ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2010-036

June 30, 2011

UNIVERSITY OF CALGARY

Case File Number F4695

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for access to information to the University of Calgary (the Public Body) relating to a research project regarding climate change that had been funded through donations. The Public Body identified responsive records but severed some information from the records under section 16 (information harmful to business interests), 17 (information harmful to personal privacy), 24 (advice from officials), 25 (information harmful to the economic interests of a public body) and 27 (privileged information). The Public Body also required the Applicant to pay fees for processing the access request. The Applicant requested review of the Public Body's decisions to sever information and to charge fees.

The Adjudicator found that section 16 did not apply to the information to which the Public Body had applied this provision. The Adjudicator confirmed some of the Public Body's decisions to apply section 17 to withhold information. The Adjudicator found that section 24(1)(a) and 24(1)(b) applied to the information the Public Body had withheld under these provisions, but found that the Public Body had done so for reasons that were irrelevant to the application of sections 24(1)(a) and (b). She ordered the Public Body to reconsider its decision to withhold information under section 24(1)(a) and (b). In addition, she found that section 24(1)(h) did not apply to drafts of an audit report that had subsequently been completed. She confirmed the decision of the Public Body to withhold information under section 25 that would serve to identify anonymous donors. The Adjudicator confirmed the decision of the Public Body to withhold some of the information to which it applied section 27(1)(a). The Adjudicator reduced the fees charged by the Public Body for preparing and handling records by ordering it to recalculate them without consideration of the time spent reviewing the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 16, 17, 24, 25, 27, 40, 72, 93; Freedom of Information and Protection of Privacy Regulation A.R. 200/1995 s. 11, Schedule 2

Authorities Cited: AB: Orders 96-002, 96-006, 96-013, 96-016, 96-017, 96-018, F2002-002, F2003-004, F2004-014, F2004-026, F2005-011, F2005-030, F2006-032, F2007-023, F2008-018, F2009-026, F2009-028 **ON:** P-454, P-489, MO-2496, PO-2226, PO-2435, PO-2780, PO-2843

Williams, D. C. et al. *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* /1980. Toronto: Queen's Printer of Ontario, 1980.

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

Access and Privacy Branch, Alberta Government Services. *Freedom of Information and Protection of Privacy Guidelines and Practices Manual 2009*. Edmonton: Government of Alberta, 2009.

Cases Cited: *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. 2851; *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No.3475; *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Mount Royal University v. Carter*, 2011 ABQB 28; *Ontario (Public Safety and Security) v. Criminal Lawyers Association,* 2010 SCC 23; *Canada v. Solosky* [1980] 1 S.C.R. 821; *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner*), 2010 ABCA 26

I. BACKGROUND

[para 1] On April 16, 2008, the Applicant made a request to the University of Calgary (the Public Body) for access to the following information:

1) All records, emails and correspondence prepared between February 2, 2008 up to April 14, 2008, regarding the handling of a Freedom of Information request sent on February 12, 2009 by [a reporter] from Canwest News Service, including documents or correspondence that explain why information was severed from the records that were disclosed, and including any document or correspondence that explains why audit was publicly released to all media outlets on April 14, 2008, but excluding correspondence that was sent directly to or from [the reporter] at Canwest News Service.
2) Copies of all invoices, research files and documents produced between August 1, 2004 and April 15, 2008 that were reviewed by the University Audit Services Special Investigation in its analysis of trust accounts – RT73-2028 & RT73-2153 – that were set up at the University of Calgary by [a professor] for "research on the Climate-Change Debate" including:
    a. A list of donors or contributors to the accounts in question along with invoices of receipts;
    b. A copy of a cheque for $5000 that was made out to FOS Society and reviewed by the audit services special investigation
    c. A copy of a letter dated September 17, 2004 from [the professor] which said: "This letter confirms to you that I would like to direct a project at the University of Calgary on "Research on the Climate Change Debate". I and my associates are prepared to assist you in this project and will offer you what financial assistance we can. To that end, I have begun the process to open a trust account at the U of C."

d. A copy of the backup for a donation of $50000 from the Kahanoff Foundation, including a congratulatory letter from the foundation as well a letter from the Friends of Science to the Kahanoff Foundation.
e. Records or copies of any correspondence between the University of Calgary and Elections Canada between January 1, 2008 and Tuesday April 18, 2008
f. Records or copies of any correspondence between the University of Calgary and the Canada Revenue Agency between January 1, 2008 and Tuesday, April 15, 2008.
g. Records of any copies or invoices and correspondence related to the purchase of radio advertising in Ontario from September 2005 until March 2006

[para 2] On September 19, 2008, the Public Body responded to the Applicant's access request in the following way:

> I am replying to your request of April 22, 2008 for access to records used by Audit Services in its analysis of two specific trust accounts.
>
> Some of the records you requested contain information that is excepted from disclosure under the *Freedom of Information and Protection of Privacy Act*. I have severed the excepted information so that the remaining information could be provided to you.
>
> The severed information is excepted from disclosure under a number of sections of the Act. The detailed sections supporting the excising of particular information is indicated on the face of each record or in a separate document inserted at the front of the file.
>
> You also requested records relating to the handling of your FOIP request #A08-003. As I indicated to you in an earlier communication, decisions regarding severing were finalized during a meeting of the Coordinator with Legal Counsel and the discussion was not documented. Similarly, the decision with respect to the release of the audit to all media outlets was made by the VP (external relations), that is, there was no formal process and therefore no documentation of a process.
>
> Section 93 permits the University to charge fees for providing you with the information that you requested. The applicable fees have been calculated as follows:
>
> Locating and retrieving the record $6.75 per ¼ hour 6.75
> Producing a paper copy 447@ $0.25 / page $111.75
> Preparing records for disclosure 21 hours @ $6.75 ¼ hour $567.00
> Shipping Actual cost $19.75
> Total $705.25
> Paid $120.00
> Balance $585.25

However, the head of the Public Body decided to reduce the processing fees by half and eliminate the fee for locating the record. In total, the Applicant was required to pay $415 in fees.

[para 3] The Applicant requested review of the Public Body's decision to withhold information, in particular the names of donors. The Applicant also requested review of the fees the Public Body charged for processing his access request.

[para 4] The Commissioner authorized mediation to resolve the issues between the parties. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 5] A notice of inquiry was sent to the parties. The issues for the inquiry were set out as the following:

1. Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the records/information?

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

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

4. 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?'

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

6. Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) of the Act?

Parties who were potentially affected by the issues relating to the application of section 16 or 17 of the FOIP Act were given notice of the inquiry and the right to make representations. Some of these parties provided submissions for the inquiry. In addition, the Applicant and the Public Body both provided initial and rebuttal submissions.

[para 6] On April 12, 2011, I wrote the Public Body and asked it the following questions:

1. The Public Body has applied section 24(1)(h) of the Freedom of Information and Protection of Privacy Act (the FOIP Act) to a draft version of a report. According to the Public Body's arguments, a final version of the report was made public. Is the draft version of a report, "the contents of a formal research or audit report that is, in the opinion of the head of a public body, "incomplete" for the purposes of this provision?

2. Assuming that section 24(1)(h) applies to the information referred to in question 1, how and why was discretion exercised to withhold the information from these records? Given that a final report was made public, what harm would result from disclosing the draft? In answering this question, if the Public Body finds it necessary to refer to specific information in the records at issue, this aspect of its response may be provided in camera. However, if the Public Body chooses to answer this question, the Public Body must also provide exchangeable submissions describing how and why discretion was exercised so as to withhold the information in the records.

3. In relation to all information to which a provision of section 24(1) was applied, how was discretion exercised and why?

4. Has the Public Body passed a bylaw or other legal instrument under section 95 of the FOIP Act in order to charge fees? If so, a copy of this bylaw or instrument should be supplied for my review.

5. If the Public Body has not set fees by bylaw or other legal instrument under section 95, does section 93 authorize the head of a local public body that has not set fees to determine the fees payable under the regulations and charge and collect them on its behalf?

The Public Body responded to these questions on June 1, 2011. The Applicant was provided an opportunity to respond to the Public Body's answers to these questions but did not provide a response.

II. RECORDS AT ISSUE

[para 7] Records contained in a binder prepared by the Public Body for this inquiry entitled, "Records at Issue (For the Commissioner Only, Not Exchanged Among the Parties)" are at issue.

III. ISSUES

Issue A: Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the records/information?

Issue B: Does section 17 of the Act (disclosure harmful to personal privacy) apply to the records/information?

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

Issue D: 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?'

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

Issue F: Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) of the Act?

IV. DISCUSSION OF ISSUES

Issue A: Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the records/information?

[para 8] Section 16 is a mandatory exception to disclosure. It states:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party,*
>
> *(b) that is supplied, explicitly or implicitly, in confidence, and*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*

> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
> *(iii) result in undue financial loss or gain to any person or organization, or*
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[para 9] The purpose of mandatory exceptions to disclosure for the commercial information of third parties in access to information legislation is set out in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* at page 313:

> The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information.

Section 16 is intended to protect specific types of proprietary information or "informational assets" of third parties from disclosure, so that businesses may be confident that they can continue to invest in this kind of information, and to encourage businesses to provide this kind of information to government when required.

[para 10] In Order F2005-011, the Commissioner adopted the following approach to section 16 analysis:

> Order F2004-013 held that to qualify for the exception in section 16(1), a record must satisfy the following three-part test:
> Part 1: Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?
> Part 2: Was the information supplied, explicitly or implicitly, in confidence?
> Part 3: Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

I will therefore consider whether the information withheld by the Public Body under section 16 meets the requirements of sections 16(1)(a), (b), and (c) and therefore falls under section 16(1).

Part 1: Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

[para 11] The Public Body argues that the information severed from the records at issue under section 16 consists of the financial, commercial, or technical information of third party businesses and contractors for the purposes of section 16(1)(a). It argues:

> It is important to note that under section 16(1)(a) "commercial information" can include the names and titles of a third party's key personnel because they provide information about how a third party organizes

its work. In this context, what would otherwise be personal information can also be commercial information (F2003-004).

In some instances, the donor information excepted from disclosure contains the names and titles of the donor's key personnel, and in this context personal information can be considered commercial information.

Also under section 16(1)(a), "financial information" includes information regarding the monetary resources of a third party (F2002-002). Financial information is not only limited to information regarding a third party's monetary resources themselves, but also how that third party chooses to distribute its monetary resources (F2009-0280.

The donor information can clearly be considered financial information as it outlines the monetary resources that the donor has available to it, and it also indicates how those donors choose to distribute those resources to the University. Accordingly, it falls within the financial information category.

Also under section 16(1)(a), "technical information" includes information that relates to particular subjects, crafts or professions that are based on a specific technique or approach (F2002-002).

In some instances, the information provided on consulting invoices is proprietary in nature and provides insight into the approach that those consultants take to their profession and descriptions of their work product. Thus it falls within the technical information category.

Accordingly, the University submits that the requirements of section 16(1)(a) are met.

[para 12] The Applicant argues that the Public Body has not established that harm would result from disclosure of the information it has withheld under section 16, and has therefore not met the requirements of section 16(1)(b). Moreover, he argues that the Public Body was incorrect to apply section 16 to invoices.

[para 13] In Order F2008-018, I considered the meaning of "technical information" for the purposes of section 16(1)(a). I said:

In my view, technical information includes information falling under the category of applied sciences or mechanical arts, and includes such topics as construction, operation or maintenance of a structure, process, equipment or thing. I find that Records 1 - 9, 25 - 27, 36 - 41, 45 - 76, 95, and 121 - 122 do not contain technical information. Consequently, these records cannot be withheld on the basis that they contain technical information under section 16. However, I find that the remaining records contain technical information as it falls under the category of mechanical arts and addresses the operation and maintenance of equipment.

[para 14] In Order F2002-002, as the Public Body notes, the Adjudicator considered information to be technical if it relates to particular subjects, crafts or professions that are based on a specific technique or approach.

[para 15] In Order P-454, the Assistant Commissioner of the Office of the Information and Privacy Commissioner of Ontario considered the meaning of "technical information" within the context of Ontario's equivalent of section 16. He said:

In my view, technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional

> in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the Act.

[para 16] The *Canadian Oxford Dictionary* offers the following definitions of the word "technical": "1. of or involving the mechanical arts and applied sciences 2. of or relating to a particular subject or craft". Previous decisions of this office differ from one another to a certain extent, given that Order F2008-018 considers technical information to refer to information relating to fields of applied sciences or mechanical arts, while Order F2002-002 holds information to be technical for the purposes of section 16(1)(a) provided it relates to particular subjects or crafts.

[para 17] As I found in Order F2008-018, "technical information" includes information belonging to a third party that falls under the general category of applied sciences or mechanical arts. "Technical" is paired grammatically with "scientific" in section 16(1)(a), which is consistent with the notion that the two terms are intended to complement one another. "Scientific" information would then to information relating to information belonging to a third party regarding natural or physical sciences, such as proprietary formulas, as an example, while technical information is information belonging to a third party regarding the applied sciences, such as proprietary designs, methods, and technology.

[para 18] Defining "technical" for the purposes of section 16(1)(a) as referring to information "relating to a particular subject or craft" is consistent with the idea that technical information is information belonging to a third party that has to do with applied sciences and mechanical arts. Technical information, in essence, is information about such things as specialized designs, methods, and technology.

[para 19] The Public Body withheld information from consulting invoices and from spread sheets detailing consulting services for the stated reason that this information provided insight into the approach that the consultants who billed the Public Body take to their profession and also because the information contains descriptions of their work product. However, I find that this information does not describe their work product or their methods for conducting business. Moreover, I find that the information contained in the invoices and spread sheets does not describe specialized ways of conducting business, such that it could be classified as technical information. The information in the records reveals the services that were provided, but does not contain specialized information that would reveal technical or specialized designs or methods belonging to the consultants. On review of the records at issue, I find that none of the information withheld by the Public Body under section 16 is "technical information" within the meaning of section 16(1)(a).

[para 20] In Order 96-013, the former Commissioner adopted the following definition of "commercial information" from Order P-489, a decision of the Information and Privacy Commissioner of Ontario:

> The Ontario Commissioner has also made some specific additions to the ordinary dictionary definition of "commercial information", which I wish to adopt. The category of "commercial information" includes "contract price" and information, "...which relates to the buying, selling, or exchange of merchandise or services..." (Order P-489 [1993] O.I.P.C. No. 191).

[para 21] In Order PO-2780, the Assistant Commissioner of the Office of the Information and Privacy Commissioner of Ontario described information meeting the requirements of commercial and financial information in the following way:

> Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

[para 22] In Order 96-018, the former Commissioner said the following regarding "financial information" for the purposes of section 16:

> In keeping with my decision in Order 96-013, I attribute ordinary meaning to the word "financial". I also reiterate that careful consideration must be given to the content of the document in determining whether or not the information falls within this section. Financial information, in my opinion, is information regarding the monetary resources of the third party and is not limited to information relating to financial transactions in which the third party is involved.
>
> <u>As such, the information in the record is not of a "financial" nature because it reveals nothing of the third party's financial capabilities beyond its commitment to raise the dollar amount specified.</u> Similarly, I find that the record reveals nothing of the third party's assets or liabilities, either past or present. (My emphasis)

[para 23] In Order MO-2496, an order of the Office of the Information and Privacy of Commissioner of Ontario, the Adjudicator considered the meaning of "commercial" and "financial" information as they appear in Ontario's equivalent of the FOIP Act's section 16. The Adjudicator stated:

> These terms have been defined in previous orders of this office as follows:
>
> …
>
> > Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
> >
> > Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

[para 24] In my view, Orders 96-013 and 96-018 of this office, and Order MO-2496 of the Office of the Information and Privacy Commissioner of Ontario, are essentially saying the same thing. "Commercial information" is information belonging to a third party about its buying, selling or exchange of merchandise or services. "Financial information" is information belonging to a third party about its monetary resources and use and distribution of its monetary resources.

[para 25] The information the Public Body severed from the records under section 16 falls under two categories: the names and identifying information of organizations who provided donations to the Public Body anonymously, and information from invoices submitted to the Public Body for services rendered. The information withheld from invoices includes the following kinds of information: the amounts billed, the names of contractors, the business contact information of contractors, and descriptions of services. The severing in relation to this kind of information is inconsistent, in that in some records this kind of information is withheld and in others it is not.

Names of donors

[para 26] The Public Body withheld the names of businesses that made donations under section 16, but not the amount of the donation. Given my conclusion in relation to the application of section 25 to this information, I need not decide whether section 16 applies to this information.

Information of third party consultants

[para 27] Individuals who made donations in a business capacity were identified as affected parties in the inquiry. Some of these referred to themselves in their submissions as "the anonymous consultants," for the reason that they provided consulting services to an individual who made an anonymous donation to the Public Body. Their arguments relate to their status as donors or the status of an individual for whom they provide consulting services as a donor, and their desire to maintain the anonymity of their clients or themselves as donors. I have therefore addressed the arguments of the "anonymous consultants" under section 25 in my analysis in relation to the identities of anonymous donors, below.

[para 28] The Public Body withheld the names of individuals working as consultants as "commercial information" for the purposes of section 16(1)(a). It reasons:

> It is important to note that under section 16(1)(a), "commercial information" can include the names and titles of a third party's key personnel because they provide information about how a third party organizes its work. In this context, what would otherwise be personal information can also be commercial information (F2003-004 [158]).

[para 29] The passage from Order F2003-004, on which the Public Body relies, states:

> Moreover, I find that the names and titles of Bell West's key personnel and contract managers contained in Schedule D is Bell West's commercial information, as that information relates to how Bell West proposes to organize its work. In particular, the contract manager is responsible and accountable for Bell West's obligations under the SuperNet Master Agreement and other agreements. In this context, what would otherwise be personal information can also be commercial information. See Order 99-030 for another example in which personal information meets the requirements of section 16(1).

[para 30] The Public Body did not explain why it considered the names of the contractors it severed to be the names of "key personnel" or "contract managers" as described in Order F2003-004. However, I infer from the fact that the names of the consultants that were withheld appear

to be the sole representatives of the consulting businesses in question, that the Public Body decided that they would be "key personnel" for this reason.

[para 31] In my view, the definition of "commercial information" put forward in Order F2003-004 is inconsistent with other orders of this office and with orders from other jurisdictions. As noted above, "commercial information" is information belonging to a third party about its buying, selling or exchange of merchandise or services. However, Order F2003-004 defines "commercial information" as information about how a third party organization proposes to organize its work in the future, and expands this notion further by including the job titles and names of employees that would then be involved in this work within the scope of "commercial information".

[para 32] I find the definition contained in F2003-004 problematic for the following reasons.

[para 33] First, it is unclear how information about "proposed organization of work" is commercial information, as that term is usually understood, as this definition does not incorporate the concept of "commerce".

[para 34] Second, it is unclear how information about proposed work arrangements, that are contingent on acceptance by a public body before they will become actual arrangements, could be said to belong to a third party at the time the proposed arrangements were supplied to a public body for the purposes of section 16(1)(b).

[para 35] Third, it is unclear how disclosing the names of employees or their job titles could reveal commercial information belonging to a third party, or information about its proposed work arrangements.

[para 36] Finally, if names, business contact information and job titles of employees were information falling under section 16(1)(a), there would be conflict between section 16 and section 40(bb.1). Section 40(1)(bb.1) authorizes public bodies to disclose the following:

> *40(1) A public body may disclose personal information only*
>
> *(bb.1) if the personal information is information of a type routinely disclosed in a business or professional context and the disclosure*
>
> *(i) is limited to an individual's name and business contact information, including business title, address, telephone number, facsimile number and e-mail address, and*
>
> *(ii) does not reveal other personal information about the individual or personal information about another individual,*

Section 40(1)(bb.1) authorizes public bodies to disclose information such as names of individuals, their business contact information, and their job titles if information of this kind is routinely disclosed in a business or professional context. Order F2003-004 states that this kind of

information can also fall under section 16(1)(a), as information of this kind would reveal how a third party business organizes, or intends to organize, its work.

[para 37] Section 40 is not "subject to" section 16, nor does it apply "notwithstanding" this provision. However, given that section 40 provides discretion to disclose the kinds of information that Order F2003-004 suggests it is mandatory to withhold under section 16, it would be necessary for the legislature to establish which of these provisions takes precedence in the event that both could be said to apply. In my view, the fact that the legislation is silent as to which of these provisions takes precedence is a signal that the legislature did not intend section 16(1)(a) to encompass business contact information of employees, consultants, or contractors.

[para 38] I find that the names, titles, and business contact information of employees, consultants, or contractors of third party businesses is not commercial information or information to which section 16(1)(a) applies. I therefore find that this kind of information cannot be withheld under section 16.

[para 39] I turn to information contained in the invoices relating to services and the prices of services. This is the commercial information of the consultants who submitted them, in the sense that the information is about the terms under which these contractors sold services to the Public Body. I will therefore consider whether this information was supplied in confidence for the purposes of section 16(1)(b),

Was the information regarding services performed by contractors contained in spread sheets or contained in invoices submitted for payment by third party contractors supplied, explicitly or implicitly, in confidence?

[para 40] In Order F2005-030, the Commissioner commented that information *negotiated between* a public body and a third party is generally not information that has been *supplied to* the public body by a third party.

> Order 2000-005 held that, generally, information in an agreement that has been negotiated between a third party and a public body is not information that has been supplied to a public body. There are exceptions, where information supplied to the public body prior to or during negotiations is contained in the agreement in a relatively unchanged state, or is immutable, or where disclosure of information in an agreement would permit an applicant to make an accurate inference about information supplied to the public body during the negotiations (See Order 2000-005 at para 85; see also an extensive discussion of this topic in British Columbia Order 03-15.)
>
> In this case, the information the Public Body seeks to withhold is part of a contract negotiated between itself and the Affected Party. With respect to most of the Agreement, there is no evidence before me that any of the information that the Affected Party has described as its commercial or financial information was supplied to the Public Body by the Affected Party for the purpose of or prior to the negotiations of the contracts, or that any inferences can be drawn from the requested information about information that was so supplied. Accordingly I cannot conclude that most of this part of the requested information was information supplied to a Public Body as contemplated by section 16(1)(b).

[para 41] Similarly, in Order PO-2843, an order of the Office of the Information and Privacy Commissioner of Ontario, the Assistant Commissioner said:

> The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. [See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No.3475 (Div Ct.)]

[para 42] In determining that an agreement negotiated between parties did not constitute or reveal information supplied by third parties, the former Information and Privacy Commissioner of Ontario made the following finding in Order PO-2226:

> Record 1 in this appeal is a complex, multi-party agreement for the purchase of the assets of a large corporation. Records 2 and 3 are agreements that flow from Record 1, and they are also detailed and complex. All three contracts are multi-faceted and contain customized terms and conditions. None of the parties resisting disclosure have provided representations supporting the position that the agreements or any specific provisions in them were "supplied" to the Ministry or that they would reveal information actually supplied to the Ministry and, in my view, it is simply not reasonable to conclude that contracts of this nature were arrived at without the typical back-and-forth, give-and-take process of negotiation. I find that the records at issue in this appeal are not accurately described as "the informational assets of non-governmental parties", but instead are negotiated agreements that reflect the various interests of the parties engaged in the purchase and sale of "the de Havilland business".

[para 43] Order PO-2226 was upheld by the Ontario Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. 2851. The Ontario Divisional Court said the following regarding negotiated information:

> The Commissioner took the view that the records before him did not contain information which was supplied to the Ministry because the information was found in complex contracts which were the subject of agreement by a number of parties, in the case of the Asset Purchase Agreement, and between the government and Bombardier with respect to the other two agreements. His conclusion that complex and detailed agreements like the ones before him were the result of negotiations was a reasonable one. While the Ministry has suggested that its role was passive with respect to the Asset Purchase Agreement, it was reasonable for the Commissioner to conclude that the agreement was, nevertheless, negotiated and that it reflected all the parties' interests.
>
> During argument before us, counsel for the applicants did not point to anything in the sealed records ("the Private Record") which showed that the Commissioner erred in concluding that there were no informational assets in the three agreements. Having examined the Private Record, I find that the Commissioner reasonably concluded that the agreements were the subject of negotiations between the parties, and that they do not reveal information of the applicants actually supplied to the Ministry. The Asset Purchase Agreement in the Private Record contains neither the exhibits nor the schedules to which Boeing referred in its factum, and which might have disclosed information supplied by it.

[para 44] In *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No.3475, the Ontario Divisional Court upheld the decision of an Adjudicator of the Ontario Office of the Information and Privacy Commissioner, which held that a memorandum of understanding (MOU) did not contain information "supplied" by a third party. The Court said:

> In any event, the French version of s.17(1) may be read in a way that implicitly includes the notion of "supplied", as the purpose of s.17(1) incorporates the idea that the exemption is designed to protect information "received from" third parties, a notion that conforms with the concept of "supplied". Thus,

> the presence or absence of the verb "supplied" in the French version is not determinative, and the English and French versions may be read harmoniously.
>
> We see no merit in the distinction made by the Applicants between conventional supply contracts and the agreement in question here. It should be noted that in *Boeing* none of the contracts were, in fact, conventional supply contracts. They consisted of an asset purchase agreement, a shareholders agreement and a share purchase agreement.
>
> Although the CMPA would like to characterize the 2000 and 2004 MOUs as being "in essence information sharing agreements", the evidence before the Adjudicator indicated that it provided for much more. The CMPA expressly agreed to provide various services, including malpractice coverage. Provisions of the 2004 MOU itself provide that the CMPA agrees "to continue to work together" with the other two parties and to take certain steps and provide certain services.
>
> Moreover, there was nothing immutable about the information provided by the CMPA. The language of Appendix 2 clearly contemplates that the information is subject to change. It should also be pointed out that the issue of immutability was not raised before the Adjudicator. In any event, immutability is just one factor, and the onus is on those resisting disclosure to show immutability and they have not done so.
>
> The Adjudicator explained that while the information in Appendix 2 may have been originally provided by the CMPA, the methodology had come to represent the negotiated intention of all the parties. In so concluding, the Adjudicator appropriately considered the entirety of the evidence, the relevant jurisprudence with respect to the interpretation and application of s.17(1) of FIPPA and expressed a reasonable line of analysis to reach this conclusion. Therefore, there is no basis to interfere with her decision.

[para 45] In Order PO-2435, an order of the Office of the Information and Privacy Commissioner of Ontario, the Adjudicator noted that even where a contract is preceded by little or no negotiation, the information in a contract is mutually generated, rather than supplied by a third party. The Adjudicator said:

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP released by MBS, the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a VOR agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or SSHA, to claim that the per diem amount was simply submitted and was not subject to negotiation.

[para 46] Previous orders of this office, and orders and judgments of other jurisdictions establish that "negotiating contractual terms" is not "supplying information" for the purposes of section 16(1)(b). In Order F2009-028, I addressed the argument that information in an accepted bid would enable one to learn commercial or financial information, and said:

> It is necessarily the case that what a party has agreed to is what it was prepared to agree to, and that it determined what it would agree to through some process of analysis of its resources and situation. That is the case with all contracts. Despite this, however, the cases are clear that negotiated contractual terms cannot be withheld under section 16. Partly, this is because, as discussed below, the contractual terms were not supplied by a third party, but were negotiated between the parties. This position can also be explained on the basis that, to the extent proposed contractual terms can be deduced from the final

> contractual terms, the former are not themselves commercial or financial information (other than what can be deduced from them about a party's financial capabilities), but only become such if they are transformed into the final contractual terms.

Proposed terms, such as those in bids, tenders, and proposals, do not become the commercial information of an organization until a public body elects to accept them. Moreover, accepting proposed terms amounts to a form of negotiation, given that once a public body accepts the terms, the terms reflect what both parties have agreed to.

[para 47] The Public Body argues the following in relation to its decision to withhold descriptions of services and the prices of services from invoices:

> The Applicant also notes that, "section 16 of the act was also used in numerous cases to withhold details on invoices. For example, page 31 of the released documents from the University of Calgary exempts details of "Consulting services" provided by "Paulsen Consulting". The University contents that descriptions of work performed for a client in consulting contracts include services provided by that consultant. Accordingly, disclosure could reasonably be expected to lead to undue financial loss to those consulting companies, and undue financial gain to those who may benefit from those proprietary elements if they are disclosed.

[para 48] As noted above, I accept that the information regarding services provided and the prices for services appearing on invoices submitted for payment is the commercial information of the consultants who submitted the invoices, given that the information relates to a commercial transaction in which the consultants are involved. However, I find that this information reflects contractual terms negotiated between the Public Body and the consultants, rather than information that could be said to be supplied by the consultants. In addition, at the time this information was submitted, it did not reflect the commercial information of the consultants, but only became so once the Public Body accepted their terms.

[para 49] The consultants submitted the invoices for payment and the Public Body paid the invoices. While it does not appear that extensive negotiation took place between the consultants and the public body, it is clear that the consultants proposed terms and the Public Body accepted them and indicated this acceptance by paying the invoices. Consequently, the information regarding services and the prices of services is negotiated and not supplied for the purposes of section 16(1)(b).

[para 50] As the requirements of section 16(1)(a), (b), and (c) must all be met before section 16 applies to information, and because I have found that the information withheld by the Public Body regarding services performed by contractors contained in spread sheets or contained in invoices submitted for payment does not meet the requirements of section 16(1)(b), I need not consider whether the requirements of section 16(1)(c) are met.

Issue B: Does section 17 of the Act (disclosure harmful to personal privacy) apply to the records/information?

[para 51] The Public Body withheld names and contact information that would serve to identify third party individuals from the records at issue. The Public Body also severed the hours worked and the rate of pay of third party individuals. Some of these individuals whose names were withheld are donors, while others are individuals who provided consulting services.

[para 52] Section 1(n) defines personal information under the Act:

> *(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;*

Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.

[para 53] I find that the information severed by the Public Body is personal information, as it is about third parties as identifiable individuals. I will therefore consider whether section 17 requires the Public Body to withhold the personal information of these individuals.

[para 54] Section 17 states in part:

> *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*
>
> *…*
>
> *(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body…*

…

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

…

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

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

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

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

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

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

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

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

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

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

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

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

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

[para 55] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 56] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its

application applies). Section 17(5) is not an exhaustive list and other relevant circumstances must be considered.

[para 57] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

> In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. 16(5) and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4). In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) is (sic) met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4).

[para 58] Section 17 requires a public body to withhold personal information when disclosing the information would be harmful to the personal privacy of an identifiable individual. However, it also contains provisions that establish situations when it would not be an unreasonable invasion of personal privacy to disclose personal information, such as when section 17(2) applies. I will first consider whether any of the provisions of section 17(2) apply to the information withheld by the Public Body under section 17.

Information from invoices, receipts and summaries of accounts

[para 59] The Public Body withheld under section 17(1) the names of consultants, the hours they worked, their contact information, receipts, and their hourly rates from invoices they submitted for payment. The Public Body also withheld the names of individuals who provided services from a record entitled "Summary of Account RT732028.

[para 60] In Order F2004-014, the Commissioner found that personal information that would be revealed by disclosing the details of a contract for services is subject to section 17(2)(f). He said:

> In contrast, the phrase "financial … details of a contract to supply … services" in section 17(2)(f) is highly apt to describe the information at issue – the hourly rate, monthly and total hours, and total contract cost. The amount of the payment for the service (in this case teaching of a course or courses), and the manner of calculating it, very naturally engage the phrase in section 17(2)(f).
>
> Thus I can conclude that section 17(2)(f) governs this situation and the information at issue also on the basis that its language more aptly and precisely describes the information.
>
> In my view my conclusions on this issue comport with the policy implicit in sections 17(2)(e) and (f) that there should be transparency for expenditures of public funds for employment or the purchase of services. This policy goal is evident in Ontario Order M-18, cited by the Public Body. That case involved a 'contract of service' relationship in which there was a salary but no salary range. The Commissioner directed that a salary range be established and disclosed so that the policy goal of transparency in the section of the legislation parallel to section 17(2)(e) could not be defeated by not having a range. In Alberta, for situations in which there are salary ranges, section 17(2)(e) achieves the desired transparency. For situations where there are contracts to pay a fee for the performance of a particular service, section 17(2)(f) does so.

> Because in my view the records are covered by section 17(2)(f), I conclude that disclosure of the personal information at issue would not be an unreasonable invasion of the personal privacy of the fee-for-service instructors, and that the Public Body cannot rely on section 17 for mandatory refusal. I do not need to consider, therefore, whether any of the factors in section 17(5) operate to rebut any presumptions arising under section 17(4).

The Commissioner found that the hourly rate of a contractor, the monthly and total hours, and the total contract cost was information subject to section 17(2)(f). In making this finding, he concluded that the purpose of section 17(2)(f) is to ensure transparency when public bodies expend public funds to purchase services.

[para 61] In my view, this purpose of transparency would also be achieved by disclosing contractual details such as the identities of the contractors with whom the public body does business, the amounts the contractors submit for payment, and the nature of the services and expenses billed to a public body.

[para 62] As section 17(2)(f) addresses a situation in which it is not an invasion of personal privacy to disclose the personal information of a third party, information subject to section 17(2)(f) must have a personal component, such that the individual contractor could be identified through disclosure of the details of the contract. It follows then that the identity of a contractor is a detail of a contract to supply goods and services to a public body as contemplated by section 17(2)(f).

[para 63] As I find that section 17(2)(f) applies to the personal information of contractors withheld by the Public Body, I find that section 17 does not apply so as to require the Public Body to withhold this information.

[para 64] In his submissions, the Applicant stated that he was not seeking personal financial information, such as account numbers, customer reward numbers, or personally identifying address information contained in the invoices. As the Applicant agrees that this kind of information should be withheld, I will make no findings or order in relation to it even though it appears on invoices and receipts.

Records 109, 110, 111 of File 2

[para 65] The Public Body withheld email correspondence between its legal department and an individual who took issue with the research for which the Public Body accepted donations. The Public Body has not explained why it severed the individual's emails, and two of its responses to him, in their entirety. While section 17(1) requires a public body to withhold personal information, section 6(2) gives a right of access to a record once information subject to an exception has been severed from it. Consequently, a public body must consider whether it is possible to sever personal information from a record and to provide the remainder to an applicant.

[para 66] Having reviewed records 109, 110, and 111 of File 2, I find the individual's name, email address, signature line, and address line and his views regarding the University of

Calgary's research funding program are personal information subject to section 17(4)(g). Moreover, there do not appear to be any relevant factors set out in section 17(5) that would support disclosing the individual's personally identifying information. However, I find that if the name, email address, signature line, and address line are severed from the records, the remaining information would no longer be subject to section 17(4)(g), as it would no longer be associated with the individual's name.

[para 67] The remaining names in the emails are those of employees acting in a capacity in which they represent the Public Body. In Order F2009-026, I reviewed orders of this office addressing when the information of employees of a public body is their personal information and said:

> If information is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. As noted above, the definition of "third party" under the Act excludes a public body. In Order 99-032, the former Commissioner noted:
>
>> The Act applies to public bodies. However, public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.
>
> In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of section 17 may apply to the information. I must therefore consider whether the information about employees in the records at issue is about them acting on behalf of the Public Body, or is information conveying something personal about the employees.

In *Mount Royal University v. Carter*, 2011 ABQB 28, Wilson J. found the above analysis to be reasonable. I will therefore consider whether the information about employees contained in the emails appearing on records 109, 110, and 111, are about the employees acting in a personal capacity or in a representative capacity.

[para 68] I find that the references to the employees contained on records 109, 110, and 111, are references to the employees acting as representatives of the Public Body. The emails state the position of the Public Body and respond to criticism on behalf of the Public Body, and also establish protocols and steps for employees of the Public Body to take in relation to the concerns of the individual. I find that the information created by employees in the emails on records 109, 110, and 111 of File 2, does not have a personal dimension. I therefore find that section 17 does not apply to the names of employees, or to the emails they created in these records.

[para 69] As I find that that the personally identifying information of the individual contained in records 109, 110, and 111 of File 2 can be severed from the records so that the remaining information may be provided to the Applicant without offending section 17, I intend to order the Public Body to do so.

Names of employees appearing on spreadsheets

[para 70] The Public Body severed the names of employees appearing on spreadsheets where disclosing the names would reveal the amounts these employees were paid.

[para 71] I find that the Public Body is required to sever the names of employees in these cases, as disclosing the names of the employees in the context of their earnings from employment would enable the Applicant to learn their salaries, which is personal information subject to section 17(4)(g). In addition, there are no factors under section 17(5) weighing in favor of disclosing this information.

[para 72] As I find that the Public Body was right to sever the names of employees in situations where disclosing their names would reveal their salary information, I will confirm the Public Body's decision to sever this information under section 17(1).

Paragraph 3 of Record 121 of File 2

[para 73] The Public Body removed the third paragraph of a letter written by the Provost and Vice-President (Academic) to a professor under section 17(1). However, the Public Body did not provide any explanation as to why it withheld this paragraph, when it disclosed the remaining paragraphs of this letter, which disclose the identity of the professor.

[para 74] It may be that this paragraph was severed on the basis that it refers to action the professor was required to take, and the Public Body considered this information to have a personal dimension for that reason. However, on reviewing the instruction to the professor, it appears that the professor was required to take action as an employee of the Public Body, with the assistance of another employee of the Public Body, in relation to accounts under the control of the Public Body. The letter does not indicate that the direction to the professor is outside the normal course of the activities of the public body or the professor's employment responsibilities.

[para 75] I am therefore unable to conclude that there is any information in the third paragraph about the professor acting in his personal capacity. I therefore find that section 17 does not apply to the third paragraph.

[para 76] As I find that section 17 does not apply to the information in the third paragraph of record 121, I intend to order the Public Body to disclose this information to the Applicant.

Names of donors

[para 77] I turn now to the names of individuals who made donations to the Public Body. I find that the names of the individual donors is their personal information and is subject to section 17(4)(g), as the names of these individuals appear in the context of information establishing that they made donations to the Public Body. A presumption therefore arises that disclosing the names of the individual donors would be an unreasonable invasion of their personal privacy, given that disclosing their names in the context of the donations they have made would reveal that they made donations in particular amounts to support research intended to disprove the possibility of climate change. I will therefore consider under section 17(5) whether there are any

relevant factors that would have the effect of rebutting the presumption that it would be an unreasonable invasion of the individual donors' privacy to disclose their names.

[para 78] The Public Body argues the following in relation to the factors set out in section 17(5):

> Even where the activities of a public body have been called into question, the disclosure of personal information should only occur where it is necessary, and only to the extent necessary, to subject the activities of the public body to public scrutiny (F2004-015, F2008-020). Citing Ontario Order P-673, it was noted that where a public body had previously disclosed a substantial amount of information, the release for personal information is not likely to be desirable for the purposes of subjecting the public body to public scrutiny, and that this is particularly so where the public body had also investigated the matter in issue (F2008-020). In certain cases disclosure may satisfy public curiosity, but may not achieve public scrutiny.

[para 79] I agree with the Public Body that personal information must be necessary for the purpose of subjecting the activities of a public body to public scrutiny before section 17(5)(a) can be said to apply. In my view, disclosing the names of individual donors in this case would not serve the purpose of subjecting the activities of the Public Body to public scrutiny, as the activities of the individual donors are not the activities of the Public Body. If the names of the donors were disclosed, this would have the effect of subjecting the activities of the donors to public scrutiny, but the Public Body's activities would not be subjected to any greater scrutiny than the disclosures of information it has already made provide. Moreover, I am not aware of a public interest for the purposes of section 17(5) that would be met by subjecting the activities of the donors to public scrutiny. I also find that there are no factors under section 17(5) that weigh in favor of disclosing the names of donors. I find that the presumption established by section 17(4)(g) in relation to the donor information is not rebutted. I therefore find that the Public Body properly withheld the names of individual donors from the records at issue under section 17(1).

[para 80] To summarize, I find that information from invoices and receipts submitted by consultants for payment is personal information subject to section 17(2)(f). I therefore find that it is not an unreasonable invasion of the consultants' personal privacy to disclose this information. I will make no order in relation to information such as account numbers, rewards plan identification numbers, or personal addresses appearing on the invoices, as the Applicant clarified that he is not seeking this kind of information. I confirm that section 17(1) requires the Public Body to withhold the names of individual donors. I find that if the Public Body severs the name, email address, address, and signature line of an individual from records 109, 110, and 111 of File 2, that the remaining information will not be subject to section 17. I find that the third paragraph of record 121 of File 2 is not subject to section 17. I find that the Public Body properly severed the names of the employees where the presence of the name would reveal individual wages or salaries.

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

[para 81] The Public Body applied provisions of section 24(1) to withhold information from the records. The relevant provisions of section 24(1) are the following:

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 Counsel,*
>
> *(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*
>
> ...
>
> *(h) the contents of a formal research or audit report that in the opinion of the head of the public body is incomplete unless no progress has been made on the report for at least 3 years.*

The Public Body withheld information from records 119 – 120 and 124 – 127 of File 2, and records 2 and 5 of File 3 under section 24(1)(a). It withheld information from record 163 of File 2 under section 24(1)(b). The Public Body also applied section 24(1)(c) to withhold information from records 119 – 120 of File 2. The Public Body withheld the contents of records 13 – 22 and 24-45 of File 2 under section 24(1)(h).

Section 24(1)(a)

[para 82] In Order 96-006, the former Commissioner established a test to determine whether information is advice, recommendations, analyses or policy options within the meaning of section 24(1)(a). He said:

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

The three part test adopted by the former Commissioner in Order 96-006 is intended to assist parties to identify information meeting the requirements of section 24(1)(a). This test recognizes

that the purpose of section 24(1)(a) is to protect the decision making processes of public bodies from interference before and after the decision is made.

[para 83] The Public Body withheld some, but not all, information from records 119 and 120 under section 24(1)(a). The severed information falls under the heading "Issues". The Public Body did not sever all information described as "issues" in these records, but only some. The information severed contains an analysis of facts and an assessment of possible scenarios arising from the facts. In my view, the information severed by the Public Body is consistent with "analysis" for the purposes of section 24(1)(a). Moreover, the analysis appears intended to instruct management about a situation that had arisen and the particular consequences that could result from the situation, so that management could decide the action to be taken in regard to the circumstances documented. I find that section 24(1)(a) applies to the information withheld by the Public Body from records 119 and 120 of File 2.

[para 84] While the Public Body applied section 24(1)(a) to withhold records 124 – 127 of File 2 in their entirety, it also applied section 27(1)(a) to these records. Given my conclusion in relation to the application of section 27(1)(a) to these records, below, I need not consider whether section 24(1)(a) also authorizes the Public Body to withhold the information.

[para 85] The Public Body withheld records 2 and 5 of File 3 in their entirety. The information severed from record 2 is an analysis of audit findings, while the information withheld from record 5 contains recommended courses of action. I find that the information severed from these records is subject to section 24(1)(a).

24(1)(b)

[para 86] The Public Body withheld some information from record 163 of File 2 under section 24(1)(b). The record indicates that the Public Body asked its Chief Development Officer his views in relation to a particular set of circumstances, and that he provided his views.

[para 87] I find that the information withheld from record 163 is a consultation between employees of the Public Body and I therefore find that section 24(1)(b) applies to the information severed by the Public Body from record 163 of File 2.

24(1)(h)

As cited above, section 24(1)(h) states:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> > *(h) the contents of a formal research or audit report that in the opinion of the head of the public body is incomplete unless no progress has been made on the report for at least 3 years.*

[para 88] The Public Body withheld the contents of 13 – 22 and 24-45 of File 2 on the basis that these records contain the draft of an audit report. A final audit report was completed and made public.

[para 89] As I was uncertain as to why the Public Body withheld a draft report under section 24(1)(h), when the final audit report had been completed, I asked the Public Body the following questions:

> 1. The Public Body has applied section 24(1)(h) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to a draft version of a report. According to the Public Body's arguments, a final version of the report was made public. Is the draft version of a report, "the contents of a formal research or audit report that is, in the opinion of the head of a public body, "incomplete" for the purposes of this provision?
>
> 2. Assuming that section 24(1)(h) applies to the information referred to in question 1, how and why was discretion exercised to withhold the information from these records? Given that a final report was made public, what harm would result from disclosing the draft? In answering this question, if the Public Body finds it necessary to refer to specific information in the records at issue, this aspect of its response may be provided *in camera*. However, if the Public Body chooses to answer this question, the Public Body must also provide exchangeable submissions describing how and why discretion was exercised so as to withhold the information in the records.
>
> 3. In relation to all information to which a provision of section 24(1) was applied, how was discretion exercised and why?

[para 90] The Public Body provided the following response:

> Yes, it is submitted that the Draft Report, Recommendations, Management Response and Activity and Status Report is an incomplete audit report.
>
> Tab 2 of the Records at Issue, Documents 1 – 22 (the Table) consists of information taken from the draft report and circulated to management for review, discussion, comment and response The Table has four columns: recommendation, management response, timing, and activity and status. This version contains the information collected from various departments as at March 31, 2008. Documents numbered 24-45 at Tab 2 are the complete text of the draft report, as at March 7, 2008. It includes the audit recommendations but does not include the management response which had not yet been collected, and therefore could not be factored into the report.
>
> The FOIP Guidelines and Practices (2009) published by the Government of Alberta states that "[a] report submitted by an auditor to officials of a public body for review and discussion prior to its formal presentation would be incomplete." It is submitted that the Table is the very type of record contemplated in the FOIP Guidelines and Practices (2009).

[para 91] The Public Body applied section 24(1)(h) to two different versions of a report. These versions differ from the final audit report, in that the final version contains the management response. The Public Body takes the position that the early drafts are incomplete audit reports because they do not contain information that was added to the final audit report.

[para 92] Section 24(1)(h) permits a public body to withhold the *contents* of a formal research or audit report that is, in the opinion of the head of a public body, incomplete. (It is unclear how this provision operates when a provision of section 24(2) also applies to information forming part of the contents of an incomplete research or audit report; however, for the purposes

of this inquiry I need not address that issue.) If no progress is made on the draft report for at least three years, section 24(1)(h) does not apply. In my view, the purpose of this provision is to enable public bodies to complete formal audit and research reports. A public body may withhold *all* the information in an incomplete report, not simply information that would reveal its decision making process. The provision does not refer to decision making at all, but rather to the process of creating a formal audit or research report. This suggests that this provision is not intended to protect a public body's decision making process, although it may also have that effect. Significantly, section 24(1)(h) does not apply when a formal research or audit report is complete, or is incomplete but no progress has been made on the report for three years. This limitation in the application of section 24(1)(h) supports the interpretation that section 24(1)(h) is intended to enable public bodies to complete formal research and audit reports by allowing them to withhold their contents before the final research or audit report is complete. Conceivably, making the contents of an incomplete audit or research report public could have the effect of interfering with, or otherwise limiting, the ability of a public body to complete such a report.

[para 93] The Public Body relies on the view that each draft of a formal research or audit report may be considered to be distinct from the final research or audit report. Therefore, even though the final report has been completed, and could not be withheld on the basis of section 24(1)(h), it reasons that earlier drafts of the report may be, as they remain incomplete. In essence, it takes the position that progress made on a subsequent draft, is not progress made on an initial draft. A contrary view would be that section 24(1)(h) protects the process of completing a formal research or audit report. As a result, progress may be seen to be made on a report through the creation of subsequent versions of a report, including the final report. However, once the formal audit or research report is complete, section 24(1)(h) may not be applied.

[para 94] I accept the Public Body's evidence that the final audit report, which is complete, contains more information than the draft versions it withheld. Therefore, the draft versions are incomplete, in the sense that they do not contain all the information in the final version. However, section 24(1)(h) refers to the completion of a formal *report,* not the completion of drafts of the report. When applying section 24(1)(h), the key point is to consider whether the report has been completed. Once the final version of the report has been completed, the report is no longer incomplete within the terms of this provision.

[para 95] Section 24(1)(h) cannot be applied to a report on which progress has not been made for over three years. In the case before me, if one is to consider the incomplete draft reports to be distinct from the final report, in the sense that completing the final version of a report does not amount to making progress on earlier versions, then the last dates on which progress was made on these reports was March 7, 2008 and March 31, 2008, as the Public Body indicates in its submissions. As a result, more than three years have now passed since progress was made on the draft reports, and section 24(1)(h) does not apply to the contents of reports on which progress has not been made for at least three years. While the Public Body argues that the information it severed under section 24(1)(h) is "clearly a working document and a work in progress" it is only clear that this information had that character in March 2008. It is difficult to imagine that that the Public Body would have made any recent progress in relation to those drafts, given its evidence that they lack the information that appeared in later versions, such as the final version, and it has already completed the final audit report.

[para 96] A difficulty with considering early drafts to be distinct from each other for the purpose of assessing whether progress has been made on them is that this interpretation would have the effect of undermining the purpose of section 24(1)(h). For example, if it took more than three years between creating an initial draft of a report and the final report, then the initial report could not be withheld under section 24(1)(h), even though a public body was still making progress on later versions of the report. However, the purpose of the provision, as discussed above, is to ensure that a public body may complete a formal research or audit report, free from the interference that could result if an incomplete draft were released.

[para 97] In my view, the better approach is to consider draft reports to be part of the process of creating the final audit report. As a result, progress made on a subsequent draft of a research or audit report, remains progress on the formal research or audit report contemplated by section 24(1)(h). Consequently, I find that further progress was made on the drafts withheld by the Public Body under section 24(1)(h) after March 2008. However, I also find that the Public Body's evidence establishes that it completed the audit report. Therefore, section 24(1)(h) cannot be applied to the contents of the draft reports, as the audit report is complete.

[para 98] For these reasons, I find that section 24(1)(h) does not apply to the contents of records withheld by the Public Body under this provision.

Exercise of Discretion

[para 99] In *Ontario (Public Safety and Security) v. Criminal Lawyers Association,* 2010 SCC 23, the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion. The Court noted:

> The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.
>
> In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:
>
>> In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis in original]
>
> Decisions of the Assistant Commissioner regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness (see *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).

> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).
>
> In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.
>
> The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above.
>
> Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

[para 100] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

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

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

[para 101] While this case was decided under Ontario's legislation, in my view, it has equal application to Alberta's legislation. Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

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

[para 102] In Order 96-017, the former Commissioner reviewed the law regarding a Commissioner's authority to review the head of a public body's exercise of discretion and

concluded that section 72(2)(b), (then section 68(2)(b)), was the source of that authority. He commented on appropriate applications of discretion and described the evidence necessary to establish that discretion has been applied appropriately.

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

[para 103] In that case, the Commissioner found that the Public Body had not made any representations or provided any evidence in relation to its exercise of discretion. Further, he determined that the head must consider the purpose of the exception in the context of the public interest in disclosing information when exercising discretion. As the head of the Public Body had not provided any explanation for withholding information, the Commissioner ordered the head to reconsider its exercise of discretion to withhold information under a discretionary exception.

[para 104] Similarly, in Order F2004-026, the Commissioner said;

> In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case. I find support for this position in orders of the British Columbia Information and Privacy Commissioner. Orders 325-1999 and 02-38 include a list of factors relevant to the exercise of

> discretion by a public body. In addition to "the general purposes of the legislation (of making information available to the public) the list includes "the wording of the discretionary exception and the interests which the section attempts to balance". It strikes me as a sound approach that the public body must have regard to why the exception was included, and whether withholding the information in a given case would meet that goal.

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

[para 105] As discussed above, the purpose of section 24(1)(a) is to enable public bodies to make sound decisions by enabling them to seek advice in confidence, free from interference, harassment, and second-guessing before or after they make decisions regarding potential courses of action. The purpose of section 24(1)(b) is similarly to ensure that employees and officers of a public body may consult or deliberate on courses of action free from interference. The purpose of section 24(1)(c) is to ensure that a public body's planning and negotiating processes are not exposed to potential interference.

[para 106] The Public Body explained that it exercised its discretion to withhold information under the provisions of section 24(1) in the following way:

> The Public Body exercised its discretion through a review by the Access and Privacy Coordinator, the Head of the Public Body, and the Vice President (University Relations). It was determined that section 24(1) applied to the records. The Public Body then considered whether or not harm could result from the disclosure.
>
> The Public Body determined that there could be harm to the Public Body. An example of the Public Body's concern was the potential harm to the Public Body with respect to the reputation of the Public Body, the ability to discuss all options frankly, and concern with respect to possible increased risk of loss or fraud attempts if potential control weaknesses of the Public Body were publicly identified.

[para 107] I accept that consideration of the potential harm to the Public Body's ability to discuss all options frankly is a purpose consistent with the application of sections 24(1)(a) and (b) of the FOIP Act. However, the Public Body did not apply sections 24(1)(a) and (b) solely for this reason. Rather, it also considered that the information it withheld under these provisions could serve to damage its reputation, if disclosed, and expose it to loss or fraud attempts. While it is not clear to me that the information the Public Body withheld under section 24(1)(a) and (b), would have this effect, I note that avoiding damage to reputation and exposure to fraud are not purposes, in and of themselves, for which section 24(1)(a), (b), or (c) is intended. Consequently, these considerations are irrelevant to the application of these provisions, unless they relate in some way to the purpose of protecting a public body's decision making process.

[para 108] It is not clear to what extent the Public Body applied sections 24(1)(a) and (b) to protect its ability to discuss options frankly, and to what extent it withheld information under these provisions to protect its reputation or to protect itself from fraud attempts. As a result, given that its decision to withhold information under these provisions is based, at least in part, on irrelevant considerations, I must ask the Public Body to exercise its discretion again in relation to the information it withheld under sections 24(1)(a) and (b). Moreover, in keeping with the principles established in *Ontario (Public Safety and Security)* regarding exercise of discretion, in the event that it decides to exercise its discretion in favor of withholding information under sections 24(1)(a) and (b), the Public Body must provide adequate reasons to support its decision.

Any new decision it makes regarding its exercise of discretion would be reviewable by the Commissioner.

[para 109] If I am wrong in finding that the contents of the draft reports withheld by the Public Body are complete, and therefore not subject to section 24(1)(h), I will consider whether it has demonstrated that it exercised its discretion appropriately when it withheld information under this provision.

[para 110] As discussed above, the purpose of section 24(1)(h) is to ensure that a public body is free to complete a formal research or audit report. The Public Body's stated purpose for withholding information under section 24(1)(h) is the following:

> The Public Body exercised its discretion not to release the records because the Table is incomplete. Not all departments had responded to the recommendations when the Table was printed and some statements are highlighted to indicate that there was still some question around the final form of the response. The Table is clearly a working document and a work in progress. If disclosed, the Table would give an inaccurate and incomplete view of how the Public Body intended to respond to the allegations and could potentially unfairly, harm the reputation of the Public Body.

Given that the audit report in question was completed, it is unclear how the Public Body could exercise discretion in favor of withholding draft versions of the audit report on the basis that there remain questions regarding the final form of the response, or for reasons consistent with, or relevant to, the purpose of section 24(1)(h). Had I found that section 24(1)(h) applied in this case, I would have ordered the Public Body to reconsider its decision to exercise its discretion to withhold information under this provision.

Issue D: 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?

[para 111] Section 25 creates an exception to the right of access in situations where disclosure of information would result in harm to economic and other interests of a public body. It states, in part:

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

[para 112] In Order 96-016, the former Commissioner considered the meaning of section 25(1)(c), (then section 24(1)(c). He said:

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

[para 113] Section 25 recognizes that there is a public interest in withholding information that could harm the economic interests of a public body. Sections 25(1)(a) – (d) contain a non-exhaustive list of information, the disclosure of which could be reasonably expected to harm the economic interests of a public body, or the Government of Alberta's ability to manage the economy.

[para 114] A public body must establish a nexus, through evidence, between the disclosure of the information it seeks to withhold and a reasonable expectation of harm to the Government of Alberta's or its own economic interests in order to establish that section 25(1)(c) applies.

[para 115] The Public Body argues the following in relation to its application of section 25:

> Multiple donors have indicated directly that if their identities were to be disclosed in connection with this project, they would refuse to donate to the University in the future where the funding may go towards projects dealing with politically charged topics. Some of these donors have provided substantial funding to a wide range of University projects over a long period of time so the decision to disclose donor identities and donation amounts would clearly have a chilling effect on future donations in general and specifically on the academic freedom of the faculty to examine, to question, to investigate, to comment and to criticize without deference to prescribed doctrines. A resulting lack of funding, would have an adverse effect on the variety of research that the University would be able to fund, and would therefore put the University at a competitive disadvantage to similar institutions. As noted above, section 25(1)(c) has been properly applied in the past where a public body refused disclosure of fundraising projects on the basis that it would hamper private sector participation and therefore their competitive position. Accordingly, the disclosure of the information requested would clearly be harmful to the economic interests of the University. A reasonable expectation of genuine harm to the economic interests of the University is therefore demonstrated, including both financial loss and prejudice of competitive position. A clear cause and effect relationship exists between the requested disclosure and the effected harm.
>
> In addition, agents of the donor who were provided with a non-disclosure agreement have indicated that if the donor's identify was disclosed, it would have a negative impact on future granting to the

> University. Moreover, if the [clients] of the agent, such as the anonymous donor, may no longer consider donations to the University since it was unable to maintain the confidentiality of these donors. Again, it is clear that there is a reasonable likelihood of harm arising out of disclosure of the donor identities and therefore the University's refusal to [disclose] under section 25 was justified.

[para 116] As discussed above, the "anonymous consultants" argue that disclosing the identities of anonymous donors could have the effect of reducing the donations the Public Body receives in the future, as it would be unable to accept donations from donors who make anonymity a condition of making a donation.

[para 117] While evidence or submissions from the Public Body as to the extent it has relied on anonymous donations in the past, and continues to do so, would have assisted me to assess the risk of financial harm to the Public Body should its ability to accept anonymous donations be compromised, I acknowledge that the Public Body, like other Universities, most likely relies on donations for research, including anonymous donations.

[para 118] Anonymous donations, such as those documented in the records before me, make the anonymity of the donor a condition of the donation. If the Public Body were to disclose the names and identifying information of anonymous donors, despite its prior agreement to maintain their anonymity, it is likely that these donors, and other donors who also prefer to donate anonymously, would cease to make donations to the Public Body. If the Public Body is not in a position to assure the anonymity of anonymous donors, by withholding their names, addresses, and names of employees and representatives that may serve to identify them, it is conceivable that such donors will elect to donate to other universities or causes that are willing to assure it. There is therefore a direct connection between disclosing information that would serve to identify donors, and losing donations. As a result, there is a direct relationship between disclosing the information to which the Public Body applied section 25(1) and the projected outcome of financial loss to the Public Body for the purposes of section 25(1)(c)(i). I therefore find that the Public Body properly withheld information under section 25(1)(c) to information that would serve to identify donors.

Exercise of discretion

[para 119] As discussed above, section 25(1)(c) authorizes public bodies to withhold information, if disclosing the information could be reasonable expected to result in economic harm to the public body. A financial loss is an example of economic harm.

[para 120] The Public Body withheld information that would serve to identify anonymous donors on the basis that disclosing this kind of information would dissuade donors who prefer to donate anonymously from making donations to the Public Body in the future. I find that the Public Body's reason for applying section 25(1) is consistent with the purpose of this provision and the public interest this provision reflects. I therefore find that the Public Body properly applied section 25(1) to withhold information that would serve to identify anonymous donors.

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

[para 121] Section 27(1)(a) of the FOIP Act is a discretionary exception to disclosure. It states, in part:

> *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…*

The Public Body withheld information from records 119 – 120, and 124 - 127 of File 2, record 5 of File 3, and records 66, 67, 68, 69, 70 – 73, and 74 – 75 of File 4 on the basis that these records are subject to solicitor-client privilege.

[para 122] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky* [1980] 1 S.C.R. 821. Speaking for the Court, Dickson J. (as he then was) said:

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

[para 123] The first question to consider whether solicitor-client privilege applies to records is whether the records are a communication between a solicitor and a client.
I find that this aspect of the test is not met in relation to the information withheld from records 119, 120 of File 2, and record 5 of File 3. Records 119 and 120 do not contain information that can be construed as a communication between a solicitor and a client. However, I find that this aspect of the test is met in relation to records 124 – 127 of File 2, and records 66 – 75 of File 4.

[para 124] In relation to the second part of the test, that is, whether the communication entails the seeking or giving of legal advice, I find that this aspect of the test is not met in relation to records 119 and 120 of File 2, or record 5 of File 3, as the information in these records was not prepared by a solicitor for the purpose of giving advice, or a client for the purpose of seeking it. However, I find that the second part of the test is met in relation to records 124 - 127 of File 2 and records 66 – 75 of File 4.

[para 125] In relation to the third part of the test, none of the records indicate explicitly that the information they contain is intended to be confidential. However, the Public Body argues that the nature of the communication itself implies confidence for the purposes of the third part of the *Solosky* test. I agree with the Public Body that when solicitors and clients communicate for the purpose of giving and receiving legal advice that these communications are intended to be kept confidential. Certainly, there is nothing in the records at issue that would suggest that the solicitors and clients whose communications are recorded in records 124 – 127 of File 2 and records 66 – 75 of File 4 expected anything other than to keep their communications confidential or did anything to jeopardize the confidence of their communications. I am therefore satisfied

that the third part of the *Solosky* test is met in relation to records 124 – 127 of File 2 and records 66 – 75 of File 4.

[para 126] For the reasons above, I find that records 124 – 127 of File 2 and records 66 – 75 of File 4 are subject to section 27(1)(a). However, I find that records 119 – 120 of File 2, and Record 5 of File 3 are not subject to section 27(1)(a).

Exercise of Discretion

[para 127] The Public Body argues the following in relation to its decision to withhold information subject to solicitor-client privilege under section 27(1)(a):

> In accordance with section 27(1)(a) of the Act, a public body may refuse to disclose information that is subject to any type of legal privilege, including solicitor-client privilege. The Supreme Court of Canada has noted the fundamental importance of solicitor-client privilege to the proper functioning of the Canadian legal system (*Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44). Due to the fundamental importance and near absolute nature of this privilege, a public body's decision to withhold information under section 27(1)(a) will be upheld in most cases where the public body or the records themselves establish that the privilege applies, even if only providing a minimal explanation regarding their exercise of discretion granted under section 27 (F2009-009).

[para 128] I agree with the Public Body that once a public body establishes that records are subject to solicitor-client privilege, withholding them is usually justified for that reason alone. In *Ontario (Public Safety and Security)*, the Supreme Court of Canada held that the public interest in maintaining solicitor-client privilege is such that it is unnecessary to balance the public interests in withholding records subject to this privilege and those in relation to disclosing them, as the public interest in withholding such records will always outweigh the interests associated with disclosing them.

> We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in McClure, stressed the categorical nature of the privilege:
>
> > . . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis…
>
> Accordingly, we would uphold the Commissioner's decision on the s. 19 claim.

[para 129] As I am satisfied that records 124 - 127 of File 2 and records 66 – 75 of File 4 are subject to solicitor-client privilege, it follows that I find that the Public Body properly exercised its discretion to withhold them under section 27(1)(a).

Issue F: Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4)?

[para 130] I asked the Public Body questions as to whether it had made a bylaw to set the fees it requires to be paid under section 93 under section 95. I also asked it whether the head it

has designated could require fees under section 93(1) in the event a local public body had not passed a bylaw under section 95(b). However, I have decided it would be unfair to address this issue for the following reasons: the ability of the Public Body to collect fees was not set as an issue for inquiry, the potential impact of this issue on other public bodies, depending on what I decide, would require further evidence and argument from other parties affected by the decision but the time limits imposed on me for completing the inquiry (see *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner*), 2010 ABCA 26) would preclude me from doing so, and the applicant has not made any submissions in relation to the issue. I will therefore make my decision in relation to fees based on the assumption that the Public Body has the authority to require fees.

[para 131] Section 93(4) grants discretion to the head of a public body to waive fees. It states:

> *93(4) The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head,*
>
> *(a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or*
>
> *(b) the record relates to a matter of public interest, including the environment or public health or safety.*

[para 132] In order F2007-023, the Adjudicator explained the Commissioner's jurisdiction to review decisions regarding fee waivers in the following way:

> When deciding whether a public body has properly refused to grant a fee waiver, the decision-maker must look at all of the circumstances, information and evidence that exists at the time when the Public Body denied the fee waiver and also at the time of the inquiry (Order 2001-042 (para 19)). A decision-maker may consider all information and evidence at the inquiry, even if that information and evidence was not available to the public body at the time it made its fee waiver decision.
>
> Section 72 of FOIP does not merely authorize the decision-maker to confirm a public body's decision or to require a public body to reconsider its own decision. Section 72(3)(c) of FOIP gives decision-makers the authority to render their own decision about whether to waive all or part of the fee or to order a refund. Under section 72(3)(c), the decision-maker has the authority to hear the case "de novo" as a new proceeding and to make a "fresh decision" (Order F2007-020 (para 30), OIPC External Adjudication Order #2 (May 24, 2002) Justice McMahon (para 45), Order 2001-023 (para 32)).
>
> I must review a public body's decision on a case-by-case basis, and consider all of the information before me. Therefore, if I reach a different conclusion than a public body and find that a fee should be reduced or completely waived, I may make a "fresh decision" and substitute my own decision for the public body's decision. However, if I reach the conclusion that a public body properly applied section 93(4) when denying a fee waiver, I may confirm that decision.

[para 133] The Applicant argues that the fees should be waived in the public interest. He states:

> FOS [Friends of Science] were issued payments totaling $123,427.52 from the Accounts. All of these payments were reimbursements of expenses incurred and included items such as video production, advertising, educational conferences, administrative assistant, website costs and radio ads.

However, it is clear from the receipts that many of the expenses occurred before the "Researcher" had applied to pen the trust accounts, and that some items described as "educational conferences" included trips, flights, meals and entertainment expenses in locations such as New Mexico.

These revelations are not adequately portrayed or captured in the audit that was released.

All of this information is in the public interest because of the nature of the debate on climate change science. Climatologists are portrayed in the work of this research project as not doing adequate research or manipulating evidence, so it is imperative for the public to learn exactly who is making these accusations and how they are doing it.

Releasing additional details about the work of lobbyists or communications specialists in this university research project would also be in the public interest for these reasons.

[para 134] In turn, the position of the Public Body is that the requirements of section 93(4)(b) are not met.

[para 135] In Order 96-002, the former Commissioner noted that the concept of public interest is broad, and that not all matters arguably relating to the public interest warranted fee waivers. He said:

> I would like to make some general comments on the concept of "public interest". It is possible to have the term "public" apply to everyone ("the public good") and to anyone (John or Jane Public who are the objects of government programs and policies). Similarly "interest" can range between individual curiosity and the notion of interest as a benefit, as in a collective interest in something. The weight of public interest will depend on a balancing of the weights afforded "curiosity," "benefit" and "broad" versus "narrow" publics. Where an access request relates to a matter that is of "interest" in both the sense of curiosity and benefit and the relevant "public" is broad, the case for removing all obstacles to access is very strong. So a matter that is the subject of curiosity to the larger public and also relates to a benefit to the broad public would present a very strong case for the waiver of fees. A matter which is of curiosity to many but affects no general benefit would present a less compelling case. Similarly, a matter that affects a benefit but in which few citizens are interested may present a less compelling case. In the less compelling cases, the importance of respecting the integrity of the legislated fee structure could outweigh the public interest dimension.

[para 136] In that order, the former Commissioner also developed a list of thirteen criteria to assist a decision maker to decide when it is appropriate to grant a fee waiver in the public interest.

[para 137] In Order F2006-032 at para. 43, the Adjudicator noted that some of the thirteen criteria set out in Order 96-002 were repetitive or not relevant in every case. She set out a revised, non-exhaustive list of three main criteria and several possibly relevant sub-criteria to consider in determining whether an applicant should be excused from paying all or part of a fee on the basis of public interest. She proposed the following questions:

> 1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it? The following may be relevant:
>
> - Have others besides the applicant sought or expressed an interest in the records?
> - Are there other indicators that the public has or would have an interest in the records?

2. Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public? The following may be relevant:

- Do the records relate to a conflict between the applicant and government?
- What is the likelihood the applicant will disseminate the contents of the records?

3. If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government? The following may be relevant:

- Do the records contain information that will show how the Government of Alberta or a public body reached or will reach a decision?
- Are the records desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to scrutiny?
- Will the records shed light on an activity of the Government of Alberta or a public body that have been called into question?

[para 138] In my view, these factors need only be considered once it has been established that the requested records are likely to contain information relating to the matter the Applicant points to as being in the public interest. While the first criterion set out in Order F2006-032 could certainly be interpreted as addressing this issue, the factors to be considered when answering this question indicate that this criterion addresses the extent to which the public interest is engaged in the matter contained in the records, but do not necessarily address the question of whether the information in the records is relevant to the public interest an applicant argues disclosure of the records will serve. However, for the purposes of section 93(4)(b), before considering the extent to which the public interest is engaged in a matter, it is necessary to consider whether the Applicant has established that the records contain information relating to the matter.

[para 139] The Applicant argues that disclosing the information in the records will fuel public debate regarding climate change because the information in the records demonstrates that researchers who take the position that climate change does not exist are either manipulating evidence or doing inadequate research. The Applicant takes the position that because some of the expenses submitted by these researchers were later disallowed by the Public Body, that the research conducted by the researchers must be unreliable and slanted.

[para 140] While I accept that climate change is the subject of public debate and a matter of public interest, I find that the Applicant has not established that the information in the records would cast any light on, or otherwise inform, the debate surrounding climate change or the scientific research relating to it. In my view, the fact that some of the research expenses submitted were later reviewed by the Public Body, does not cast any light on the research methodology or findings of the researchers. The Applicant appears to rely on the proposition that the types of researchers whose expenses do not comply with income tax rules are the types of researchers who conduct poor research or falsify results; however, I find that it has not been established that there is a nexus between submitting expenses and conducting research. Moreover, I find that disclosing the information in the records would not serve to inform public debate regarding climate change, although it may shed light on how expenses were submitted to the Public Body for a particular project.

[para 141] As the Applicant argues that the records shed light on climate change research, and I find that disclosing the information in the records would not have this effect, it follows that

I find that the Applicant has not established that the information in the records relates to a matter of public interest for the purposes of section 93(4)(b) of the FOIP Act.

[para 142] However, while I find that the factors set out in section 93(4) do not apply so as to support waiving the fees in this case, I note that section 72(3)(c) of the FOIP Act permits me to reduce fees in appropriate circumstances. I will therefore review whether appropriate circumstances exist that would support reducing the fees.

[para 143] As noted above, section 93(1), permits the head of a public body to require fees for services as provided for in the regulations.

[para 144] Section 93(6) prohibits a public body from charging fees in excess of the actual costs of providing services. It states;

> *93(6) The fees referred to in subsection (1) must not exceed the actual costs of the services.*

[para 145] Schedule 2 of the Regulation establishes the maximum amounts that may be charged by a public body to recover its actual costs for providing services. It is not open to a public body to charge the maximum amount for providing a service, if the public body's actual costs for providing the service are lower than the maximum.

[para 146] Schedule 2 permits a Public Body to charge a maximum of $6.75 per quarter hour for "preparing and handling records".

[para 147] The head of the Public Body initially charged $567 for preparing the records, which was then reduced by 50% at the head's discretion, for a total of $283.50. However, the Public Body has not provided any indication as to why 21 hours were required to "prepare" the records or what "preparing records" entailed. I must therefore consider what "preparing and handling records for disclosure" mean for the purposes of Schedule 2 of the Regulation and consider whether it was appropriate for the Public Body to spend 21 hours preparing and handling records for disclosure and to require the Applicant to pay for that time.

[para 148] Schedule 2 of the Regulation refers to "records" and "copies of records" and not "information in records" or "parts of records". This schedule sets out maximum fees for reproducing or copying records and sending them to an applicant or enabling an applicant to view them. Schedule 2 does not make reference to "severing" or otherwise withholding "information" from records.

[para 149] Section 11(6) of the Regulation prohibits a public body from charging fees for reviewing records. It states:

> *11(6) A fee may not be charged for the time spent in reviewing a record.*

[para 150] Through operation of section 11(6) of the Regulation, the time spent reviewing a record cannot be included in "preparing" a record for disclosure. I note that Service Alberta's *FOIP Guidelines and Practices Manual* (the Policy Manual) states the following on page 74:

> No fee may be assessed for time spent in reviewing a record to determine whether or not all or part of it should be disclosed.

This manual reflects the view that fees may not be charged (or estimated) for the time spent reviewing records for the purpose of making decisions about severing information from records. Although the Policy Manual is not binding on me, I agree with its interpretation of section 11(6) of the Regulation. The word "review" can mean "to examine or assess with a view to making changes where appropriate". As a result, reviewing a record under section 11(6) of the Regulation likely refers to the process of examining or assessing records with a view to making changes to them as appropriate, such as when a public body decides to sever information from the records.

[para 151] In my view, section 11(6) likely reflects a concern that reviewing records may take significantly more or less time depending on the nature of the access request, the nature of the records, and the identity of the reviewer. Some records may take more time to review, while some reviewers may take longer to review records than others. As including time spent reviewing records could vary dramatically between reviewers, and potentially be viewed as arbitrary, it may be that cabinet decided to preclude public bodies from charging fees for reviewing records for that reason.

[para 152] The Policy Manual distinguishes the time spent making decisions about severing from the act of severing itself. In my view, deciding what to sever from a record, by reading the record to assess its contents, cannot be meaningful separated from the process of reviewing records. In order to sever information from a record, one must review the information it contains to determine whether what is being severed is consistent with the decision to sever. This in itself is reviewing, as set out in section 11(6) of the Regulation.

[para 153] Although the Public Body has not explained what contributed to the need to take 21 hours to prepare records for disclosure, I infer that it likely included time spent reviewing records in order to determine what to sever from them in the total. I draw this inference, as the actual time needed to remove records and to redact names, as was done in this case, and to handle the records prior to shipping them to the Applicant, would reasonably be expected to take significantly less time than 21 hours. As a result, it appears that the Public Body included the time spent reviewing records to decide what to redact from them, when it calculated the fees for preparing and handling the records.

[para 154] In my view, the time spent redacting information from the records, if one does not count the time spent reviewing the information in the records, would be reasonably expected to take significantly less time than 21 hours. In addition, the Public Body has not explained what activities were included in preparing and handling records, or how the time was distributed for these activities. I am therefore unable to confirm the fees charged by the Public Body.

[para 155] I will therefore reduce the fees required by the Public Body for preparing and handling records to exclude any time spent reviewing the records. The Public Body will recalculate the time spend preparing and handling records, removing any time spent reviewing records from the total, and make adjustments to the fees it required from the Applicant, accordingly.

V. ORDER

[para 156] I make this Order under section 72 of the Act.

[para 157] I confirm the decision of the Public Body to sever the name, email address, address, and signature line of an individual from records 109, 110, and 111.

[para 158] I confirm the decision of the Public Body to withhold the names of employees where their names appear in the context of their wages or salaries.

[para 159] I confirm the decision of the Public Body to sever, under section 17(1), the names of individual donors from the records.

[para 160] I order the Public Body to disclose the remaining information it withheld under section 17(1) from invoices and receipts submitted to it for payment by consultants, but for account numbers, customer reward numbers, and personal address information.

[para 161] I order the Public Body to reconsider its decision to withhold information under section 24(1)(a) and (b) of the FOIP Act.

[para 162] I impose the following term on the head of the Public Body in reconsidering the decision to withhold information under section 24(1):

- I require the head of the Public Body to exercise discretion either to disclose the information it has withheld under section 24(1)(a) and (b), or to withhold it under these provisions and to provide reasons relevant to a decision to withhold information under section 24(1).

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

[para 163] I confirm the decision of the Public Body to withhold, under section 25(1) of the FOIP Act, information that would serve to identify anonymous donors, such as their names, employees, representatives, and contact information.

[para 164] I confirm the decision of the Public Body to withhold records 124 - 127 of File 2, and records 66 – 75 of File 4, under section 27(1)(a) of the FOIP Act.

[para 165] I order the Public Body to disclose the remaining information it withheld from the records to the Applicant.

[para 166] I reduce the fees for preparing and handling records by requiring the Public Body to recalculate the fees it charged without consideration of the time spent reviewing the records.

[para 167] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

____
Teresa Cunningham
Adjudicator