correspondence, decision documents, reports, personal notes/notebooks, notes from internal meetings, and notes from telephone conversations/interviews and video conference calls between the Public Body's personnel at its location in Calgary and its location in Qatar. In one request, she also asked for policies with respect to sick leave. In eight of the requests, she also asked for records pertaining to the Public Affairs Department.

[para 3] The twelve separate requests were processed as one overall access request. By letter dated February 18, 2009, the Public Body provided some of the requested information to the Applicant, but withheld other 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.). It noted that two individuals named by the Applicant in her access request did not have any responsive records, and that she should request records directly from the Wellness Centre. The Public Body also stated that a number of documents contained information that it did not consider to be responsive to the Applicant's access request.

[para 4] In correspondence to this Office dated March 3, 2009, the Applicant requested a review of the Public Body's decision to withhold information from her, including information that she believed to exist but was not accounted for, and information that the Public Body considered non-responsive to her access request. She also took issue with the Public Body's failure to provide information to her that was held by the Wellness Centre and a doctor associated with it.

[para 5] The Commissioner authorized a portfolio officer to investigate and try to settle the matter between the parties. This was not successful, and the Applicant requested an inquiry on February 1, 2010. A written inquiry was set down.

[para 6] This Office sent a letter to an individual, inviting him to participate in the inquiry as an affected party under section 67(1)(a)(ii) of the Act. This was a third party

against whom the Applicant had made a sexual harassment complaint, and who appeared no longer to be employed by the Public Body. The individual did not respond.

II. RECORDS AT ISSUE

[para 7] The Public Body submitted approximately 188 pages of records *in camera*. The records at issue consist of the information that it withheld, in whole or in part, on these pages. The pages are numbered according to sets. For instance, page 1-2 refers to the second page in set 1, rather than to two pages, and page 3-7 refers to the seventh page in set 3, not to a group of pages numbering 3 through 7.

[para 8] At paragraph 14 of its initial submissions, the Public Body states that it will be releasing additional records to the Applicant, which it specifies. Those particular records are therefore no longer at issue. They were not placed before me.

[para 9] The Public Body did not provide me with copies of the records at issue under section 27 of the Act. For reasons explained later in this Order, the records at issue under section 27 will not be addressed at this time.

III. ISSUES

[para 10] The Notice of Inquiry, issued June 9, 2010, set out the following issues, although I have placed them in a slightly different sequence for the purpose of discussion:

> Did the Public Body meet its duty to assist the Applicant under section 10 of the Act?
>
> 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 and other interests of a public body) to the records/information?
>
> Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the records/information?
>
> Did the Public Body properly apply section 27 of the Act (privileged information, etc.) to the records/information?

IV. DISCUSSION OF ISSUES

A. Did the Public Body meet its duty to assist the Applicant under section 10 of the Act?

[para 11] Section 10(1) reads as follows:

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

[para 12] The Public Body has the burden of proving that it met its duty to assist the Applicant under section 10(1) (Order 99-038 at para. 10; Order F2004-008 at para. 10).

1. Adequacy of the Public Body's search for responsive records

[para 13] The Notice of Inquiry specified that the issue under section 10 of the Act would include whether the Public Body conducted an adequate search for responsive records. A public body's duty to assist an applicant under section 10 includes the obligation to conduct an adequate search (Order 2001-016 at para. 13; Order F2007-029 at para. 50). The Public Body has the burden of proving that it conducted an adequate search, as it is in the best position to provide evidence of the adequacy of its search and to explain the steps that it has taken to assist the applicant within the meaning of section 10 (Order 97-003 at para. 25; Order F2009-027 at para. 46). An adequate search has two components in that every reasonable effort must be made to search for the actual records requested, and the applicant must be informed in a timely fashion about what has been done to search for the requested records (Order 2001-016 at para. 13; Order F2007-029 at para. 50).

[para 14] Section 10 requires that a public body make every reasonable effort to locate responsive records, which does not require perfection (Order F2003-001 at para. 40). The decision as to whether an adequate search was conducted must be based on the facts relating to how a public body conducted a search in the particular case (Order 98-003 at para. 37). In general, evidence as to the adequacy of a search should cover the following points: who conducted the search; the specific steps taken by the public body to identify and locate records responsive to the applicant's access request; the scope of the search conducted (e.g., physical sites, program areas, specific databases, off-site storage areas, etc.); the steps taken to identify and locate all possible repositories of records relevant to the access request (e.g., keyword searches, records retention and disposition schedules, etc.); and why the public body believes that no more responsive records exist than the ones that have been found or produced (Order F2007-029 at para. 66).

[para 15] What is required of a public body in order to meet its obligation of informing an applicant about its search for responsive records will likewise depend on the circumstances of the particular case (Order F2009-001 at para. 19). While it may not be necessary in every case for a public body to give an applicant all of the information about its search, as described in the preceding paragraph, it should provide greater detail when an applicant specifically raises questions or concerns (Order F2009-001 at para. 26).

[para 16] I summarize the Applicant's concerns regarding the adequacy of the Public Body's search as follows:

- She received no information from three contractors of the Public Body associated with the Wellness Centre;
- The Public Body improperly narrowed the scope of her access request and therefore did not provide all responsive information;
- She received no information whatsoever from two employees of the Public Body;
- She received incomplete information from other employees, given that records disclosed to her would suggest that the employees had information that was not provided to her;
- The Public Body indicated that some individuals did not have information because they were only peripherally involved in the matter and were not required to retain records, yet she questions this on the basis that the individuals were, in fact, significantly involved, the matter was contentious, and it is reasonable to believe that the individuals would normally have been required to retain records;
- The Public Body's search was limited to contacting the identified individuals, asking them whether they had any information, and even asking them a second time, but without otherwise confirming that the individuals had actually searched for the information or provided all responsive information that they located; and
- The Public Body did not properly search for electronic records, including backup electronic records.

[para 17] I will now review the various concerns of the Applicant in more detail, along with the Public Body's submissions.

(a) Information held by the Wellness Centre and doctor

[para 18] The Applicant requested information held by the University of Calgary Wellness Centre and for information held by a particular doctor associated with it. She indicates that she later made a separate request to the Wellness Centre and received her chart from its two managers, but still did not receive any records from the particular doctor. She submits that these individuals are contractors of the Public Body, and that the Public Body was therefore responsible for providing information held by them.

[para 19] In her affidavit, the Public Body's Access and Privacy Coordinator says that the Applicant agreed to file a separate request with the Wellness Centre and that the Applicant later advised that she had received the requested information. Because the Applicant says that she received nothing from the doctor as well as makes submissions, generally, about whether the Public Body was responsible for information held by the Wellness Centre, she is clearly not satisfied with the outcome of her separate request to the Wellness Centre. She was entitled to make that request as an alternative to the one she made to the Public Body, and it does not mean that she relinquished her right to obtain information from the Public Body. The fact remains that she asked the Public Body for information held by the Wellness Centre and the doctor, and this is part of the access request that is the subject of this inquiry.

[para 20] The Public Body was required to search for responsive records held by the Wellness Centre and the doctor if those records are in the custody or under the control of the Public Body. Sections 4 and 6 of the Act read, in part, as follows:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *[various information and records, none of which exist here]*
>
> …
>
> *6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.*
>
> …

[para 21] Section 4(1) states that the Act applies to all records in the custody or under the control of a public body. There are exclusions for certain types of records, but there is no suggestion here that the records held by the Wellness Centre or the doctor fall under an exclusion. If the Public Body has custody or control of records held by the Wellness Centre and the doctor that are responsive to the Applicant's access request, she has a right of access to them under section 6(1), subject to any exceptions to disclosure under section 6(2).

[para 22] "Custody" refers to the physical possession of a record whereas "control" refers to the authority of a public body to manage, even partially, what is done with a record (Order F2002-014 at para. 12). Having said this, "bare" possession of information does not amount to custody, as the word "custody" implies that there is some right or obligation to hold the information in one's possession (Order F2009-023 at para. 33). In order for the Act to apply to particular records, it is sufficient for a public body to have custody *or* control of them; the public body does not have to have both custody *and* control (Order F2002-014 at para. 13).

[para 23] Previous orders of this Office have set out ten non-exhaustive criteria, or questions, to consider in determining whether a public body has custody or control of particular records (Order 99-032 at para. 63; Order F2006-024 at paras. 21 to 45). They are as follows:

- Were the records created by an officer or employee of the Public Body?
- What use did the creator intend to make of the records?

- Does the Public Body have possession of the records either because they have been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the Public Body does not have possession of the records, are they being held by an officer or employee of the Public Body for the purposes of his or her duties as an officer or employee?
- Does the Public Body have a right to possess the records?
- Does the content of the records relate to the Public Body's mandate and functions?
- Does the Public Body have the authority to regulate the use of the records?
- To what extent have the records been relied upon by the Public Body?
- How closely are the records integrated with other records held by the Public Body?
- Does the Public Body have the authority to dispose of the records?

[para 24] The Public Body submits that it does not have custody or control of records held by the Wellness Centre, and by extension the doctor associated with the Centre, because the Centre is run by a third party contractor that purposely has an arm's length relationship with the Public Body in order to ensure the confidentiality and privacy of employee information given to the Centre, such as details about medical diagnoses. It cites the relevant agreement between the Public Body and the organization that provides services through the Wellness Centre, provisions of which I discuss below.

[para 25] In Order F2009-030, I dealt with an applicant's request to Alberta Corporate Human Resources for records relating to his long term disability insurance claim, which were held by Great-West Life. Despite the fact that some of the above criteria weighed in favour of a finding that the public body there had custody or control of the records in question, I concluded that the public body did not. Among other reasons, I found that Great-West Life manages and adjudicates claims made by government employees in a manner and arrangement that is independent and at arm's length from the government as their employer (see paras. 63). I summarized as follows (at para. 66):

> In most, if not almost all, cases where a public body contracts with a third party service provider, the public body retains control over the records relating to the services, the FOIP Act therefore applies, and the public body cannot contract out of its obligation regarding access requests under the Act. However, the present matter is an exception where, for legitimate reasons, the Public Body does not [have custody or] retain control over the records held by Great-West Life. …

[para 26] With an exception that I note below, I find that the present matter is analogous to the one discussed in Order F2009-030, and is another unusual case where a public body does not have custody or control of records held by its service provider.

[para 27] In this case, the organization that provides services through the Wellness Centre is Shepell-fgi, a division of HRCP Inc. In turn, the doctor is apparently a sub-contractor, as the Applicant indicates that he was contracted by the Wellness Centre to

solicit information from another care provider with respect to her medical situation. The "Independent Contractor Agreement", signed September 2008 between The Governors of the University of Calgary and Shepell-fgi, indicates (at pages 21) that Shepell-fgi administers the Employee Assistance Program, which provides eligible users with professional counseling and information services. The mandate of the Wellness Centre is, among other things, to provide assessment, counseling, claims management, referral, rehabilitation and re-integration services for staff members experiencing personal difficulties, illness or injury (page 22 of the Agreement). The Agreement emphasizes that Shepell-fgi is independent of the Public Body (article 2.7) and that all counseling records and case notes related to employees are its property and are confidential (article 5.3(g), as well as article C.9 of "Appendix C" to the Agreement).

[para 28] As in Order F2009-030, I find that there is a legitimate arm's length arrangement between the Public Body and Shepell-fgi, due to the nature of the services provided by Shepell-fgi and the reasonable requirement that information held by the Wellness Centre operated by Shepell-fgi be kept confidential and private, including vis-à-vis the Public Body, which is the employer of the individuals who use the services of the Wellness Centre.

[para 29] The Applicant argues in favour of a finding of custody and control because the third party service provider is deemed to be an employee of the Public Body under section 1(e) of the Act, which reads as follows:

> *1(e) "employee", in relation to a public body, includes a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body;*

[para 30] I note that previous orders of this Office have found that, where a service provider is deemed to be an employee of a public body under section 1(e), the first of the ten criteria for determining custody and control, which I reproduced above, is fulfilled (Order F2002-006 at paras. 30 to 34; Order F2006-028 at paras. 22 to 24). In my view, however, it is more correct to say that it is the fact itself that the third party provides services for the public body – rather than the application of section 1(e) – that weighs in favour of a finding that the public body has custody or control of records held by that service provider. The definition of "employee" in section 1(e) is for the purpose of interpreting other provisions of the Act, in that it applies wherever the term "employee" appears, but there is no provision in the Act that speaks of information "in the custody and control of an employee".

[para 31] Given this, I consider it more appropriate for the first and fourth criteria regarding custody and control to read as follows:

- Were the records created by an officer, employee or service provider of the Public Body?

- If the Public Body does not have possession of the records, are they being held by an officer, employee or service provider of the Public Body for the purposes of that person's duties as an officer, employee or service provider?

The result is the same in that – whether one refers to section 1(e) or the revised criteria – if records were created by a person who performs a service for a public body (which can include an appointee, volunteer or student or someone acting under a contract or agency relationship with the public body) and/or the service provider is in possession of records for the purposes of responsibilities as that service provider, this weighs in favour of a finding that the public body has custody or control of the records, but is not determinative.

[para 32] Here, records that the Applicant requested from the Wellness Centre and the doctor were created by persons providing services to the Public Body, the records are held for the purposes of their duties, and the Public Body possibly relies on the records to a minor extent, such as to administer claims regarding employee benefits. These factors weigh in favour of a conclusion that the Public Body has custody or control of the records in question. On the other hand, the intention of the service provider, Shepell-fgi, is to use the records for its own independent purposes, their content relates to its own mandate and functions rather than those of the Public Body, the Public Body does not have possession of the records and they are not integrated with other records of the Public Body, and with the exception about to be discussed, the Public Body does not have the authority to possess the records, regulate their use or dispose of them. These factors weigh against a finding of custody or control. On weighing the criteria and relevant considerations, I conclude for the most part that the records requested by the Applicant from the Wellness Centre and the doctor are not in the custody or under the control of the Public Body.

[para 33] The Applicant argues that a private contract cannot supersede the terms of the Act. I noted in Order F2009-030 (at para. 32) that the underlying principle is that a public body cannot, by contract, place a record outside its custody or control if, in actuality, it has custody or control; however, it is not improper for an agreement to reflect the fact that a public body does not have custody or control, if that is indeed the fact and, moreover, it is based on a reasonable rationale. I find here that the Independent Contractor Agreement properly reflects that the Public Body generally does not have custody or control of records held by the Wellness Centre and the doctor. The arm's length arrangement is based on a reasonable rationale, as explained earlier.

[para 34] The Applicant also points to article 5.5(a) of the Agreement, which states:

> *Contractor and the University acknowledge that this Agreement and the relationship between the Contractor and the University will be subject to the provisions of The Freedom of Information and Protection of Privacy Act (Alberta), as amended, replaced or restated from time to time, and any other applicable privacy legislation.*

[para 35] The above provision does not mean that the Public Body has custody or control of the records requested by the Applicant. Article 5.5(a) acknowledges that the Act will inform questions involving the relationship between Shepell-fgi and the Public Body – which it would in any event – and I have just considered the Act in relation to the question of custody and control. However, I have found the result to be that the Public Body does not have custody or control of the records held by Shepell-fgi, with the exception discussed below.

[para 36] Because, generally speaking, the records that the Applicant requested from the Wellness Centre and the doctor are not in the custody or under the control of the Public Body under sections 4(1) and 6(1) of the Act, the Public Body had and has no obligation to search for them as part of its duty to assist the Applicant under section 10.

[para 37] The exception is that there is a possibility that the Public Body has custody or control of records requested by the Applicant from the Wellness Centre and the doctor, to the extent that the requested records fall within a category of records set out in the Independent Contractor Agreement between the Public Body and Shepell-fgi. Article 5.1 states:

> *Any records, information, data, documents and materials provided by the University to Contractor for its use in the performance of the Services shall remain the property of the University and shall be returned by the Contractor to the University, without cost to the university, upon the University's request and, in any event, upon the expiration or termination of this Agreement, in the same condition as when received by the Contractor reasonable wear and tear excepted.*

[para 38] Although the nature of the agreement and relationship between the Public Body and Shepell-fgi is such that the Public Body does not have the authority to possess, regulate the use of, or dispose of most records held by the Wellness Centre and the doctor, the Public Body does have such authority over the records described in article 5.1. I find that this means that the Public Body has control over records of this nature that were requested by the Applicant, so that the records are captured by sections 4(1) and 6(1) of the Act. It would appear that the Public Body indeed provided information to Shepell-fgi for use in the performance of its services. The Applicant submitted a copy of a page that she received from the Wellness Centre (marked 000582), which indicates that the Public Body's Human Resources Department liaised with the Wellness Centre regarding the Applicant's medical condition and an independent medical evaluation. The page also includes a reproduction of e-mail correspondence from the Director of Human Resources, which would have been information provided from the Public Body to Shepell.fgi.

[para 39] Therefore, the Public Body has an obligation to search for any responsive information held by the Wellness Centre or the doctor that was provided by the Public Body to Shepell-fgi and falls within the terms of article 5.1 of the Independent Contractor Agreement, and an obligation to respond to the Applicant accordingly. As explained earlier, this is notwithstanding that the Applicant later made a separate request to the

Wellness Centre and received information from its two managers. Because the Applicant made an access request to the Public Body, the Public Body had and continues to have an obligation under section 10 to properly search and account for all records requested in that access request.

(b) Information that the Public Body considered non-responsive

[para 40] The Public Body submits that the Applicant's access request was vague, and that it therefore clarified the information that she was seeking during a telephone conversation with her. It says that it drafted a more specific request and that the Applicant agreed to its language at the time of the conversation. The Public Body subsequently wrote what it understood the Applicant to be requesting, in its cover letter of February 18, 2009 with which it enclosed records being provided to her. The relevant part of the letter reads as follows:

> *In responding to your request, we focused on three specific areas:*
>
> *1. personal information relating to your performance, the management of your sexual harassment complaint, and the management of your request for medical leave;*
>
> *2. general/personal information relating to the decision to change the reporting structure of Public Affairs ie from a direct report to the Dean to a joint report to the Dean and External Relations, Calgary; and*
>
> *3. general information relating to the decision to integrate the Public Affairs Department, Qatar with External Relations, Calgary, that is, to extend the model of "embedded positions"[Access and Privacy Coordinator's term] in place on the Calgary campus and Doha campus.*

[para 41] The Applicant submits that the Public Body improperly narrowed the scope of her access request and therefore did not search for and provide all responsive information. She says that it was not her intention that the background and clarification that she gave by telephone would serve to "reduce" the amount of information that she would receive. She says that approximately 100 pages, and 50 partial pages, were determined by the Public Body to be non-responsive. She questions how the Public Body found 150 full or part pages of records to be non-responsive when its employees considered them relevant enough to turn them over to the Access and Privacy Coordinator. She cites Order 97-020 (at para. 33), which defined "responsiveness" as follows:

> "Responsiveness" must mean anything that is reasonably related to an applicant's request for access. In determining "responsiveness", a public body is determining what information or records are relevant to the request. It follows that any information or records that do not reasonably relate to an applicant's request for access will be "non-responsive" to the applicant's request.

[para 42] In my view, the Applicant's access request was overly broad in one respect, in that she asked for various records "pertaining to the Public Affairs Department" without any further specification. Records pertaining to an entire department would be very numerous. In any event, the Applicant has not explained to me how the Public Body's subsequent written understanding of her request failed to account for what she was seeking, or failed to accurately reflect the results of the telephone conversation that she had with the Public Body. While I acknowledge the lapse of time between the telephone conversation and the written clarification, I find that the written statement does, in fact, accurately reflect the discussion between the Applicant and the Public Body. I am prepared to rely on the written record of the clarification, as the fact of the telephone conversation is not in dispute and the written record is the best indication of the results of the discussion. Finally, to the extent that the Applicant could, if now asked, clarify or re-formulate what she would actually like to receive, nothing precludes her from requesting it by way of another access request. As will be explained, I intend to order the Public Body to conduct an adequate search for records responsive to the Applicant's existing access request. At the same time, it could also search for other records, should they be requested by the Applicant.

[para 43] As for the existing access request that is the subject of this inquiry, responsive records are accordingly those that fall within the Applicant's access request of October 20, 2008, but as clarified above by the Public Body in its letter of February 18, 2009. On my review of the package of records submitted by the Public Body, I find that some information was properly redacted on the basis of being non-responsive, but that other information was improperly redacted on that basis.

[para 44] The Public Body submits that several records were not responsive or portions of documents were severed because the information did not relate to the Applicant. For instance, in some meetings, several topics were discussed but only the references to the Applicant were produced and the balance severed as being non-responsive. I find that the Public Body properly redacted information in most of these instances. I also find that parts of some e-mail correspondence are non-responsive, as they deal with a different individual, who happened also to be on leave at the same time as the Applicant and so was discussed in the same e-mail correspondence. Other information is non-responsive because it concerns the performance reviews of individuals other than the Applicant. All of the foregoing information does not reasonably relate to the Applicant's access request.

[para 45] By way of example of under-inclusion of information in the Public Body's response to her, the Applicant says that the Public Body found portions of notes from a meeting to be non-responsive to her access request when she herself attended that meeting. She appears to be referring to pages 3-45 to 3-47 of the records, which are meeting notes for a working group. However, I find that the Public Body disclosed the responsive information. The fact that the Applicant attended a meeting does not mean that everything discussed at the meeting relates to her or to the other items set out in her access request. The Applicant says that all of the meeting notes are of interest to her contextually, but her interest in the context does not make the information responsive.

[para 46] At other times, I find that the Public Body incorrectly determined that information was not responsive to the Applicant's access request, as noted in the index that the Public Body prepared and/or in the records themselves. There are instances where it considered information to be non-responsive when, in fact, it pertains to the Applicant and falls within the scope of the Public Body's own restatement of her access request in its letter of February 18, 2009. Examples are portions of e-mail correspondence on page 5-128, and lines of information in notes on page 7-19, which relate to the Public Body's management of the Applicant's request for medical leave. Another example is a small amount of information in e-mail correspondence on pages 7-231 and 7-235, which refers to the Applicant using her name or initials. It would also appear that e-mails on pages 8-3 and 8-7, and an attachment to one of them, are responsive. Although the Applicant is not actually mentioned in the text of those e-mails and the topic of discussion is not explicitly stated, the context and surrounding records indicate that the information relates to the Public Body's management of issues pertaining to her and that fall within the scope of her access request. The attachment on page 8-3 bears the Applicant's name.

[para 47] The fact that the records before me contain responsive information that the Public Body incorrectly considered to be non-responsive tells me that, even in view of the Public Body's clarification of the Applicant's access request, the Public Body did not adequately account for the information responsive to it. It also gives rise to a possibility that the Public Body improperly circumscribed what the Applicant was seeking when it conducted the search in the first place. On the first or both of the foregoing grounds, I find that the Public Body failed to adequately search or account for the records actually requested by the Applicant, and therefore failed to respond to her openly, accurately and completely, as required by section 10 of the Act.

[para 48] On pages 8-3 and 8-7, the Public Body indicates that, as an alternative to its view that the information is non-responsive, it is withholding the information under section 24. Similarly, the Public Body notes that pages 7-49 to 7-122 of the records – which consist of two "Plans" (one begins on page 7-49 and the other on page 7-102) – are non-responsive and/or were withheld under section 24. It does not more specifically indicate which parts of the Plans are non-responsive and which were withheld under section 24. On my review of the contents, I find that the information on pages 7-73, 7-77 (lower half only), 7-78, 7-108 (last heading and paragraph only), 7-109, 7-111 (points 8 and 9 only), 7-117 (goal 8 only) and 7-118 is sufficiently responsive to the Applicant's request for information "relating to" the Public Body's decision to integrate the Public Affairs Department, Qatar with External Relations, Calgary. The information appears to provide background regarding that decision. Pages 7-49 and 7-102 are also responsive, as they are the cover pages of the Plans and therefore provide the context for the other responsive information (i.e., the title of the Plans and their dates).

[para 49] I discuss the Public Body's application of section 24 to the foregoing information later in this Order.

(c) Information held by specific employees

[para 50] One of the employees, from whom the Applicant says she received no information whatsoever, is a Manager of Marketing Services in the Public Affairs Department. Whereas the Applicant believes that the Manager has responsive information, the Public Body submits that the Manager is in the best position to confirm what records he has, and that he indicated that he does not have any responsive records. It adds that the Manager was the Applicant's subordinate, and that it is therefore extremely unlikely that he would be involved in personnel decisions and other matters involving his supervisor.

[para 51] The Public Body submitted a copy of an e-mail exchange between the Manager and its Access and Privacy Coordinator. The Access and Privacy Coordinator wrote on December 15, 2008:

> *I am just checking up on your progress with respect to the access request. Do you have records that are responsive to the request? If you do, when are you going to be able to send those to me?*

The Manager responded on December 17, 2008:

> *I searched in my work e-mails but I couldn't find any communications between [the Applicant] and I regarding her issue. But I found an e-mail she sent me to my personal e-mail from her personal e-mail containing some communication with [a particular Dean] about her issue with [a colleague against whom the Applicant made a sexual harassment complaint]. It is in my personal e-mail, do u need that?*
>
> *Lately, [the Applicant] was sending me e-mails and I was asking her not to contact me anymore but she kept doing so and finally I had to CC [the Director of Human Resources and the Acting Director of Public Affairs] and I asked her officially not to contact us. Do u want those e-mails too[?]*

The Access and Privacy Coordinator replied on December 18, 2008:

> *Regarding the personal e-mail, let's leave that out of this access request. Don't destroy it but I won't include it if I can avoid it.*

[para 52] In my view, the first e-mail that the Manager mentions in his e-mail of December 17, 2008 is responsive to the Applicant's access request. It was written by her and deals with her sexual harassment complaint against a colleague, which falls within the scope of her access request. The other e-mails that the Manager mentions may also be responsive, depending on their content. Further, although the e-mails were generally sent to and from personal e-mail accounts (the one copied to the Directors was presumably sent to their work e-mail accounts), I find that the Public Body has custody and/or control of them, on my review of the criteria set out earlier in this Order. The e-mails were created by the Applicant and Manager, who were employees of the Public Body. The Applicant intended for the Manager to have the e-mails that she sent to him,

presumably in his capacity as an employee of the Public Body and, in the case of at least one, in the context of her sexual harassment complaint against yet another employee. Some of the e-mails were also copied to Directors of the Public Body, further pointing to custody and/or control on the part of the Public Body. Additionally, the fact that the Manager alerted the Access and Privacy Coordinator's attention to the e-mails tells me that he considered them to be work-related e-mails, despite the fact that they were in his personal e-mail account. In other words, even if the Public Body does not have possession of the e-mails in question, it would appear that the Manager believes that the Public Body has a right to possess them and he is willing to hand them over. Finally, the content of at least the first e-mail mentioned by the Manager relates to the Public Body's mandate and functions in relation to resolving the harassment complaint made by the Applicant against her colleague. While some of the other criteria weigh against a finding of custody or control, such as the fact that the e-mails sent to the Manager may not be integrated with other records of the Public Body, I find that the criteria are outweighed by the foregoing.

[para 53] Because the first e-mail to which the Manager refers above is responsive and in the custody or under the control of the Public Body, the Public Body had a duty to account for it as part of its duty to assist the Applicant under section 10 of the Act. The Public Body also had an obligation to determine whether any of the other e-mails mentioned by him contained responsive information, and to inform the Applicant accordingly. The fact that the Manager received e-mails regarding the Applicant contradicts the Public Body's assertion that he is unlikely to be involved in matters relating to his supervisor, that is, the Applicant. Even if he was not involved in any personnel decisions, he was nonetheless involved in matters by virtue of his receipt of relevant e-mail correspondence.

[para 54] More generally, I find that the e-mail of the Access and Privacy Coordinator reproduced above, in which she indicates that she does not wish to include particular records in the response to the Applicant if she "can avoid it", reflects a probability that the Public Body did not search for, provide or otherwise account for additional records responsive to the Applicant's access request. If the Access and Privacy Coordinator had a preference not to provide records that were actually located, it is doubtful that she took adequate steps to search for all responsive records in the first place. Her statement indicates a lack of willingness on the part of the Public Body to respond to the Applicant openly, accurately and completely, as required by section 10.

[para 55] The other employee of the Public Body who located no responsive information whatsoever is the Vice-Provost (International). The Public Body says that she had few records and did not retain them because she was not directly involved in the Applicant's employment problems. The Applicant responds as follows:

> *[The Vice Provost] was involved in several decisions affecting my position, she queried various steps that were being taken, and she was in more than one "sit down" meeting with me. She is, by title, the Vice Provost International, and is responsible for the operations of the Doha campus. There is considerable information in the notes that were provided that indicate that she was involved in*

> *meetings where I was discussed, and e-mails that were either sent or circulated to her, or created by her.*

[para 56] The Public Body counters that the Applicant misunderstands the structure of the Public Body, and that despite her title, the Vice-Provost is not involved in personnel matters. The Public Body's Access and Privacy Coordinator states:

> *The Vice-President [sic] (International) advised me and I do verily believe, that she was copied on some e-mail messages but that she did not keep them as she was only peripherally involved in the Applicant's situation. Her office is not the "office of primary responsibility" (OPR) or the "office of secondary responsibility" (OSR) for such administrative matters and therefore, she had no record-keeping responsibilities [as documented in a records retention schedule]. The Vice-President [sic] (International) advised me and I do verily believe, that she deleted messages after reviewing the contents. I verified this information with her three times – during two meetings and then by e-mail – while the request was being processed.*

[para 57] I find the above explanation to be inadequate in terms of explaining to the Applicant why no more information exists than what has been found or produced by the Public Body. The Applicant specifically drew the Public Body's attention to the fact that the Vice-Provost attended meetings with the Applicant. I see, for instance, that page 7-18 indicates that she attended a meeting at which the Applicant was discussed. However, there is no explanation as to why the Vice-Provost created no records about the Applicant at or after those meetings, if that is the case. The Access and Privacy Coordinator goes on to say that the Vice-Provost deleted all electronic messages that she received from others about the Applicant. However, as will be discussed later in this Order, this explanation is not sufficient to establish that the Public Body conducted an adequate search for e-mail messages deleted by the Vice-Provost and/or to establish that the Public Body properly informed the Applicant about what was done to search for the e-mail messages. I also note that pages 7-141, 7-149 and 9-16 consist of a small amount of e-mail correspondence pertaining to the Applicant that was prepared and sent by the Vice-Provost, which indicates that she was not merely copied on relevant e-mails.

[para 58] The Applicant argues that there is additional evidence, in the records themselves, to show that the Vice-Provost likely has responsive records. I see a portion of meeting notes disclosed to the Applicant on page 3-45, stating that the Vice-Provost "reviewed the focal points of her data gathering meetings with each Director" in relation to "Public Affairs communications; linkages with External Relations in Calgary". This subject-matter falls within the scope of the Applicant's request for information relating to the decision to integrate the Public Affairs Department, Qatar, with External Relations, Calgary. The fact that the Vice-Provost "gathered data" in relation to this topic suggests that she would have responsive records or, at the very least, the Public Body needs to more fully explain why she does not. That the Vice-Provost's office is not the office of responsibility for matters pertaining to the Applicant is not a satisfactory explanation, given that the Applicant requested more than just information about herself, and it would appear that the Vice-Provost had responsive records, at least at one point. Again, the statement that she deleted e-mail messages is also unsatisfactory, as further explanation is

required as to why the Vice-Provost would have set about to gather data but no longer has any of it.

[para 59] One of the employees from whom the Applicant says she received incomplete information (as opposed to no information) is the Director of Human Resources. In particular, the Applicant did not receive information from a notebook of the Director, which she specifically asked for in her access request. In her request for review, the Applicant indicates that the Director uses the notebook to document meetings. The Public Body says that the Director was asked twice about records involving the Applicant, including whether she had a notebook. The Director advised on both occasions that "she had produced all of her responsive records". Her administrative staff also apparently searched for additional records and none were found. The Public Body adds that the Director was questioned in August 2010 in preparation for a trial appearance as to whether there are any other documents as alleged by the Applicant. The Director indicated that she did not have records as attributed to her by the Applicant.

[para 60] The Public Body has not explained why it did not locate a notebook that the Applicant knows to be used by the Director of Human Resources. It has not alternatively indicated that the notebook did not contain any responsive information, and why, if that was the case. It has not alternatively indicated that it located the notebook and it contains responsive information, but the Public Body is withholding it. As a result, I find that the Public Body either failed to make every reasonable effort to search for responsive records held by the Director or else failed to inform the Applicant about what was done to search for them. While it is possible that the Public Body properly searched for records of the Director, and that she does not have anything additional, the Public Body has, at a minimum, failed to adequately explain its search to the Applicant and why the Director has no more information that what has been found or produced, despite the Applicant's belief that there is additional information.

[para 61] The Applicant says in her submissions that there were three individuals, in particular, who she believes handed over only part of the responsive information in their possession. I have just discussed the Director of Human Resources. I take one of the other individuals to be a staff member of Human Resources who, the Applicant alleges in her request for review, did not provide a complete record of her correspondence, and did not provide notes from meetings with others regarding the Applicant's health issues and employment. I take the other to be an employee in the Public Body's Harassment Office who, the Applicant says in her submissions, should have reports or notes from telephone conversations. The Applicant specifically raised the foregoing concerns, yet the Public Body has not responded, and I cannot otherwise determine from the evidence before me whether the Public Body adequately searched for responsive information in the hands of the aforementioned employees. As the Public Body has not explained how it conducted an adequate search and/or informed the Applicant why no more records of these individuals exist, I again find that the Public Body did not fulfill its duty to assist the Applicant under section 10 of the Act.

(d) The Public Body's search generally

[para 62] The Applicant notes that approximately ten days after she made her access request to the Public Body, she filed a lawsuit against it. She argues that, given this lawsuit, there was a potential that employees would not be forthcoming with information and that the Public Body should not simply have asked the employees to conduct searches and report back. She writes that, during what was apparently another search for records, "it seems the University responded by simply asking for the confirmation of each named employee that they did not have additional records". She adds that one individual did not respond when the Public Body asked its employees to search a second time, as the individual was on leave. The Applicant submits that the Public Body should have used all available storage and other information retention resources to locate and produce responsive records. She cites Order 99-021 (at para. 54), where it was stated that a public body must make a reasonable search of all repositories where records relevant to the request might be located, including off-site storage areas.

[para 63] In Order F2007-028 (at para. 46), the Commissioner said:

> Section 10 places the duty to assist an applicant on the head of the public body, not simply employees of the public body, or the public body in general. As a result, the head, or the person to whom the head has delegated authority, must be in a position to establish that he or she did in fact conduct an adequate search for records as part of the duty to assist an applicant. In a situation where the head or the delegate does not have direct knowledge of the steps taken to search for records, the head will be unable to establish that the search for records was adequate. I do not mean that the head of a public body is required to seek out every record personally. However, the head, or the head's delegate, should take a supervisory role and be aware of exactly what steps have been taken to locate records, as the head is accountable for the quality of the search under section 10.

[para 64] The foregoing was upheld in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593 (at paras. 53 and 54), in which the Court agreed that sufficient evidence must be presented in order to establish the adequacy of a search:

> As recognized by the Commissioner, it would be impractical to require the head of a public body to either conduct or supervise the searches mandated by *FOIPP*. This obligation can be delegated. However, the public body must be in a position to establish that reasonable efforts were taken to search records in order to be able to respond openly, accurately and completely to the request. It follows that the person to whom the obligation is delegated must be in a position to provide evidence sufficient to establish what was done.
>
> In this case, [a disclosure analyst] was tasked with organizing the search. Her letter of January 18, 2006 does not detail the steps taken to search for records. It simply asserts that she conducted searches with various individuals and categories of individuals and located the records itemized in the letter. There is no evidence from [the disclosure analyst] as to the steps which she took to supervise the search.

[para 65] In this inquiry, the Public Body's evidence is, essentially, that its Access and Privacy Coordinator contacted the various employees, received records from nine of them, and did not receive records from two of them, being the Manager in the Public Affairs Department and the Vice-Provost (International). As I have already discussed, the Public Body has provided a partial, but inadequate, explanation regarding its search for information held by these two individuals. It has also provided a partial, but inadequate, explanation regarding its search for information held by the Director of Human Resources.

[para 66] More broadly, in terms of its overall search, the Public Body has failed to provide any information about its search for records in the possession of all other employees, other than to say that the employees reported back as to what records they had. The Public Body merely submits: "The applicant specifically requested certain individuals search for records and this request was complied with and was overseen by the Access & Privacy Coordinator". The Access and Privacy Coordinator merely states in her affidavit: "In conducting a search for responsive records, I contacted each of the sources suggested by the Applicant except for the Wellness Centre (discussed below). Except for two of the sources, all indicated that they had responsive records."

[para 67] The Public Body has indicated that its search was overseen by its Access Privacy Coordinator and that the various employees conducted searches, but it has provided virtually no information about the specific steps taken and the scope of the overall search. In the absence of any detail about the Public Body's search generally, I cannot find that it conducted an adequate one. I see that the Access and Privacy Coordinator noted a retention schedule when discussing records held by the Vice-Provost (International), but the Public Body has made no other references – for example, to specific databases, off-site storage areas or keyword searches – in order to describe the steps taken to search for records held by other employees, and to explain the scope of its overall search.

[para 68] Rather than simply relying on the word of employees, the Applicant also submits that the Public Body should have conducted an independent search of computer servers. She writes:

> *Of particular note, it appears that merely asking an employee to turn over electronic records is not sufficient to be considered a thorough search. The University of Calgary does retain a back-up of information, documents and emails contained on its servers. There is no evidence that any attempt was made to locate or search these resources for information pertaining to this request, or from any other sources. (See attached: University of Calgary Records Retention and Disposition Policy)*
>
> *Secondly, the computers used by employees at the University of Calgary – Qatar campus were replaced in the summer of 2008. As the transfer was made from the old computer to the new one, a "snapshot" of the contents of each computer was made by the IT department as a back-up. To my knowledge, these resources were not checked, nor were the email back-up tapes generated at that campus reviewed in an attempt to comply with the request.*

[para 69] At the outset, I note that, under section 10(2) of the Act, a public body is not required to create a record for an applicant, from a record that is in electronic form, if it is not possible to do so using the public body's normal computer hardware and software and technical expertise, or if creating the record would unreasonably interfere with the operations of the public body. With respect to an electronic record from which information responsive to an access request may be obtained, section 10(2) should be considered where it is possible that the section applies: see *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593 at paras. 79 to 87. In addressing the factors under section 10(2) in cases where they might be relevant, procedural fairness requires that a public body be given notice that records in an electronic form are in issue: *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89 at para. 28).

[para 70] Here, the Public Body was given notice of the issue regarding the backup electronic records by way of the Applicant's initial submissions, but it has not responded in any way. It has also led no evidence in response to the Applicant's argument that information could be retrieved from the "snapshot" of the contents of the computers replaced in the summer of 2008.

[para 71] By way of example of electronic records in this case, the Public Body's Access and Privacy Coordinator states that the Vice-Provost (International) deleted electronic messages relating to the Applicant after reviewing their contents. Typically, however, an e-mail that is deleted once is not permanently deleted from a person's computer, as it is retained in a "deleted e-mail" folder until such time as the person deletes it a second time. I note, in the records before me, that some of the e-mail correspondence sent to the Vice-Provost was sent just a few months prior to the Applicant's access request of October 20, 2008, making it possible that the Vice-Provost had not yet permanently deleted them, or other responsive e-mails. In conducting its search for records, the Public Body may first have failed to consider whether the Vice-Provost could still herself retrieve some of the e-mails that she had deleted. If responsive e-mails had been permanently deleted or were otherwise not retrievable by the Vice-Provost, the Public Body should then have considered whether they could be retrieved from a backup system or from the "snapshot" of the contents of the computers replaced in the summer of 2008. If the Public Body could make reasonable efforts to retrieve them, the e-mails should either have been produced to the Applicant or withheld pursuant to an exception to disclosure. If the responsive information was contained in a record in an electronic form from which a record for the Applicant would have to be created, the Public Body should have considered whether it was possible to create records for her under section 10(2). If the Public Body believed that creating a record was not possible or reasonable, it should then have said so, whether to the Applicant in response to her access request or during this inquiry.

[para 72] The actual answers to the various considerations just set out are not necessary for the purposes of my review of the adequacy of the Public Body search for responsive records and the adequacy of its indication to the Applicant about what was done to search for the requested records. Regardless of the scenario, the Public Body

failed to search for some electronic records in the first place and/or failed to inform the Applicant that particular electronic records did not exist, that they could not be retrieved or that no record for the Applicant could be created from them.

[para 73] Finally, the Applicant submits that the Public Body did not provide copies of some attachments to e-mails that it provided. I see an indication of the existence of e-mail attachments on pages 1-11, 3-19, 4-26, 4-35, 4-55, 4-95, 5-128 and 8-3. Given the context, including sometimes the fact that the e-mail correspondence itself was withheld from the Applicant, I presume that the e-mail attachments were not disclosed to the Applicant. As they also do not appear in the records before me, I find that the Public Body did not properly search or account for the e-mail attachments. Moreover, the e-mail attachments were sent or received by no less than seven of the Public Body's employees working in three different areas (Administration, Human Resources and External Relations). This again leads me to find that the Public Body did not adequately search for records, or did not otherwise make every reasonable effort to respond to the Applicant openly, accurately and completely as possible.

[para 74] In summary, I find that the Public Body failed to conduct an adequate search for records in the possession of all of the employees named by the Applicant in her access request, and not just in the possession of the specific employees discussed in the preceding part of this Order. The Public Body has provided insufficient evidence regarding its overall search, particularly in light of the Applicant's concerns that all she knows is that each employee was merely contacted by the Access and Privacy Coordinator and requested to report back, and her view that insufficient effort was made to search for electronic records, which could be in the possession of any employee. Moreover, I found earlier that the Public Body incorrectly found some information to be non-responsive and may have overlooked other responsive information, which again could be in the possession of any employee.

(e) Conclusion regarding the Public Body's search

[para 75] As set out earlier in this Order, the Public Body has the burden of proving that it conducted an adequate search for responsive records, which involves making every reasonable effort to search for the records actually requested by the Applicant and informing her about what was done to search for them. In respect of the Applicant's access request, generally, I find that the Public Body has presented inadequate evidence to establish what was done to search for the requested information. It has essentially said that its Access and Privacy Coordinator contacted various individuals and that they reported back, with or without responsive records. The Public Body has not given sufficient information about the specific steps taken to identify and locate records responsive to the Applicant's access request, the scope of the search conducted (e.g., physical sites, program areas, specific databases, off-site storage areas, etc.), and the steps taken to identify and locate all possible repositories of records relevant to the access request (e.g., keyword searches, records retention and disposition schedules, etc.) (Order F2007-029 at para. 66).

[para 76] While I find that the Public Body failed to conduct an adequate search overall, there are particular aspects of the search that fell short. The Public Body did not determine whether the Wellness Centre had responsive records falling within a subset of records that are under the control of the Public Body. The Public Body overlooked some responsive information appearing in the records before me, and therefore may have overlooked other responsive information. The Public Body did not adequately search for particular records in the hands of particular employees, or else did not tell the Applicant why those records do not exist or were not being provided. The Public Body did not account for all obvious e-mail attachments. The Public Body did not determine, or else did not explain, whether there were additional responsive records in computer folders containing deleted e-mails. It did not determine, or else did not explain, whether it could retrieve or create responsive information from the backup computer systems.

[para 77] The point of conducting an adequate search under section 10 of the Act is two-fold, in that a public body must not only conduct an adequate search, but also fulfill the informational component by explaining what was done to conduct the search and why no more responsive records exist. In an inquiry like this one, where a public body does not adequately explain its search, it is difficult to know whether an adequate search was not conducted, or whether the public body conducted an adequate search but did not adequately explain what was done. Either way, the duty to assist has not been met, and the public body may be ordered to conduct an adequate search in all or certain respects, inform the applicant what was done in respect of the search, and explain why no more responsive information exists than what has been found or produced.

[para 78] A failure to meet the duty to assist, in terms of conducting a search for records and informing an applicant about the search, was discussed by the Court of Queen's Bench, as follows, in *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89 (at paras. 41 to 45):

> The University argues that it provided a full, complete and accurate response, and that it was unreasonable to find that it failed in the information component of the duty to assist. In particular, the University says that the Adjudicator unreasonably required it to explain why it believes no further responsive records exist and failed to describe the steps it took to identify the location of responsive records.
>
> The University's submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, *Lethbridge Regional Police Commission*, F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):
>
> > In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps taken to identify and locate all records and possible

> repositories of them, and why the Public Body believes that no more responsive records exist than what has been found or produced. [Emphasis added by the Court of Queen's Bench]
>
> Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University's rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords would not lead to responsive records, its reasons for concluding that no more responsive records existed.
>
> The University argues that the Adjudicator's reasoning is circular because she unreasonably expanded the search by ignoring the proper scope of the Request and the University's reasonable steps to ascertain the likely location of records, and then asks the University to explain why it did not search further. That argument is itself circular, presupposing that the University's search parameters were reasonable.
>
> In my view, the Adjudicator's conclusion that the University either expand its search or explain why such a search would not produce responsive records was reasonable in the circumstances and based on the evidence.

[para 79] In this inquiry, my review of the very limited evidence presented by the Public Body has led me to conclude that it failed to conduct an adequate search generally and in certain specific respects, and that it also failed to fulfill the informational component.

[para 80] The Public Body cites Order F2009-022, which was issued in an inquiry where it was also a party, for the proposition that a public body has adequately searched for records if it confirms that records responsive to the access request never existed (see paras. 16 and 17). However, in this case, the Public Body has not satisfied me that all responsive records have been accounted for, or that information that the Applicant believes to exist, in fact, does not exist. The Public Body submits that the results of its search were "fully explained" to the Applicant in its letter of February 18, 2009. This is not true. All that the letter indicated, in respect of the search, was that nine employees located responsive records, two did not, and records held by the Wellness Centre fell outside the scope of the request to the Public Body. For all of the reasons set out earlier in this Order, the Public Body's response of February 18, 2009, its submissions in the inquiry and the affidavit of its Access and Privacy Coordinator are not satisfactory, whether for the purpose of establishing that an adequate search was conducted, or for the purpose of informing the Applicant what was done to search for the information that she requested.

[para 81] I conclude that the Public Body failed to make every reasonable effort to search for the records requested by the Applicant, and failed to inform her in a timely fashion about what was done to search for them. It therefore failed to fulfill its duty to

respond to the Applicant openly, accurately and completely, as required by section 10 of the Act.

2. Other concerns regarding the Public Body's duty to assist

[para 82] The Applicant says that some of the information provided to her is not legible, citing handwritten notes on pages 1-29 and 1-41. The Public Body submits that the Applicant did not raise concerns about this until the inquiry. I am addressing her concerns because they nonetheless relate to the duty to assist under section 10 of the Act, which was set out as an issue in the inquiry.

[para 83] Part of a public body's duty under section 10(1) of the Act is to make every reasonable effort to ensure that information provided to an applicant is legible, and, where any of it is not, to legibly duplicate the original documents or provide typed versions to accompany the illegible information (External Adjudication Order No. 5 at para. 33). Here, the Applicant's concern does not appear to be that she cannot read handwritten notes; rather, it is that notes were not legibly photocopied, in that they show up essentially blank. The Public Body says that some of the records were of poor quality when they were received by its Access and Privacy Coordinator, as though this relinquishes it of its obligation to provide legible records. If the Access and Privacy Coordinator found information to be illegible, she should have asked whether a better copy was available from the employee who had provided it.

[para 84] I agree that the information that was disclosed to the Applicant on page 1-29, consisting of approximately half of the page, is illegible. While the one line of information disclosed to her on page 1-41 is legible to me in the copies submitted in this inquiry, it is apparently not legible in the copy provided to the Applicant. I also find that page 1-38 is illegible. As it would not be unreasonable for the Public Body to more legibly duplicate the information that it disclosed on pages 1-29, 1-38 and 1-41, I intend to order it to do so. In her initial submissions, the Applicant says that various other notes of individuals are illegible, but I see no other illegible information in the records placed before me. Neither the Public Body nor the Applicant submitted a copy of the pages that were released to the Applicant in their entirety.

[para 85] The Applicant also raises concerns about the time it took for the Public Body to respond to her access request. However, the general duty to assist applicants under section 10(1) does not normally encompass other, more specific, duties set out under the Act (Order 2000-014 at para. 84). This includes the duty to respond to a request within the time limits set out in section 11 (Order F2006-022 at para. 37). Moreover, the Public Body notes that the matter regarding the timeliness of its response to the Applicant was addressed in a separate review by this Office. Given the foregoing, I will not review the Applicant's concerns regarding the time it took the Public Body to respond to her access request.

[para 86] The Applicant further argues that the Public Body has failed to assist her because "this matter was pushed to inquiry in order to delay access to documents". She

accuses that Public Body of manipulating the system to its advantage, and using the inquiry process as a means of delaying access until such time as the information is no longer useful to her. While the Applicant questions the motive of the Public Body and its strategies, the Public Body was entitled to decline to settle the matter regarding the Applicant's access request, which has led to this inquiry, the very point of which is now to decide the matter.

[para 87] The Public Body indicates that some records were destroyed or deleted prior to receipt of the Applicant's access request. The Applicant wonders whether the Public Body destroyed or deleted records *after* receipt of her access request, especially give the length of time that it took to respond. In reply, the Public Body says that the allegation is unsubstantiated and has no merit.

[para 88] It is an offence, under section 92(1)(g), to destroy any records subject to the Act, or direct another person to do so, with the intent to evade a request for access to the records. A public body's destruction of records responsive to an access request would also necessarily mean that the public body failed to respond to the applicant openly, accurately and completely under section 10. However, in this inquiry, I have no evidence that the Public Body, in fact, destroyed records after receiving the Applicant's access request.

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

[para 89] The index submitted by the Public Body indicates that it relied on sections 24(1)(a), 24(1)(b), 24(1)(c) and/or 24(1)(d) of the Act to withhold information from the Applicant on various pages. These sections read as follows:

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

Government of Alberta or a public body, or considerations that relate to those negotiations,

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

…

[para 90] In order to refuse access to information under section 24(1)(a), on the basis that it could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options, the information must meet the following criteria: (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 96-006 at p. 9 or para. 42; Order F2007-013 at para. 107).

[para 91] Section 24(1)(b) gives a public body the discretion to withhold information that could reasonably be expected to reveal consultations or deliberations involving its officers or employees. A "consultation" occurs when the views of other persons are sought as to the appropriateness of a particular proposal, and a "deliberation" is a discussion or consideration of the reasons for and/or against an action (Order 96-006 at p. 10 or para. 48; Order 99-013 at para. 48). The test for information to fall under section 24(1)(b) is the same as that under section 24(1)(a) in that the consultations or deliberations must (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 99-013 at para. 48; Order F2004-026 at para. 57).

[para 92] Part (2) of the test under both sections 24(1)(a) and 24(1)(b) is that the information must be directed toward taking an action. The information must relate to a suggested course of action, which will ultimately be accepted or rejected by the recipient (Order 96-006 at p. 8 or para. 39; Order F2007-013 at para. 108). Taking an action includes making a decision (Order 96-019 at para. 120; Order F2002-028 at para. 29). However, sections 24(1)(a) and 24(1)(b) do not protect a decision itself, as they are only intended to protect the path leading to the decision (Order F2005-004 at para. 22; Order F2007-013 at para. 109). Background facts may be withheld if they are sufficiently interwoven with the advice, etc. (Order 99-001 at paras. 17 and 18; Order F2007-013 at para. 108) or with the consultations or deliberations (Order 96-006 at p. 10 or para. 50; Order F2004-026 at para. 78).

[para 93] Further, section 24(1) does not generally apply to information that merely reveals that advice was sought or given, consultations or deliberations took place, or that particular individuals or topics were involved, when the information does not reveal the substance of the discussions; there may be cases where the foregoing items reveal the content of advice, etc. or consultations/deliberations, but that must be demonstrated for every case for which it is claimed (Order F2004-026 at paras. 71 and 75).

[para 94] For information to fall under section 24(1)(c) of the Act, it must reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government or a public body, or considerations that relate to those negotiations. A "consideration" is a fact or thing taken into account in deciding or judging something (Order 99-013 at para. 44). Again, the intent of section 24(1)(c) is similar to 24(1)(a) and (b), in that it is to protect information generated during the decision-making process, but not to protect the decision itself (Order 96-012 at para. 37; Order F2005-030 at paras. 71 and 72).

[para 95] Section 24(1)(d) gives a public body the discretion to withhold information that would reveal plans relating to the management of personnel or the administration of the public body. Because it applies only to plans "that have not yet been implemented", the implication is that the provision protects the premature release of plans that have already been decided by a public body (Order F2008-008 at para. 54). The provision recognizes that a public body's ability to manage personnel and administration might be compromised if information about its plans was released prior to implementation (Order F2007-022 at para. 45).

[para 96] The Public Body has the burden of proving that it properly applied section 24 to the information that it withheld under that section. Sections 71(1) and 71(2) of the Act state:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*
>
> *(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.*

[para 97] This Office's *Adjudication Practice Note 2*, a copy of which was provided to the parties with the Notice of Inquiry, reminded the Public Body that it would generally have the burden of proof in the inquiry, and that it would be required to provide sufficient evidence and argument to support its decision in response to the Applicant's access request. In her submissions, the Applicant likewise notes that the Public Body has the burden of proof in relation to section 24 and is required to demonstrate its authority to withhold the information that it withheld. Although she does not have the burden, she cites orders for various propositions and makes arguments that the Public Body did not properly apply section 24.

[para 98] Despite section 71(1), the *Practice Note* and the Applicant's submissions, the following is the full extent of the Public Body's submissions regarding its application of section 24 in this case:

> *The Records which are subject to exclusion pursuant to Section 24 of the Act are found in the "Records at Issue" binder.*

> *The University submits that these Records (or portions thereof) have been properly withheld.*

[para 99] The above fails to present any argument, and fails to present any evidence apart from a reference to the records themselves. Moreover, the Public Body was clearly advised in the aforementioned *Practice Note* as follows:

> It is also not sufficient to provide the Commissioner with records and leave it up to him to try to draw from the records the facts on which he will base his decisions. The Commissioner requires that persons representing the public body, organization or custodian provide evidence by speaking to the contents of the records, for example by explaining how each part of a record for which an exception to disclosure is claimed falls within the exception. If the explanation depends on certain facts being true, the public body, organization or custodian must provide evidence of these facts.
>
> Parties that do not provide the evidence that is necessary to support their arguments risk having decisions go against them. See, e.g., *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593 at para. 42.

[para 100] I considered whether the records, in and of themselves, permitted me to find that information fell within the scope of section 24(1)(a) and/or 24(1)(b). I concluded otherwise. Some of the withheld information reveals a decision itself, rather than information about the path leading to a decision. Other information consists merely of background facts that are not sufficiently interwoven with advice, etc. or with consultations or deliberations. Other information merely reveals that advice was sought or given, consultations or deliberations took place, or that particular individuals or topics were involved, without revealing the substance of any discussions. In instances where it is possible that an individual is suggesting a course of action, providing views as to the appropriateness of a particular proposal or discussing reasons for or against an action, it is not clear whether the individual was providing the information as part of his or her position or responsibilities and/or whether the recipient was someone who could take or implement action. I am not in a position to presume any of these facts in the absence of any submissions from the Public Body explaining the responsibilities of the individuals in question and the specific decisions being made.

[para 101] In the single instance where the Public Body applied section 24(1)(c) – globally to the Plans at pages 7-49 to 7-122, without any indication as to which specific parts – I fail to see what positions, plans, procedures, criteria or instructions are being developed for the purpose of contractual or other negotiations, if any. As for the instances where the Public Body applied section 24(1)(d), I have insufficient information about the plans, if any, that the Public Body considers to relate to the management of personnel or its administration, and I do know whether those plans have not yet been implemented.

[para 102] Bearing in mind the burden of proof under section 71(1) of the Act, I conclude that the Public Body did not properly apply section 24 of the Act to any of the

information that it withheld under that section. Having said this, I must decide whether section 17 applies to any of the personal information of third parties that also appears in the records withheld under section 24. Section 17 sets out a mandatory exception to disclosure where it would be an unreasonable invasion of personal privacy, so I must independently review whether this personal information must be withheld, which I will do later in this Order.

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

[para 103] The index submitted by the Public Body indicates that it relied on section 25 of the Act to withhold information from the Applicant on seven pages of the records. Section 25(1) 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:*
>
> *(a) trade secrets of a public body or the Government of Alberta;*
>
> *(b) financial, commercial, scientific, technical or other information in which a public body or the Government of Alberta has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value;*
>
> *(c) information the disclosure of which could reasonably be expected to*
>
> *(i) result in financial loss to,*
>
> *(ii) prejudice the competitive position of, or*
>
> *(iii) interfere with contractual or other negotiations of, the Government of Alberta or a public body;*
>
> *(d) information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee or the public body of priority of publication.*

[para 104] For the same reasons set out in the preceding part of this Order, I find that the Public Body did not properly apply section 25 to any of the information that it withheld under that section. It was fully aware that it had the burden of proof under section 71(1), and that it was required to provide sufficient argument and evidence, yet it wrote only the following about its application of section 25:

The Records which are subject to exclusion pursuant to Section 25 of the Act are found in the "Records at Issue" binder.

The University submits that these documents have been properly excluded.

[para 105] The above does not even tell me which of the sub-provisions of section 25 the Public Body was relying on to withhold the information. On my review of the pages to which the Public body applied section 25, I fail to see how the information on them has anything to do with what is contemplated in section 25(1)(a), 25(1)(b), 25(1)(c) or 25(1)(d).

[para 106] I conclude that the Public Body did not properly apply section 25 of the Act to any of the responsive information that it withheld under that section. In the next part of this Order, I will review whether any of the information must be withheld under section 17.

D. Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the records/information?

[para 107] Section 17 of the Act reads, in part, as follows:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> …
>
> *(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council,*
>
> …
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> …
>
> *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
>
> …
>
> *(d) the personal information relates to employment or educational history,*
>
> …

(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,

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

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

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

…

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

…

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

…

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

[para 108] In the context of section 17, the Public Body must establish that the severed information is the personal information of a third party, and may 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 then 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 information in the records at issue and determine whether disclosure would or would not be an unreasonable invasion of personal privacy.

[para 109] Because I have found that the Public Body did not properly apply section 24 or 25 of the Act to any of the records at issue, I will now review not only whether the Public Body properly withheld information under section 17, but also whether any information that it withheld under section 24 or 25 must be withheld under section 17. The effect is that I will decide the extent to which section 17 applies to all of the records at issue before me.

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

[para 110] Section 1(n) of the Act defines "personal information" as follows:

1(n) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone number,

(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual's age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else's opinions about the individual, and

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

[para 111] I find that the records at issue consist of the personal information of third parties, as described more fully below. Having said this, the Applicant submits that there are times where the Public Body withheld her own personal information from her, which is not authorized under section 17. I see an instance, for example, in a line on page 3-40, which is highlighted in my copy as being withheld from the Applicant. As section 17 cannot apply, I intend to order the Public Body to disclose the Applicant's own personal information to her.

2. Would disclosure be an unreasonable invasion of personal privacy?

[para 112] Under section 17(2) of the Act, a disclosure of personal information is expressly not an unreasonable invasion of a third party's personal privacy in certain circumstances. I find that some of the information that the Public Body withheld is information about a third party's employment responsibilities as an officer or employee of the Public Body under section 17(2)(e). Specifically, there are parts of a letter at page 2-1 of the records that describe an individual's employment responsibilities as set out in his job profile, and also indicate what employment responsibilities he does not

have. I will accordingly order the disclosure of those parts, as well as the individual's name. Although the name will identify him, the release of personal information about him, as an identifiable individual, is precisely what is permissible under section 17(2)(e).

[para 113] The index prepared by the Public Body indicates that it believed that there was a presumption against disclosure of some of the third party personal information under section 17(4)(b), on the basis that the information is an identifiable part of a law enforcement record (and disclosure is not necessary to dispose of the law enforcement matter or to continue an investigation). It also cites section 17(4)(d), under which there is a presumption against disclosure of personal information that relates to employment or educational history.

[para 114] The term "employment history" describes a complete or partial chronology of a person's working life such as might appear in a personnel file (Order F2003-005 at para. 73). I find that the presumption against disclosure under section 17(4)(b) applies to information about an individual's employment start date appearing on page 3-18, and again on page 3-23. It also applies to some of the information about the sexual harassment complaint that the Applicant made against a colleague, as information of that nature may find its way into the personnel file of the individual being complained about.

[para 115] I am unable to find that any third party personal information before me is an identifiable part of a law enforcement record under section 17(4)(d). My review of the records does not tell me that there was law enforcement within the meaning of section 1(h) of the Act. I considered whether the definition set out in section 1(h)(ii) was met on the basis that there was "an administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred". The Applicant made a sexual harassment complaint against a colleague, which appears to have been at least partly investigated by the Public Body, but I do not know the extent to which the colleague could face penalties or sanctions as a result.

[para 116] In any event, the personal information of the individual that is possibly part of a law enforcement record is subject to presumptions against disclosure under other sections. First, as noted above, some of the information relates to his employment history under section 17(4)(b). Second, the personal information consists of the individual's name, and the name appears with or would reveal other personal information about him under section 17(4)(g).

[para 117] The presumption against disclosure under section 17(4)(g) also arises in relation to some of the personal information of other third parties in the records at issue.

[para 118] Finally, there is a presumption against disclosure of the information on pages 4-24 and 7-40 of the records, as it consists of personal recommendations or evaluations, character references or personnel evaluations under section 17(4)(f).

[para 119] 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.

[para 120] Some of the third party personal information that the Public Body withheld was originally provided by the Applicant, which sufficiently weighs in favour of disclosure under section 17(5)(i). For instance, on pages 2-20 and 3-7, the Public Body withheld information in points for discussion prepared by the Applicant herself.

[para 121] Some of the third party personal information that the Public Body withheld was already disclosed to the Applicant, in that she was one of the recipients of the original record. I find that this sufficiently weighs in favour of disclosure of the same information to her again, as on pages 2-17, 4-11 and 4-13. I considered whether there were any factors suggesting that she should not have received the information in the first place, but I see none. I note that there is information about the alleged wrongdoing of an employee of the Public Body (see my discussion on this topic below), but the employee reported to the Applicant, which is why the information was disclosed to her in the first place.

[para 122] Where personal information of third parties exists as a consequence of their activities as staff performing their duties, or as a function of their employment, this is a relevant circumstance weighing in favour of disclosure under section 17(5) (Order F2003-005 at para. 96; Order F2004-015 at para. 96). Information about the performance of work responsibilities by an individual is not, generally speaking, personal information about that individual, as there is no personal dimension (Order F2004-026 at 108; Order F2006-030 at para. 10). Absent a personal aspect, there is no reason to treat the records of the acts of individuals conducting the business of public bodies as "about them" (Order F2006-030 at para. 12). Further, where a name (which constitutes personal information) appears only with the fact that an individual was discharging a work-related responsibility (which is not personal information), the presumption against disclosure under section 17(4)(g) (name appearing with or revealing other personal information) does not apply (Order F2004-026 at para. 117).

[para 123] Consistent with the foregoing statements, several orders of this Office have found that disclosure of information that would merely reveal that individuals acted in a work-related capacity is generally not an unreasonable invasion of their personal privacy (for a non-exhaustive list, see Order F2008-028 at para. 53, or Order F2008-031 at para. 129). In this case, I find that much of the third party personal information in the records at issue – whether withheld under section 17, 24 or 25 – merely reveals that individuals acted in a work-related capacity. Further, for the most part (I will discuss exceptions below), I find that there are no circumstances weighing against disclosure, and that the circumstance in relation to the performance of work responsibilities outweighs the presumption against disclosure under section 17(4)(g) (name appearing with or revealing other personal information), to the extent that the presumption arises. In the instances to which I am referring in this paragraph, the presumption against disclosure

under section 17(4)(b) (employment history) does not arise at all, as the work-related activities in question – such as merely sending/receiving correspondence or discussing work-related matters – are not of the kind that would normally appear in a personnel file as part of the chronology of an individual's working life. As disclosure of the information to which I am referring in this paragraph would not be an unreasonable invasion of the personal privacy of the third parties in question, I intend to order the Public Body to give the Applicant access to the information.

[para 124] I now turn to the instances where I find that disclosure of information in the records at issue would be an unreasonable invasion of the personal privacy of third parties. Where there is associated information suggesting that an individual performing work-related responsibilities was acting improperly, there are allegations that the work-related act of an individual was wrongful, or disclosure of information is likely to have an adverse effect on the individual, the record of the act or activities and information about them potentially has a personal dimension, and thus may be the individual's personal information (Order F2006-030 at paras. 12, 13 and 16; Order F2008-020 at para. 28). Here, the information that the Public Body withheld on pages 2-45, 2-46, 2-47 and 2-48, which is about the conduct of the individual against whom the Applicant made a sexual harassment complaint, is of the foregoing kind, so as to give a personal dimension to the particular work-related activities of that individual. The factor regarding information that merely reveals the performance of work responsibilities therefore does not apply. I make the same finding in respect of the information withheld by the Public Body on page 2-31, which appears to relate to alleged wrongdoing on the part of another employee in a different context.

[para 125] I find no relevant circumstances in favour of disclosing the information withheld on pages 2-31, 2-45, 2-46, 2-47 and 2-48. I therefore intend to confirm the Public Body's decision to withhold it.

[para 126] I also see no circumstances in favour of disclosing the employment start date of the third party appearing on pages 3-18 and 3-23, or in favour of disclosing the personal recommendations or evaluations, character references or personnel evaluations appearing on pages 4-24 and 7-40. I therefore find that disclosure would be an unreasonable invasion of personal privacy.

[para 127] I found above that disclosure of portions of a letter at page 2-1 of the records is expressly not an unreasonable invasion of personal privacy under section 17(2)(e), as they set out an individual's employment responsibilities. As for the remainder of the letter, I find that disclosure would be an unreasonable invasion of the personal privacy of the individual who wrote it. The information sets out his concerns regarding his employment responsibilities, and I see no circumstances in favour of disclosing the substance of those concerns. Having said this, I do not find that disclosure of the fact that the employee had concerns, which is essentially all that is revealed on pages 3-19 and 3-23, would be an unreasonable invasion of his personal privacy.

[para 128] There are personal telephone numbers of two employees of the Public Body on pages 7-139 and 7-208. As their business telephone numbers appear elsewhere, I assume that the personal telephone numbers are not normally used for business purposes and find that disclosure would be an unreasonable invasion of personal privacy.

[para 129] I explained earlier that parts of certain e-mail correspondence dealt with an individual who happened to be on leave at the same time as the Applicant and so was discussed in the same e-mail correspondence. While I agree with the Public Body that this information is not responsive to the Applicant's access request, the Public Body also withheld it under section 17. Either way, the information does not have to be disclosed to the Applicant. I reach the same conclusion in relation to some other third party personal information in the records at issue. To ensure that the foregoing information is not disclosed to the Applicant, I confirm that the Public Body properly withheld it under section 17 in the final part of this Order.

[para 130] Finally, I considered the extent to which the circumstance set out in section 17(5)(c) is relevant in this inquiry. Under section 17(5)(c), a factor weighing in favour of the disclosure of third party personal information is that it is relevant to a fair determination of an applicant's rights. In order for section 17(5)(c) to be a relevant consideration, all four of the following criteria must be fulfilled: (a) the right in question is a legal right drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; (b) the right is related to a proceeding that is either existing or contemplated, not one that has already been completed; (c) the personal information to which the applicant is seeking access has some bearing on or is significant to the determination of the right in question; and (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing (Order 99-028 at para. 32; Order F2008-012 at para. 55).

[para 131] A statement of claim submitted by the Public Body indicates that the Applicant has commenced an action against the Public Body for constructive dismissal and infliction of mental suffering. I therefore know that the Applicant's legal rights are in question and that a proceeding is underway. As for whether there is third party personal information that might have a bearing on the Applicant's lawsuit or is required by her in order to prepare for it, I have already found that many of the records at issue should be disclosed to her, based on my finding that they merely reveal the performance of work-related responsibilities. With respect to the information that I have found should not be disclosed to the Applicant – such as information given by employees during the Public Body's investigation of the Applicant's sexual harassment complaint and the concerns of an employee about his employment responsibilities – the Applicant has not, in accordance with the burden of proof under section 71(2) of the Act, explained to me how such information, if any, has a bearing on her lawsuit.

[para 132] There is also no information before me indicating that proceedings are contemplated or in progress against the individual who was the subject of the Applicant's sexual harassment, or submissions from the Applicant to the effect that information in the

records at issue is relevant to a fair determination of her rights in that context. I therefore find that section 17(5)(c) does not apply in this way either.

[para 133] I conclude that section 17(1) of the Act applies to some of the information in the records at issue, as disclosure would be an unreasonable invasion of a third party's personal privacy. This information is set out in the final part of this Order. I conclude that section 17(1) does not apply to the remaining information that the Public Body withheld under that section, or under section 24 or 25, as disclosure would not be an unreasonable invasion of a third party's personal privacy.

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

[para 134] 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,*

[para 135] The Public Body withheld approximately 100 pages of records from the Applicant, on the basis that the information in them is subject to solicitor-client privilege under section 27(1)(a). In accordance with this Office's *Solicitor-Client Privilege Adjudication Protocol*, the Public Body chose not to submit a copy of those records to me. Also in accordance with the *Protocol*, on September 14, 2010, I requested additional argument and evidence from the Public Body regarding its claim of solicitor-client privilege, so that I could decide whether it properly applied section 27(1)(a) to the records in question. The Public Body provided a minimal amount of additional information, by letters dated October 5 and 12, 2010, but I still found that its argument and evidence, up to that point, were insufficient for me to decide the above issue in the inquiry. Therefore, on October 20, 2010, I sent the Public Body a notice under section 56(2) of the Act to produce the records over which it is claiming solicitor-client privilege, so that I could properly decide whether the Public Body had the authority to withhold those records under the Act.

[para 136] On October 29, 2010, the Public Body brought an application for judicial review of my decision to require it to produce the records in question. I am therefore unable, at this time, to proceed with the above issue in the inquiry. I reserve my decision on the issue, pending the outcome of the application for judicial review.

V. ORDER

[para 137] I make this Order under section 72 of the Act.

[para 138] I find that the Public Body correctly determined that some of the information in the records before me is not responsive to the Applicant's access request.

Under section 72(2)(b), I confirm the decision of the Public Body not to give the Applicant access to the information that it found to be non-responsive, other than as set out below.

[para 139] I find that the Public Body incorrectly determined that other information was non-responsive when it is, in fact, responsive to the Applicant's access request. As the Public Body did not alternatively indicate that it was withholding some of this information under a section of the Act, I order it, under section 72(3)(a), to decide whether to give the Applicant access to the following information, and then respond to her in accordance with section 10:

- all of the information in the e-mail correspondence on page 5-128, except the name of the first attachment (its name appears twice and the attachment relates to another individual who was on leave), the second sentence of information (which is about the other individual), the name of the other individual (about two thirds of the way down the page), and the five words after the word "night" (about one third of the way down the page);
- the fourth-, fifth- and sixth-to-last lines of the notes on page 7-19;
- the question in which the Applicant's name appears in the e-mail correspondence on page 7-231 (and the "from", "sent", "to" and subject" lines immediately above, if not released already); and
- the eight words after the words "was booked" toward the top of the e-mail correspondence on page 7-235 (and the "from", "sent", "to" and subject" lines above, if not released already).

[para 140] With the exception noted in the next paragraph of this Order, I find that the Public Body met its duty to assist the Applicant under section 10 of the Act with respect to her request for information held by the Wellness Centre and a particular doctor associated with the Centre. Records held by those parties are not, generally speaking, in the custody or under the control of the Public Body under sections 4(1) and 6(1), and the Public Body therefore had no obligation to search for those records as part of its duty to assist the Applicant.

[para 141] However, I find that the Public Body has control of records responsive to the Applicant's access request that were provided by the Public Body for the use of the third party service provider that operates the Wellness Centre. With respect to these records – and all other records requested by the Applicant – I find that the Public Body did not conduct an adequate search and therefore did not meet its duty to assist the Applicant section 10 of the Act. Specifically, the Public Body did not make every reasonable effort to search for the actual records requested by the Applicant and/or did not inform her about what was done to search for them. Under section 72(3)(a), I order the Public Body to comply with its duty to respond to the Applicant openly, accurately and completely, as required by section 10.

[para 142] Under section 72(4) of the Act, I specify that the Public Body must conduct an adequate search for records in its custody or under its control that are

responsive to the Applicant's access request. I further specify that the Public Body write an explanation to the Applicant, indicating the specific steps taken to identify and locate records responsive to her access request, the scope of the search conducted (e.g., physical sites, program areas, specific databases, off-site storage areas, etc.), the steps taken to identify and locate all possible repositories of records relevant to the access request (e.g., keyword searches, records retention and disposition schedules, etc.), and why the Public Body believes that no more responsive records exist than the ones that have been found or produced up to the time of writing the explanation to the Applicant. Without limiting the generality of the foregoing, I direct the Public Body to:

- search for responsive information held by the Wellness Centre, and the doctor associated with it, that falls within the terms of article 5.1 of the Independent Contractor Agreement with Shepell-fgi, in which case the Public Body has control of the information and should respond to the Applicant accordingly;
- search for the information in the e-mail attachments appearing on pages 1-11, 3-19, 4-26, 4-35, 4-55, 4-95, 5-128 (second attachment only) and 8-3, and respond to the Applicant accordingly;
- review all other records that the Public Body has already located and either confirm that information that it previously considered to be non-responsive is, in fact, non-responsive, or else properly respond to the Applicant in respect of any information that is responsive;
- decide whether to withhold or disclose the first e-mail mentioned by the Manager of Marketing Services in his e-mail of December 17, 2008 to the Access and Privacy Coordinator, as well as determine, and explain to the Applicant, whether the Manager has any other responsive records that may have been overlooked;
- determine, and explain to the Applicant, whether the Vice-Provost (International), the Director of Human Resources, staff in the Human Resources Department and staff in the Harassment Office have any responsive correspondence or notes from meetings or telephone conversations that have not been accounted for;
- determine, and explain to the Applicant, whether the Vice-Provost (International), as well as all other employees identified in the Applicant's access request, have responsive records that they are able to retrieve from their "deleted e-mail" folders;
- determine, and explain to the Applicant, whether there are responsive records, once in the possession of an employee but now "permanently" deleted, that may be retrieved from the Public Body's backup computer system or from the "snapshot" of the contents of the computers replaced in the summer of 2008; and
- if there is responsive information that cannot simply be retrieved in any of the foregoing ways, in that the responsive information is contained in a record in an electronic form from which a record for the Applicant would have to be created, determine, and explain to the Applicant, whether the Public Body believes that it can create a record for the Applicant under section 10(2) of the Act.

[para 143] I also find that the Public Body did not meet its duty to assist the Applicant under section 10 of the Act in that some of the information provided to her is not legible. Under section 72(4), I direct the Public Body to legibly duplicate the

information that was disclosed to the Applicant on pages 1-29, 1-38 and 1-41 of the records.

[para 144] I find that section 17(2)(e) of the Act (information about a third party's employment responsibilities) applies to some of the information that the Public Body withheld under section 17, so that disclosure is not an unreasonable invasion of personal privacy. Under section 72(2)(a), I order the Public Body to give the Applicant access to the following information:

- the name of the individual at the bottom of page 2-1;
- the second paragraph on page 2-1, except the words between the first instance of the word "Qatar" and first instance of the word "included" and except the last sentence; and
- the portion of the third paragraph on page 2-1 after the words "substituted, as".

[para 145] I find that section 17(1) of the Act applies to other information in the records at issue, as disclosure would be an unreasonable invasion of the personal privacy of third parties. Under section 72(2)(b), I confirm the Public Body's decision to refuse the Applicant access to the following information, or I require it to refuse access under section 72(2)(c):

- the name of the other individual on leave, which appears on pages 1-9 (two places), 1-11, 1-14 (two places), 4-95 and anywhere else in the records at issue;
- the entire paragraphs about the other individual on leave, which appear on pages 1-10, at the top of page 1-14, and at the top of page 1-15;
- the last two lines of the notes on page 1-35;
- the line of information about the other individual on leave, which appears on the bottom of page 1-41;
- the information on page 2-1, except that set out in the preceding paragraph of this Order;
- the information about a third party's employment start date, which appears on page 3-18 and again on 3-23;
- the personal telephone numbers appearing on pages 7-139 and 7-208; and
- the information that the Public Body withheld on pages 2-31, 2-45, 2-46, 2-47, 2-48, 3-38, 3-40 (except the line of information relating to the Applicant halfway down the page), 4-23, 4-24, 7-39 and 7-40.

[para 146] I find that section 17(1) of the Act does not apply to the remaining information that the Public Body withheld under that section, as disclosure would not be an unreasonable invasion of a third party's personal privacy. Under section 72(2)(a), I order the Public Body to give the Applicant access to the information that it withheld under section 17, other than the information set out in the preceding paragraph of this Order.

[para 147] I find that the information that the Public Body both determined to be non-responsive as well as withheld under section 24 of the Act (advice, etc.) on pages 8-2, 8-6

and 8-10 of the records is not responsive to the Applicant's access request, and the Public Body is therefore not required to give her access to it.

[para 148] I find that the Public Body did not properly apply section 24 of the Act (advice, etc.) to the remaining information that it withheld under that section, and that section 17(1) does not apply to most of that same information. Under section 72(2)(a), I order the Public Body to give the Applicant access to the information that it withheld under section 24, other than the information set out above that either must be withheld under section 17(1) or is non-responsive to the Applicant's access request.

[para 149] For clarity, with respect to pages that the Public Body notes as being non-responsive as well as being withheld under section 24 of the Act in the index that it prepared, I find that the following information is responsive to the Applicant's access request, the Public Body did not properly withhold the information under section 24, and it is therefore required to give the Applicant access to the information:

- the last sentence appearing in the e-mail correspondence on page 1-10 and again on page 1-15;
- the information on approximately the lower half of page 1-14 (except the information about the other individual on leave, as set out above);
- the third- and fourth-to-last lines of the notes on page 1-35;
- the last two lines appearing in the e-mail correspondence on page 4-47;
- the information on pages 7-49, 7-73, 7-77 (lower half only), 7-78, 7-102, 7-108 (last heading and paragraph only), 7-109, 7-111 (points 8 and 9 only), 7-117 (goal 8 only) and 7-118;
- the information withheld toward the bottom of the e-mail correspondence on page 7-124;
- the third-to-last paragraph of the e-mail correspondence on page 7-139 (except the personal telephone number, as set out above);
- the information between "today's meetings" and "I'm pleased" in the e-mail correspondence on page 7-141, and again on page 7-149;
- the information on pages 8-3 and 8-7;
- the information withheld at the top and bottom (but not the middle) of the e-mail correspondence on page 9-16; and
- the fourth paragraph of the e-mail correspondence on page 9-18.

[para 150] I find that the Public Body did not properly apply section 25 of the Act (disclosure harmful to economic and other interests of a public body) to any of the information that it withheld under that section, and that section 17 does not apply to any of it either. Under section 72(2)(a), I require the Public Body to give the Applicant access to the information that it withheld under section 25.

[para 151] I make no findings or order, at this time, regarding the Public Body's application of section 27 of the Act (privileged information, etc.) to the information that it withheld under that section.

[para 152] I further 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