ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2010-037

August 30, 2011

BUFFALO TRAIL PUBLIC SCHOOLS REGIONAL DIVISION NO. 28

Case File Number F4575

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), the Alberta Teachers' Association (the "Applicant") asked the Buffalo Trail Public Schools Regional Division No. 28 (the "Public Body") for the governing or founding documents of the School Board Employers Bargaining Authority (the "SBEBA"), of which the Public Body was a member, and all transactional records between SBEBA and the Public Body. The Public Body withheld some of the requested information under section 16(1) (disclosure harmful to business interests of a third party), section 17(1) (disclosure harmful to personal privacy), section 23(1) (local public body confidences), section 24(1) (advice, etc.), section 25(1) (disclosure harmful to economic and other interests of a public body) and section 27(1) (privileged information, etc.). The Applicant requested a review of the Public Body's decision to withhold information, as well as a review of whether the Public Body properly complied with section 10(1) (duty to assist applicants) and section 14 (extending time limits for responding).

On review of the particular concerns raised by the Applicant, the Adjudicator found that the Public Body had met its duty to assist under section 10(1), and had properly extended the time limit for responding to the access request under section 14.

The Adjudicator found that section 16(1) did not apply to the records at issue, as the information that would be revealed related to non-arm's length transactions between the

Public Body, the SBEBA and the Affected School Boards within the terms of section 16(3)(c), meaning that section 16(1) could not apply.

The Adjudicator found that the Public Body did not properly apply section 23(1) to the records at issue, as they did not reveal the substance of deliberations of a meeting of the Public Body's elected officials, its governing body, or a committee of its governing body within the terms of section 23(1)(b).

The Adjudicator found that the Public Body properly applied section 25(1) to the records at issue, as they consisted of information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Public Body under section 25(1)(c)(iii).

The Adjudicator found that the Public Body also properly applied section 24(1) to many of the records at issue, as they could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for the Public Body under section 24(1)(a), reveal consultations or deliberations involving officers or employees of the Public Body under section 24(1)(b), and/or reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Public Body, or considerations that relate to those negotiations, under section 24(1)(c).

Given the foregoing conclusions, the Adjudicator found it unnecessary to decide whether the Public Body properly applied section 27(1) to the records at issue, or whether section 17(1) applied to the records at issue.

Under section 72(2)(b) of the Act, the Adjudicator confirmed the decision of the Public Body to refuse the Applicant access to the records at issue.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(r), 7, 7(1), 10(1), 11(1), 14, 14(1)(b), 14(1)(c), 14(3), 16, 16(1), 16(3), 16(3)(c), 17(1), 23, 23(1), 23(1)(b), 24, 24(1), 24(1)(a), 24(1)(b), 24(1)(c), 24(1)(d), 24(1)(f), 24(2), 25, 25(1), 25(1)(c), 25(1)(c)(iii), 27(1), 30, 30(1)(a), 31, 67(1)(a)(ii), 71(1), 72 and 72(2)(b); *Labour Relations Code*, R.S.A. 2000, c. L-1, ss. 1(n), 60 and 151(c); *School Act*, R.S.A. 2000, c. S-3; *Teaching Profession Act*, R.S.A. 2000, c. T-2.

Orders and Decisions Cited: AB: Orders 96-003, 96-006, 96-012, 96-019, 98-013, 99-013, 99-038, F2002-028, F2003-004, F2004-008, F2004-026, F2005-004, F2005-030, F2006-022, F2007-013, F2007-029, F2009-021, F2009-028 and F2009-030; *In the matter of the Labour Relations Code between School Boards Employer Bargaining Authority and the Alberta Teachers' Association*, [2007] A.L.R.B.D. No. 108.

Other Source Cited: *Black's Law Dictionary*, 9th ed. (St. Paul: Thomson Reuters, 2009).

I. BACKGROUND

[para 1] The Alberta Teachers' Association is the bargaining agent, by certification or voluntary recognition, for certified teachers in all public, separate and some charter and private schools in Alberta. It is constituted under the *Teaching Profession Act* and is a "trade union" under the *Labour Relations Code*.

[para 2] Buffalo Trail Public Schools Regional Division No. 28 is a "board" under the *School Act* and an "employer" under the *Labour Relations Code*. In early 2007, the Public Body and eleven other school boards became members of the School Board Employers Bargaining Authority (the "SBEBA"). The SBEBA is an "employers' organization" under the *Labour Relations Code* and was authorized by the school boards to undertake collective bargaining with the Alberta Teachers' Association on their behalf.

[para 3] In correspondence dated May 15, 2008, the Alberta Teachers' Association (the "Applicant") asked Buffalo Trail Public Schools Regional Division No. 28 (the "Public Body") for information under the *Freedom of Information and Protection of Privacy Act* (the "Act"). The Applicant requested access to the following records, which relate to the Public Body and the SBEBA, for the period from January 1, 2006 to May 15, 2008:

- *The governing or founding documents (ie, constitution, operational guidelines, framework or memorandum of agreement) of the SBEBA of which Buffalo Trail Public school district is a member.*
- *All transactional records between the SBEBA and the Buffalo Trail Public school district (including, but not limited to, financial transactions and decisions, correspondence, board minutes, motions and bylaws relating to Buffalo Trails Public school district's membership and participation in the SBEBA).*

[para 4] By letter dated June 19, 2008, the Public Body provided six pages of information to the Applicant. Under section 14(3) of the Act, it extended the time limit for responding to the remainder of the access request.

[para 5] By letter dated July 11, 2008, the Public Body refused to disclose any of the remaining information requested by the Applicant, on the basis that it was excepted from disclosure under section 16(1) (disclosure harmful to business interests of a third party) and section 27(1) (privileged information, etc.).

[para 6] By letters dated July 21 and August 27, 2008, the Applicant asked the Commissioner to review the Public Body's decision to withhold information, as well as whether it properly complied with section 10(1) (duty to assist applicants) and section 14 (extending time limits for responding). The Commissioner authorized a portfolio officer to investigate and try to settle the matter. In the course of that process, the Public Body disclosed 243 additional pages to the Applicant, by letter dated March 30, 2009. It continued to withhold the remaining records, additionally citing exceptions to disclosure under section 17(1) (disclosure harmful to personal privacy), section 23(1) (local public

body confidences), section 24(1) (advice, etc.) and section 25(1) (disclosure harmful to economic and other interests of a public body).

[para 7] As the Public Body continued to withhold some of the requested information, the Applicant requested an inquiry, by letter dated April 22, 2009. A written inquiry was set down.

[para 8] Also on May 15, 2008, the Applicant had made eleven similar access requests to the other eleven school boards that were members of the SBEBA at the time. It received similar responses from these other school boards, and likewise requested a review, and then an inquiry, by the Commissioner. In view of the similarity of the records and issues involved in these other eleven matters, the Commissioner decided to conduct an inquiry into case file number F4575 as a representative case, and place the other eleven matters in abeyance pending the issuance of this Order.

[para 9] Under section 67(1)(a)(ii) of the Act, the other eleven school boards were notified as affected parties in this inquiry. They are Aspen View Regional Division No. 19, Christ the Redeemer Catholic Separate Regional Division No. 3, Conseil scolaire du Sud de l'Alberta (public) (also known as Greater Southern Public Francophone Education Region No. 4), Foothills School Division No. 38, Holy Spirit Roman Catholic Separate Regional Division No. 4, Lakeland Roman Catholic Separate School District No. 150, Livingstone Range School Division No. 68, Medicine Hat Catholic Separate Regional Division No. 20, Pembina Hills Regional Division No. 7, Prairie Land Regional Division No. 25 and Wetaskiwin Regional Division No. 11 (collectively, the "Affected School Boards"). The Affected School Boards were represented in the inquiry by the same counsel as the Public Body, and they adopted the Public Body's submissions as their own.

[para 10] The SBEBA was also notified as an affected party, but it did not make submissions in the inquiry.

[para 11] In its submissions and an affidavit, the Public Body refers to an offer of settlement that it made to the Applicant in its letter of March 30, 2009. The Applicant says that the reference to settlement discussions that occurred prior to this inquiry is inappropriate. I agree, and will disregard the Public Body's reference to its settlement offer. Having said this, the March 30, 2009 letter remains relevant, to the extent that it indicates that an additional 243 pages of records were disclosed to the Applicant and are therefore not at issue in this inquiry. Further, the letter sets out the fact that the Public Body is relying on additional sections of the Act in refusing to disclose some of the remaining records. The Applicant has not objected to the Public Body's reliance on additional provisions of the Act, having responded to all of the issues set out in the Notice of Inquiry, as reproduced below.

II. RECORDS AT ISSUE

[para 12] The records at issue consist of information withheld on approximately 250 pages of records. The nature of this information is described in greater detail when it is discussed below.

[para 13] The Public Body prepared an Index of Records, which briefly describes each document that it withheld, indicates the number of pages of the document, and lists the sections of the Act applied to the document. The Public Body withheld each document in reliance on two to five sections of the Act. It did not sever information in any of the documents, but withheld all of them in their entirety.

III. ISSUES

[para 14] The Notice of Inquiry, issued March 16, 2010, set out the following issues, although I have placed them in a different sequence for the purpose of discussion:

> Did the Public Body meet its duty as required by section 10(1) of the Act (duty to assist applicants)?
>
> Did the Public Body properly extend the time limit for responding to the request as authorized by section 14 of the Act (extending time limits for responding)?
>
> Does section 16(1) of the Act (disclosure harmful to business interests of a third party) apply to the records/information?
>
> Did the Public Body properly apply section 23(1) of the Act (local public body confidences) to the records/information?
>
> Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the records/information?
>
> Did the Public Body properly apply section 24(1) of the Act (advice, etc.) to the records/information?
>
> Did the Public Body properly apply section 27(1) of the Act (privileged information, etc.) to the records/information?
>
> Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the records/information?

IV. DISCUSSION OF ISSUES

A. Did the Public Body meet its duty as required by section 10(1) of the Act (duty to assist applicants)?

[para 15] Section 10(1) of the Act reads as follows:

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

[para 16] The Public Body has the burden of proving that it fulfilled its general duty to assist the Applicant under section 10(1) (Order 99-038 at para. 10; Order F2004-008 at para. 10). Having said this, I will limit my review of the Public Body's duty to assist to the particular concerns raised by the Applicant.

[para 17] The Applicant wrote an earlier letter, dated March 27, 2008, in which it requested the SBEBA constitution and any related bylaws made by the SBEBA. The Applicant received no response, and alleges that the Public Body failed in its duty to assist on that basis.

[para 18] In response, the Public Body submits that it had no obligation to respond to the March 27, 2008 letter, as the letter was addressed to the SBEBA as opposed to the Public Body, did not reference the Act so as to indicate that an access request was being made under the legislation, and did not include the fee payable in connection with an access request under the legislation.

[para 19] In rebuttal, the Applicant says that it sent the March 27, 2008 letter to the Public Body in addition to the SBEBA, a point made by its Executive Staff Officer in an affidavit sworn April 23, 2010.

[para 20] In surrebuttal, the Public Body notes that the only letter in the material before me is addressed to the SBEBA, and that the Applicant has not placed in evidence a copy of any letter dated March 27, 2008 addressed specifically to the Public Body. The Public Body does not recall receiving such a letter and says that it has no obligation to respond to an access request of which it becomes aware through another organization or third party.

[para 21] Section 7 of the Act reads:

> *7(1) To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record.*
>
> *(2) A request must be in writing and must provide enough detail to enable the public body to identify the record.*

(3) In a request, the applicant may ask

(a) for a copy of the record, or

(b) to examine the record.

[para 22] I note that the Applicant's letter of May 15, 2008 to the Public Body refers to a "letter of March 27, 2008 to the superintendent of Buffalo Trail Public Schools Regional Division No. 28". However, the March 27, 2008 letter before me in this inquiry is addressed to the SBEBA, not the Public Body. I therefore find that the letter did not constitute a request "to the public body" within the terms of section 7(1). Accordingly, the Public Body's duty to assist the Applicant under section 10(1) was not triggered at that time. The Applicant was specifically challenged by the Public Body to produce a copy of a March 27, 2008 letter to the Public Body, yet the Applicant merely repeated the assertion of its Executive Staff Officer, which was that, on March 27, 2008, the Applicant "sent correspondence to each of the School Boards and to the SBEBA". This is not sufficient to establish that there was, in fact, a letter of March 27, 2008 addressed to the Public Body, given the competing assertion of the Public Body.

[para 23] The March 27, 2008 letter indicates that it was copied to Teacher Welfare Staff Officers, Local Presidents of SBEBA Bargaining Units and District Representatives of SBEBA Bargaining Units. Even if the letter was also copied to the Public Body, I would interpret that act as being for the purpose of providing information, not for the purpose of also making an access request to the Public Body.

[para 24] Finally, assuming that the Public Body received a copy of the March 27, 2008 letter, I considered whether the Public Body, as a member of the SBEBA, was required to ensure that the access request was being dealt with by the SBEBA. I decided otherwise. The fact that an entity is a member of another entity does not, by that fact alone, make the first entity responsible for the obligations of the second. The letter of March 27, 2008 was addressed to the SBEBA, an entity distinct from the Public Body, and the responsibility of the SBEBA to respond to the letter is not the subject of this inquiry.

[para 25] The foregoing disposes of the Applicant's first argument regarding the Public Body's alleged failure to comply with section 10(1). I therefore make no comment on whether the Applicant, in this case, was required to reference the Act, or enclose payment of the required fee, in order for the letter of March 27, 2008 to constitute an access request under the Act and thereby give rise to the Public Body's duty to assist under section 10(1).

[para 26] For the remainder of this Order, when I refer to the Applicant's access request, I am referring to the one set out in its correspondence of May 15, 2008.

[para 27] The Applicant's second argument regarding the Public Body's duty to assist is that it did not respond within the 30-day time limit set out in section 11(1) of the Act.

This argument is more appropriately addressed in the context of an issue under section 11(1), which was not included in the Notice of Inquiry. However, because the Public Body responded without objection, I have decided to briefly address the Applicant's concern here, insofar as it possibly relates to the Public Body's duty to assist under section 10(1).

[para 28] Section 11(1) of the Act reads as follows:

> *11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless*
>
> *(a) that time limit is extended under section 14, or*
>
> *(b) the request has been transferred under section 15 to another public body.*

[para 29] The 30-day time limit set out in section 11(1) begins to run from the date that an access request is received. In this case, the Public Body received the Applicant's May 15, 2008 access request on May 20, 2008, as indicated by a date stamp on the access request. The 30-day period therefore expired on June 19, 2008.

[para 30] In a letter dated June 19, 2008, the Public Body granted the Applicant access to six pages of records, and extended the time limit for responding to the remainder of the access request. While the letter is dated June 19, 2008, the Public Body admits that it did not send it until the following day and that this was outside the 30-day time limit. However, it submits that it still made "every reasonable effort" to respond in time, which is what is required by section 11(1). The Public Body explains that it began processing the access request as soon as it was received, including referring the request to legal counsel, searching physical and electronic files, compiling the responsive records and consulting with third parties. It says that, once it determined that an extension of the time limit was necessary, it prepared the June 19, 2008 letter, but it was sent one day late because there was a delay in receiving instructions from the Public Body's superintendent during a busy time of year for the administration of the Public Body (i.e., the end of the school year).

[para 31] In response, the Applicant submits that an extension of the time limit set out in section 11(1) cannot be implemented by a public body after the initial 30-day period has expired. The Applicant appears to be distinguishing between a public body's decision as to whether to grant access to requested records, and an extension of the time limit, suggesting that only the former may occur outside the 30-day time limit if the public body has been making reasonable efforts.

[para 32] First, I find that the Public Body was making reasonable efforts to respond to the Applicant's access request and accept the Public Body's explanation for sending the June 19, 2008 letter on the 31st day following receipt of the request, rather than 30th day or earlier. Second, I decline to address whether an extension of the 30-day time limit

must be made before expiry of the initial 30 days set out in section 11(1), given that the delay in this case was only by one day and the parties only very briefly addressed the issue in their submissions. The point here is that the Applicant's concern about the time taken by the Public Body to respond, or extend its response, to the May 15, 2008 access request does not lead me to conclude that the Public Body failed in its duty to assist the Applicant under section 10(1).

[para 33] The Applicant further argues that the Public Body's response of June 19, 2008 was inadequate because Order F2007-029 stated that, to meet the duty to assist, "a Public Body must inform the Applicant of all records in its custody or under its control that are responsive to the request" (at para. 49). With the June 19, 2008 letter, the Public Body enclosed six pages of records, but did not account for any other records.

[para 34] Because the Public Body's June 19, 2008 letter extended the time limit for deciding whether to grant access to other records requested by the Applicant, the letter did not have to inform the Applicant about all responsive records. I address whether the reason for the extension was proper in the next part of this Order.

[para 35] The Applicant cites Order F2006-022, which stated that to make "every reasonable effort" means to make "an effort which a fair and rational person would expect to be done or would find acceptable" (at para. 29). The Applicant submits that the Public Body did not make every reasonable effort to respond openly, accurately and completely, as its response was identical to those of the eleven Affected School Boards to which the Applicant had made a similar access request, and moreover, there was a "niggardly gesture of producing records that were previously produced or publicly available". The Applicant says that its request was not treated in good faith and that the Public Body, the Affected School Boards and the SBEBA sought a common adversarial strategy intended to obstruct rather than assist the Applicant.

[para 36] The Public Body counters that its June 19, 2008 response was the same as those of the Affected School Boards because the access requests by the Applicant was the same, and all of the School Boards, being members of the SBEBA, were likely to possess similar responsive records. The Public Body explains that, having regard to the potential effect of disclosure of the requested information on the other School Boards and the SBEBA, it sought legal advice from the staff lawyers of the Alberta School Boards Association. The Public Body says that nothing in the Act precluded it from consulting with the Affected School Boards or retaining advice from the same source as them. The Public Body argues that there is no evidence that it conspired with the other School Boards to deprive the Applicant of access to information, or that the head of the Public Body did not exercise her own discretion when deciding whether to give access to the requested information.

[para 37] I agree that the fact that the Public Body's response to the Applicant was similar, or even identical, to those of the Affected School Boards does not mean that the Public Body failed in its duty to assist the Applicant under section 10(1). Where public bodies have the same or similar records that have been requested, it makes sense that they

might wish to adopt a consistent approach. Section 14(1)(c) contemplates that a public body might consult with other public bodies and third parties when responding to an access request.

[para 38] As evidence that a common adversarial strategy was pursued by the Public Body and the Affected School Boards, the Applicant points to an affidavit sworn June 15, 2010 by the head of the Public Body, in which she states that the Public Body and the Affected School Boards were concerned that the requested information "would provide the Applicant with confidential and internal information that it could use to further interfere with and undermine the operations of the SBEBA". To me, this is not evidence of a common adversarial strategy but rather sets out a reason why the Public Body and the Affected School Boards withheld information from the Applicant. Whether the information was properly withheld is a question to be addressed, later in this Order, when I review the Public Body's application of the exceptions to disclosure on which it relied.

[para 39] On review of the specific concerns raised by the Applicant, I conclude that the Public Body met its duty to assist the Applicant, as required by section 10(1) of the Act.

B. Did the Public Body properly extend the time limit for responding to the request as authorized by section 14 of the Act (extending time limits for responding)?

[para 40] The relevant parts of section 14 of the Act read as follows:

> *14(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if*
>
> > *(a) the applicant does not give enough detail to enable the public body to identify a requested record,*
> >
> > *(b) a large number of records are requested or must be searched and responding within the period set out in section 11 would unreasonably interfere with the operations of the public body,*
> >
> > *(c) more time is needed to consult with a third party or another public body before deciding whether to grant access to a record, or*
> >
> > *(d) a third party asks for a review under section 65(2) or 77(3).*
>
> …
>
> *(3) Despite subsection (1), where the head of a public body is considering giving access to a record to which section 30 applies, the head of the public body may extend the time for responding to the request for the period of time necessary to enable the head to comply with the requirements of section 31.*
>
> …

[para 41] Parts of section 30 and 31 are also relevant in this case, and they read as follows:

> *30(1) When the head of a public body is considering giving access to a record that may contain information*
>
> > *(a) that affects the interests of a third party under section 16, or*
> > …
>
> *the head must, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (4).*
> …
>
> *(4) A notice under this section must*
>
> > *(a) state that a request has been made for access to a record that may contain information the disclosure of which would affect the interests or invade the personal privacy of the third party,*
> >
> > *(b) include a copy of the record or part of it containing the information in question or describe the contents of the record, and*
> >
> > *(c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or make representations to the public body explaining why the information should not be disclosed.*
> …
>
> *(5) When notice is given under subsection (1), the head of the public body must also give the applicant a notice stating that*
>
> > *(a) the record requested by the applicant may contain information the disclosure of which would affect the interests or invade the personal privacy of a third party,*
> >
> > *(b) the third party is being given an opportunity to make representations concerning disclosure, and*
> >
> > *(c) a decision will be made within 30 days after the day notice is given under subsection (1).*
>
> *31(1) Within 30 days after notice is given pursuant to section 30(1) or (2), the head of the public body must decide whether to give access to the record or to part of the record, but no decision may be made before the earlier of*
>
> > *(a) 21 days after the day notice is given, and*

(b) the day a response is received from the third party.

…

[para 42] The Public Body has the burden of establishing that it properly extended the time limit for responding to the Applicant's access request under section 14. Having said this, I will limit my review of the Public Body's extension to the single concern raised by the Applicant, which is that the extension was made for an improper reason.

[para 43] The Public Body's letter of June 19, 2008 to the Applicant stated that the Public Body had contacted a third party, as contemplated by section 30 of the Act. The letter did not identify the third party, but the Public Body's subsequent response of July 11, 2008 to the Applicant indicated that it was the SBEBA. In its submissions, the Public Body explains that it was also consulting with the Affected School Boards, but its extension of June 19, 2008 referred only to "another organization" and "the affected party" in the singular.

[para 44] In its letter, the Public Body wrote that it was providing the third party with an opportunity to consent to disclosure of the requested information or make representations as to why disclosure may harm its business interests. The Public Body went on to cite section 14(3), saying that an extension of the time limit for responding to the access request was required to enable the head of the public body to comply with the requirements of section 31. Section 31 requires a public body to decide whether to give access to requested records, after giving notice to a third party whose interests may be affected, but the Public Body may not do so until a particular period of time has elapsed.

[para 45] Although the Public Body cited section 14(3), the Applicant says that, because the Public Body was consulting with a third party, it was implicitly relying on section 14(1)(c) to make the extension. In its submissions, the Public Body also now refers to section 14(1)(c) as a basis for the extension. I agree that the Public Body's letter of June 19, 2008 may be interpreted as also extending the time limit for responding to the Applicant's access request under section 14(1)(c) in order to consult with the SBEBA, despite the fact that section 14(1)(c) was not actually cited.

[para 46] In its submissions, the Public Body also now refers to section 14(1)(b) as a basis for the extension, in that there was a large number of records requested by the Applicant. However, the letter of June 19, 2008 did not purport, in any way, to be extending the time limit for that reason. The Public Body therefore cannot rely on that reason now.

[para 47] Whether the extension was made under section 14(1)(c) (extra time needed to consult with a third party) or under section 14(3) (extra time needed to comply with the requirements for making a decision after giving notice to a third party), the Applicant's argument is that the Public Body did not properly extend the time limit because the requested records do not relate to an arm's length transaction between the Public Body and the SBEBA. Under section 16(3)(c) of the Act, a public body cannot withhold records under section 16(1) if information relates to a non-arm's length transaction

between a public body and another party. The Applicant argues that, because section 16(1) cannot apply, the Public Body improperly invoked sections 30 and 31, and in turn sections 14(1)(c) and 14(3), as the grounds for extending the time limit for responding to the access request.

[para 48] Section 30(1)(a) states that a public body must give notice to a third party if it is considering giving access to a record that "may" contain information that affects the interests of the third party under section 16. It is not necessary for the records to actually contain such information, or for section 16 to actually apply, as that determination is to be made by a public body after receiving the third party's representations. Here, it is sufficient that the Public Body reasonably believed that the interests of the SBEBA were affected under section 16. As explained in the next part of this Order, it was also correct for the Public Body to consider the SBEBA to be a third party for the purpose of the provision. I therefore do not accept the Applicant's position that the Public Body relied on an improper reason to extend the time limit for responding to the access request. I will return to the application of section 16(3)(c), and the question of whether the records at issue relate to a non-arm's length transaction, when deciding below whether the Public Body properly withheld information in reliance on section 16.

[para 49] The foregoing addresses the Applicant's concern regarding the extension. I conclude that the Public Body properly extended the time limit for responding to the Applicant's access request, as authorized by section 14 of the Act.

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

[para 50] The relevant parts of section 16 of the Act read as follows:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> …
>
> *(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.

…

(3) Subsections (1) and (2) do not apply if

…

(c) the information relates to a non-arm's length transaction between a public body and another party, or

…

[para 51] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the records that it withheld under section 16.

[para 52] The Public Body applied section 16(1) on the basis that the records at issue would reveal the financial and labour relations of the SBEBA, the information was supplied in confidence, and disclosure could reasonably be expected to cause harm to the SBEBA. It submits that section 16(1)(c) is the most pertinent, in that disclosure of the records at issue would cause significant harm to the negotiating position of the SBEBA when it negotiates future collective bargaining agreements with the Applicant.

[para 53] The parties raised the question of whether the SBEBA is a third party for the purpose of section 16(1). I find that the SBEBA is a third party in this inquiry, and that it is therefore possible for section 16(1) to apply to the records at issue.

[para 54] Section 1(r) of the Act defines "third party" as "a person, a group of persons or an organization other than an applicant or a public body". The SBEBA falls within this definition. It is comprised of a number of School Boards, only one of which is the Public Body, making it a "group of persons" other than the Public Body. Further, it is an "employer's organization", which is defined in section 1(n) of the *Labour Relations Code* as "an organization of employers that acts on behalf of an employer or employers…" [underline added]. The SBEBA is therefore also an "organization" other than the Public Body.

[para 55] A public body cannot withhold information under section 16(1) if any of the circumstances under section 16(3) exist. In this case, the Applicant submits that the

information at issue relates to a non-arm's length transaction between the Public Body and the SBEBA under section 16(3)(c).

[para 56] Neither the phrase "non-arm's length transaction" nor "arm's length transaction" is defined in the Act. The Applicant notes that *Black's Law Dictionary* (at p. 1635) defines "arm's length transaction" as "[a] transaction between two unrelated or unaffiliated parties". The Applicant further notes that *Black's Law Dictionary* (at p. 123) defines "arm's length" as "[o]f or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equally bargaining power; not involving a confidential relationship".

[para 57] The Applicant submits that it is counter-intuitive to suggest that the Public Body and the SBEBA, as it bargaining agent, are not related or not on close terms. It says that an agency relationship exists between them and they must be on close terms in order to give effect to the relationship.

[para 58] In response, the Public Body cites Order 98-013, in which the former Commissioner made or noted the following comments about an arm's length versus non-arm's length transaction (at paras. 28 and 29):

> I must therefore turn to the common law for guidance in defining the term. According to the *Black's Law Dictionary* 6th ed. (St. Paul: West, 1990) at 109, a transaction is deemed to be at arm's length when the parties involved are unrelated, independent and acting in their own self-interest:
>
> > Said of a transaction negotiated by unrelated parties, each acting in his or her own interest; the basis for a fair market value determination. A transaction in good faith in the ordinary course of business by par[t]ies with independent interests. Commonly applied in areas of taxation when there are dealings between related corporations... The standard under which unrelated parties, each acting in his or her own interest, would carry out a particular transaction...
>
> Conversely, a transaction is deemed to be non-arm's length when the interests of the parties can not, for a number of possible reasons, be considered separate. I also rely upon the following passage from the headnote of *Re: Tremblay* (1980) 36 B.C.R. 111 (Que. S.C.):
>
> > In the absence of a better definition, a transaction at arm's length could be considered to be a transaction between persons whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other. Inversely, the transaction is not at arm's length where one of the co-contracting parties is in a situation where he may exercise control, influence or moral pressure on the free will of the other. Where one of the co-contracting parties is, by reason of his influence or superiority, in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration which is

> substantially different than adequate, normal or fair market value, the transaction is not at arm's length.

[para 59] The SBEBA is comprised of its member School Boards. The Public Body submits that the SBEBA is not controlled by the Public Body or any of the Affected School Boards, in that no individual School Board can single-handedly affect the operations of the SBEBA, and the Public Body could withdraw from the membership of the SBEBA and the SBEBA would continue to operate in the same manner as before.

[para 60] I find that the records at issue would reveal information that relates to a non-arm's length transaction between the Public Body and the SBEBA. The Public Body is a member of the SBEBA, and the SBEBA acts on its behalf as its bargaining agent. The Public Body and the SBEBA are related, they have similar or overlapping interests, and the SBEBA's actions are dependent, at least partially, on the views of the Public Body. Elsewhere in its submissions, the Public Body notes that the SBEBA board is made up of trustees from each School Board, who each have a vote and give direction to the SBEBA administrators. The fact that the SBEBA's actions are also dependent on the views of the Affected School Boards, and that these other School Boards may have certain interests that differ from those of the Public Body, does not detract from my conclusion that the Public Body and the SBEBA are not at arm's length. As for the Public Body's submission that it cannot single-handedly affect the operations of the SBEBA, the Public Body can nonetheless exert pressure so as to influence the SBEBA's decisions and operations. Indeed, that is the point of the SBEBA acting as the Public Body's bargaining agent.

[para 61] Further, I characterize the actions and decisions that are carried out between the Public Body and the SBEBA, including the Public Body's decision to join the SBEBA in the first place, to be "transactions". *Black's Law Dictionary* (at p. 1635) defines "transaction" as "[t]he act or an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract", "[s]omething performed or carried out; a business agreement or exchange" or "[a]ny activity involving two or more persons". Finally, I find that the information that would be revealed by the records at issue "relates" to the non-arm's length transactions between the Public Body and the SBEBA. The Applicant requested the governing or founding documents of the SBEBA and transactional records between the SBEBA and the Public Body.

[para 62] The Public Body alternatively submits that the Affected School Boards are third parties at arm's length from it, and that the records relating to the SBEBA also affect their interests. However, I likewise find that the relationship between the Public Body and the Affected School Boards is non-arm's length. When the SBEBA was formed, and when it negotiates collective agreements with the Applicant, the interests of the Public Body and the Affected School Board were not, and are not, separate. Therefore, information that would be revealed by the records at issue also relates to non-arm's length transactions between the Public Body and the Affected School Boards.

[para 63] I conclude that the circumstance set out in section 16(3)(c) of the Act exists in this inquiry, and that the Public Body therefore cannot withhold the records at issue in reliance on section 16(1).

D. Did the Public Body properly apply section 23(1) of the Act (local public body confidences) to the records/information?

[para 64] Section 23 of the Act reads as follows:

> *23(1) The head of a local public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> > *(a) a draft of a resolution, bylaw or other legal instrument by which the local public body acts, or*
> >
> > *(b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.*
>
> *(2) Subsection (1) does not apply if*
>
> > *(a) the draft of the resolution, bylaw or other legal instrument or the subject-matter of the deliberation has been considered in a meeting open to the public, or*
> >
> > *(b) the information referred to in that subsection is in a record that has been in existence for 15 years or more.*

[para 65] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 23.

[para 66] The Public Body explains in its submissions that it applied section 23(1)(b), in the alternative, to some of the records at issue, such as the minutes and agendas of the SBEBA. It did so in the event that the SBEBA was found not to be a third party.

[para 67] Section 23(1)(b) can apply only to the substance of deliberations of a meeting of a local public body's elected officials, its governing body, or a committee of its governing body. In this inquiry, the Public Body is the local public body in question. I found, in the preceding part of this Order, that the SBEBA is a third party vis-à-vis the Public Body. The SBEBA is not comprised of the Public Body's elected officials, it is not a governing body of the Public Body, and it is not a committee of such a governing body.

[para 68] When the SBEBA conducts its meetings, the elected officials of the Public Body and the Affected School Boards are involved. However, as noted by the Applicant, section 23(1)(b) does not exempt from disclosure the substance of deliberations of meetings of a public body's elected officials where those deliberations include or involve another public body's elected officials. The phrase "a meeting of its elected officials" in section 23(1)(b) indicates that the provision is referring to the internal meetings of a local public body.

[para 69] I accordingly conclude that section 23(1)(b) cannot apply to the records at issue.

E. Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the records/information?

[para 70] The Public Body applied section 25(1)(c) to all of the records at issue, except three documents. Section 25(1)(c) reads as follows:

> *25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:*
> …
>
> *(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 71] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 25.

1. Does the information fall within the terms of section 25(1)?

[para 72] In withholding the records at issue, the Public Body relies on section 25(1)(c)(iii) in particular. It says that disclosure of the records at issue would cause harm to the Public Body by impacting its options and approaches to negotiation of future collective bargaining agreements, in other words obstructing such negotiation or making it more difficult. It elaborates as follows:

Having regard to the nature of the records and the Applicant's past actions, which are discussed in the records and are the subject of the 2007 Labour Relations Board decision, it is submitted that this criteria is satisfied in that the Public Body would clearly experience economic harm if the records were disclosed to the Applicant. That is, should the Applicant obtain a copy of the SBEBA's bylaws and constitution and its negotiating strategies disclosed in the correspondence and minutes, the Applicant would be aware of the SBEBA's (and through that, the Public Body's) strategies and negotiation tactics in the collective bargaining negotiations (which are likely to be similar in future labour negotiations). It is reasonable to conclude that this would serve to undermine the Public Body's effectiveness and usefulness in future collective bargaining negotiations with the Applicant.

For example, some of the responsive records discuss positions, options strategies that may be acceptable but not necessarily optimal of the Public Body. This is evident in the Board Minutes and President's e-mails including, for example [various records as numbered in the Index of Records]. If the Applicant is aware of these confidential and internal discussions the Public Body will be at a disadvantage in future collective bargaining negotiations and which may result in financial loss to the Public Body as a result of [not] being able to negotiate an optimal situation for the Public Body.

[…]

If the Applicant were privy to the internal discussions and decision-making process of the SBEBA through the last negotiations of the collective bargaining agreements … [it] would also be able to use this information to attempt to create a division among the School Boards in an effort to dismember the SBEBA. The interest of the Applicant in this course of action was evident in a 2007 Labour Relations Board decision, which canvassed some of the tactics that the Applicant has already attempted to utilize in order to undermine the SBEBA. In that decision, the Labour Relations Board held that the Applicant had breached its duty to bargain in good faith with the SBEBA and had interfered with the formation of the SBEBA.

Disclosure of the requested information would serve only to provide the Applicant with information necessary to attempt to further undermine the SBEBA and to take advantage of the Public Body's bargaining position and strategies. This is a real and possible result given the Applicant's actions during the last collective bargaining, as reflected in the various e-mails of the SBEBA President and the above Labour [Relations Board] proceeding.

[para 73] In response, the Applicant cites Order F2005-030, in which the Commissioner made the following comments about section 25(1)(c)(iii) (at para. 90):

> I note first in this regard that it is not enough to fall within the section that disclosure would interfere with contractual negotiations. It is necessary, in addition, that this interference would cause economic harm to a public body or the government.

The Applicant says that the Public Body has not shown that any economic harm can reasonably be expected to occur on disclosure of the records at issue.

[para 74] The Applicant further notes that, in order to apply section 25(1), the Public Body must satisfy the "harm test" that has been articulated in previous orders of this Office. There must be a clear cause and effect relationship between disclosure of the withheld information and the harm alleged; the harm that would be caused by the disclosure must constitute damage or detriment and not simply hindrance or minimal interference; and the likelihood of the harm must be genuine and conceivable (Order 96-003 at p. 6 or para. 21; Order F2009-021 at para. 44).

[para 75] The Applicant argues that the Public Body has not submitted evidence sufficient to meet the harm test under section 25. The Applicant says:

> *The tactic employed, rather, is to point cryptically to a past decision of the Labour Relations Board that found against the ATA, and state that disclosure of any information now will be used by the Applicant to "dismember" or otherwise undermine the SBEBA.*

In the analogous context of the harm test under section 16, the Applicant further writes:

> *The Respondent's whole argument appears to be the assertion that, because a 2007 decision of the Alberta Labour Relations Board found that certain statements made by members of the ATA constituted interference with the formation of the SBEBA, it is reasonable to assume that any information disclosed to the Applicant now would cause significant harm to the negotiating position.*
>
> *The Respondent's submissions on this point are mere speculation: there is no evidence before the Commissioner to show what has been called "a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue [see, e.g., Order 96-003 at p. 6 or para. 20; Order F2003-004 at para. 194], nor evidence to show "a direct linkage between the harm… and the information in the records" [see, e.g., Order 98-013 at para. 35; Order F2009-028 at para. 71].*

[para 76] The Labour Relations Board decision to which the parties refer is reported as *In the matter of the Labour Relations Code between School Boards Employer Bargaining Authority and the Alberta Teachers' Association*, [2007] A.L.R.B.D. No. 108. In the decision, the Alberta Labour Relations Board concluded that the Alberta Teacher's Association (the "ATA"), being the Applicant in this inquiry, failed to bargain in good faith with the SBEBA in breach of section 60 of the *Labour Relations Code*, and interfered with the formation of the SBEBA contrary to section 151(c) of that *Code*.

[para 77] The parts of the Labour Relations Board decision that provide the necessary background, and which I consider relevant to this inquiry, are as follows (at paras. 79-83, 86-87 and 89):

> *SBEBA's Complaints of Bad Faith Bargaining by the ATA*
>
> The SBEBA complains that the ATA by refusing to recognize or deal with it has thereby committed a breach of the section 60 obligation to bargain in good faith. In this respect, it points to its letter to the ATA of April 5th giving notice to commence bargaining on behalf of the 12 named employers who have authorized it to act for them in connection with collective bargaining (except for Buffalo Trail and Pembina Hills who were not then in a position to commence bargaining) and to which the ATA did not respond nor contact the named bargaining representative. Although the letter does not contain any specific reference to multiunit bargaining, we conclude it is reasonable to infer that bargaining was being proposed on that basis, at least for the 10 employer members who were then in a position to engage in bargaining.
>
> As we have already pointed out, the response by the ATA was to ignore this letter and to continue to correspond directly with the Employers and the other members of the SBEBA. It was not clear to us from the evidence presented when it was that the ATA reached the decision not to consent to multiunit bargaining, but it was presumably some time between March 8th and April 16th. In the evidence given by [the ATA's coordinator of Teacher Welfare] he stated that ATA continued to correspond directly with the individual Employers, and therefore ignore the SBEBA, because that is the way he had always conducted the initiation of the bargaining process with the Employers and thought that is what was required of ATA under the current collective agreement. Presumably he thought that by sending the SBEBA copies of the letters the ATA was sending to the Employers that this was somehow, a sufficient compliance with the ATA's obligation to carry on bargaining with this employers' organization. If indeed that is what he thought he was very much mistaken. The Board would not countenance conduct of the part of an employer who chose to engage in bargaining by corresponding directly with the employees and merely sent copies of the letters to the bargaining agent, and cannot countenance similar conduct on the part of a trade union that merely sent the employers' organization copies of the letters it was sending directly to the individual member employers. As Adams points out in *Canadian Labour Law*, at p. 10-94:
>
> - ... the duty to bargain in good faith has two components. The first aspect of the duty is to reinforce the employer's obligation to recognize the trade union's exclusive right to represent the employees ...
>
> This comment can equally be applied to the situation involving employers' organizations under section 62, that is, an important aspect of the duty to bargain in good faith is to reinforce the trade union's obligation to recognize the employers' organization's right to collectively bargain on behalf of those employers who have authorized it to do so.

The ATA argues that it cannot be obliged by the Employers or by SBEBA to engage in multiunit bargaining and, therefore, it cannot be found to be in breach of the duty to bargain in good faith when all that it was attempting to do was to avoid that very process of bargaining. It argues that it is ready, willing and able to engage in bargaining with SBEBA on a single unit basis. But, strangely, it never put that position to the SBEBA in writing or otherwise. Rather, it continued to avoid any direct contact with the SBEBA and instead told the individual Employers that if they persisted in wanting to conduct their collective bargaining through the SBEBA, rather than negotiating directly with the teachers' negotiating committees at their individual institutions, those teachers' negotiating committees would only engage in bargaining with the SBEBA on a single unit basis. We are unable to conclude that the ATA had any logical or reasonable basis for continuing to engage in its deliberate attempts to avoid recognizing the SBEBA as the authorized agent of its employer members for purposes of collective bargaining. At all times, it was open to the ATA on its own, or in conjunction with the SBEBA, to refer a difference to the Board that would put the issue of multiunit bargaining at rest. Instead, it chose the riskier path of continuing to avoid or ignore the SBEBA and, as it turns out, did so at its peril.

The conduct on the part of the ATA to fail to correspond with or otherwise contact the SBEBA or its bargaining representative is evidence of its failure to bargain in good faith with the SBEBA in breach of section 60 and we so declare.

SBEBA's Complaint of ATA's Interference with its Formation

At the same time as SBEBA complained about ATA's failure to bargain in good faith, it also complained that ATA had interfered with its formation, contrary to section 151(c). …

[…]

… Here, the employers' organization virtually from the moment of its birth and extending for approximately one month thereafter, was faced with conduct on the part of the ATA intended to interfere with its formation and this conduct persisted until the date we have fixed as being the conclusion of its formative period. The actions on the part of the ATA that we consider to form part of its interference with the formation of the SBEBA include the following:

- on March 8th it stated in its press release, "Boards abrogate their responsibilities and opt for labour strife", and "teachers view this (i.e. joining the employers' organization) as an aggressive move designed to strip collective agreements and ensure labour strife", and "the only reason ... for boards to join this employers' organization is to beat up on their teachers", and finally, "school boards have responsibility ... not to waste taxpayers dollars on needless labour disputes".

- in the March 13th edition of ATA News it repeated the same comments as were contained in its March 8th press release.

- in the March 27th edition of the ATA New[s] it stated “by banding together to form a bargaining cartel, those boards are doing nothing that will solve the underlying structural problems. Instead they are sloughing off their responsibility to deal directly with teachers they employ and, in the process, setting the stage for increased labour strife”, and in reference to the bargaining with the SAAs in the 1970s through to the 1990s the ATA states, “the fact is regional bargaining associations in the past have proven themselves to be unable to consistently conclude collective agreements with their teachers”, and “history has shown that these types of employer associations result in a high frequency of labour disruptions and strikes. Some of the longest strikes in this province’s history have involved these cartels”, and finally, “ATA President [name] is deeply concerned about the potential for the new employer cartel to frustrate the collective bargaining process”.

> It appears to us that the ATA had a twofold purpose in mind in making these public comments. First, it hoped the individual school jurisdictions who were members of the SBEBA might be persuaded to change their mind and withdraw from the organization. Second, and perhaps of more importance, it wanted to ensure the teachers of the affected school boards were firmly opposed against showing any support for the SBEBA. In addition, we find it peculiar the ATA would suggest that SBEBA wanted to strip collective agreements and beat up on teachers and engender labour strife at a time when there was still no contact between it and the SBEBA. At best, the ATA was making wild assumptions about what sort of collective bargaining proposals might be forthcoming. It suggested that since SAAs caused strikes this means that the SBEBA will also cause strikes. But this assertion, like all the assertions being made by the ATA, was not supported by any reliable evidence. In fact, this absence of any reliable factual foundation to the assertions made by the ATA is some evidence that its motives were inappropriate and improper[.]
>
> […]
>
> In our opinion, the actions of the ATA constitute interference with the formation of the SBEBA contrary to section 151(c) and we so declare.

[para 78] On my review of the Public Body’s submissions, including its reference to the decision just excerpted, I find that the Public Body has satisfied the harm test under section 25(1).

[para 79] First, there is a clear cause and effect relationship between disclosure of the records at issue and the Applicant undermining the future collective bargaining negotiations of the SBEBA, as agent of the Public Body. The records at issue consist of background documents about the SBEBA, meeting agendas, minutes of meetings and memos regarding the formation and organization of the SBEBA, as well as lists of attendees at meetings and contact information. These records indicate such things as which School Boards were for or against the formation of the SBEBA, questions that School Board representatives had about the SBEBA and the accompanying answers,

communications strategies, and views about the proposed content of the SBEBA's constitution and bylaws. The records at issue also consist of personnel information of the Public Body and the Affected School Boards, such as numbers of full time equivalent staff (FTEs) and grievances against members of the SBEBA. In my view, all of the foregoing information could be used by the Applicant in an effort to sow division between the School Boards that are members of the SBEBA, which in turn would affect the Public Body's collective bargaining negotiations.

[para 80] There are minutes of other meetings that indicate motions before the directors of the SBEBA that were considered or passed, as well as letters and e-mails of the President of the SBEBA, which set out negotiation strategies in the course of collective bargaining with the Applicant. There are updates regarding the collective bargaining and the Labour Relations Board matter set out in the decision excerpted above, which indicate proposed approaches and responses to actions taken by the Applicant. I find that this information could be used by the Applicant in an effort to weaken the SBEBA's ability to advance its collective bargaining position in the future. If the Applicant learns details behind the SBEBA's past negotiations and dealings with the Applicant, the Applicant could use those details to undermine the SBEBA and therefore the Public Body's future negotiations and dealings.

[para 81] The records at issue also consist of financial information of the SBEBA, the Public Body and the Affected School Boards, such as invoices and expense claims. The Applicant could use this information in order to gain a better understanding of the SBEBA's operations, and thereby gain an advantage over the SBEBA and the Public Body in the course of future collective bargaining. It could disseminate the financial information in order to criticize the operations of the SBEBA, which would in turn harm the Public Body's bargaining position.

[para 82] The Applicant questions, in particular, how disclosure of the SBEBA's constitution and bylaws would undermine the Public Body's negotiating position. In my view, they fall within the terms of section 25(1)(c)(iii) because they reveal how the SBEBA is organized and operates. As is to be expected, the constitution and bylaws set out eligibility for membership in the SBEBA, membership fees and obligations, how meetings are to be carried out, and the powers and duties of the directors, among other things. I find that disclosure of this information could reasonably be expected to permit the Applicant to interfere with the SBEBA's collective bargaining negotiations on behalf of the Public Body, in that the Applicant could use or disseminate the information in an effort to undermine the efficacy of the SBEBA.

[para 83] The Applicant submits that, because it has already concluded collective agreements with the Public Body and other members of the SBEBA, it is already aware of the negotiating tactics that the Public Body says would be revealed by the records at issue. It questions how negotiation in the future will be affected by disclosure of the records, which are from a past period. I accept the Public Body's response, which is that the Public Body and the SBEBA, as its bargaining agent, have various positions and strategies that might be utilized during collective bargaining, which have been discussed

internally but not necessarily implemented during the previous round of bargaining. It is also likely that the records at issue consist of much greater detail about the Public Body's negotiating strategies than have been revealed during any collective bargaining itself.

[para 84] As for the second branch of the harm test, the harm that would be caused by the disclosure of the records at issue constitutes damage or detriment, and not simply hindrance or minimal interference. If the Applicant, a party adverse in interest to the Public Body in matters pertaining to labour relations, were to become aware of the views of the various School Boards when the SBEBA was being formed, learn the personnel and financial information of the Public Body and Affected School Boards, or find out the negotiation strategies considered by the SBEBA on behalf of the Public Body and the Affected School Boards once the SBEBA was formed, the Applicant would be in a position to use or disclose the information in order to gain an advantage over the opposing side during future collective bargaining. The Applicant's advantage would be the Public Body's disadvantage. Further, as required under section 25(1), the harm would be economic, given that the outcome of collective bargaining has significant financial implications.

[para 85] Finally, the likelihood of the harm is genuine and conceivable. I find that there is a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue. Specifically, there is a probability of harm from disclosure of the records at issue in view of the past conduct of the Applicant in relation to the SBEBA as bargaining agent for the Public Body. As excerpted above, the Labour Relations Board concluded that the Applicant had no "logical or reasonable basis for continuing to engage in its deliberate attempts to avoid recognizing the SBEBA as the authorized agent of its employer members for purposes of collective bargaining". The Board found that, in making the public statements about the SBEBA that the Applicant had made, the Applicant "hoped the individual school jurisdictions who were members of the SBEBA might be persuaded to change their mind and withdraw from the organization" and "wanted to ensure the teachers of the affected school boards were firmly opposed against showing any support for the SBEBA."

[para 86] I find it reasonable to expect that the Applicant, which has attempted in the past to interfere with the ability of the SBEBA to represent the interests of its member School Boards, and has disseminated information in an effort to undermine the credibility and efficacy of the SBEBA as a bargaining agent, will use or disseminate the information in the records at issue in order to interfere with the Public Body's negotiation of future collective agreements. There is more than mere speculation that the Applicant will use the information in the records at issue to thwart the SBEBA's future negotiations on behalf of the Public Body.

[para 87] In response to the Public Body's submissions, the Applicant says that many persons who have been critical of public bodies have subsequently sought disclosure of records from those same public bodies. It accordingly argues that the

Public Body has not raised a valid objection to disclosure. While it is true that a person critical of a public body may request and be entitled to records from that public body, my finding here is not simply that the Applicant has been critical of the SBEBA, and indirectly the Public Body. My finding is that the Applicant has shown that it wants to undermine the SBEBA, and is prone to disseminate statements about the SBEBA so as to diminish its credibility and efficacy as a bargaining agent, the result being that disclosure of the records at issue could reasonably be expected to interfere with the Public Body's collective bargaining negotiations in the future.

[para 88] I note that the Alberta Labour Relations Board decision did not directly involve the Public Body, in that the Public Body was apparently not yet in a position to commence collective bargaining with the Applicant. This does not affect my conclusions. The Applicant nonetheless interfered with the formation of the SBEBA, and published what the Labour Relations Board found to be unsubstantiated statements about the SBEBA and its member School Boards, which in turn had an impact on the Public Body, being one of the members of the SBEBA which would later undertake its own collective bargaining. My finding that it is probable that the Applicant will use the information in the records at issue to undermine collective bargaining negotiations of the SBEBA, in the future, does not depend on which School Boards were in a position to undertake collective bargaining at the time of the Labour Relations Board decision, or even which School Boards were members of the SBEBA at that time. The Applicant's interference with future collective bargaining negotiations will nonetheless have an impact on the Public Body's own future negotiations.

[para 89] Given all of the foregoing, I conclude that the information in the records to which the Public Body applied section 25(1) falls within the terms of section 25(1)(c)(iii).

[para 90] While the Labour Relations Board made declarations that the Applicant had breached the two particular provisions of the *Labour Relations Code*, it found that no useful labour relations purpose would be served by granting any other remedies. In this inquiry, the Applicant submits that, if I now give credence to the Public Body's argument that the Applicant is not entitled to the records at issue as a result of the Labour Relations Board decision, I would be providing a remedy where that Board saw fit to deny one.

[para 91] As countered by the Public Body, I am not exceeding my jurisdiction or exercising any authority belonging to the Labour Relations Board. Rather, I am relying on the evidence set out in the Labour Relations Board decision, which the Public Body is entitled to raise in this inquiry, to support my finding that there is a reasonable probability that disclosure of the records at issue would interfere with negotiations of the Public Body within the terms of section 25(1)(c)(iii) of the Act.

2. Did the Public Body properly exercise its discretion not to disclose?

[para 92] A public body exercising its discretion relative to a particular provision of the Act should consider the Act's general purposes, the purpose of the particular provision on which it is relying, the interests that the provision attempts to balance, and whether withholding the records would meet the purpose of the Act and the provision in the circumstances of the particular case (Order F2004-026 at para. 46).

[para 93] The reason for the Public Body's exercise of its discretion not to disclose the records at issue, in reliance on section 25(1)(c)(iii), is self-evident. Given that the Public Body has established that disclosure of the records could be expected to cause harm, in this case interference with its future collective bargaining negotiations, it is a reasonable exercise of discretion to withhold the records in order to avoid that harm. The exercise of such discretion is in keeping with the general purposes of the Act and the particular purpose of section 25(1)(c)(iii).

[para 94] I conclude that the Public Body properly applied section 25(1) of the Act to the records at issue, as they consist of information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Public Body under section 25(1)(c)(iii) of the Act.

F. Did the Public Body properly apply section 24(1) of the Act (advice, etc.) to the records/information?

[para 95] In this part of the Order, I will review the Public Body's application of section 24(1) to the records to which it applied that section, even though most of them were also withheld under section 25(1), which I have already found to have been properly applied by the Public Body. In other words, in respect of many of the records, what follows will serve as an alternative analysis to the one regarding the Public Body's application of section 25(1) to those same records.

[para 96] Section 24 of the Act reads, in part, as follows:

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

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations,

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

…

(f) the contents of agendas or minutes of meetings

(i) of the governing body of an agency, board, commission, corporation, office or other body that is designated as a public body in the regulations, or

(ii) of a committee of a governing body referred to in subclause (i),

…

(2) This section does not apply to information that

[various types of information, none of which exist here]

…

[para 97] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 24.

[para 98] Section 24(2) states that section 24 does not apply to certain information, meaning that the Public Body cannot withhold that information in reliance on section 24(1). I considered whether any of the provisions of section 24(2) were relevant in this inquiry, but found that none of them were.

1. Does the information fall within the terms of section 24(1)?

[para 99] Where the Public Body withheld a record under section 24(1), it always did so under subsections 24(1)(a), 24(1)(b) and 24(1)(c). It occasionally withheld a record in additional reliance on section 24(1)(d) or 24(1)(f), but, given my conclusions below, I find it unnecessary to review the Public Body's application of those two subsections.

[para 100] In order to refuse access to information under section 24(1)(a), on the basis that it could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options (which I will refer to as "advice, etc."), the information must meet the following criteria: (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be

directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 96-006 at p. 9 or para. 42; Order F2007-013 at para. 107).

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

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

[para 103] For information to fall under section 24(1)(c), it must reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government or a public body, or considerations that relate to those negotiations (which I will refer to as "positions, etc. for the purpose of negotiations"). A "consideration" is a fact or thing taken into account in deciding or judging something (Order 99-013 at para. 44). Again, the intent of section 24(1)(c) is similar to 24(1)(a) and (b), in that it is to protect information generated during the decision-making process, but not to protect the decision itself (Order 96-012 at para. 37; Order F2005-030 at paras. 71 and 72).

[para 104] The Public Body makes submissions in relation to its application of sections 24(1)(a), 24(1)(b) and 24(1)(c) as follows:

> *The majority of the SBEBA-related records contain advice or recommendations, positions and plans, consultation and deliberations, and positions and instructions to the SBEBA as bargaining agent to the Public Body regarding labour relations and negotiations with the Applicant for a new collective bargaining agreement. The SBEBA is the bargaining agent of the Public Body who is delegated the authority to negotiate on its behalf. In this role, the SBEBA*

advises the SBEBA board made up of trustees from each School Board who each have a vote and give direction to the SBEBA administrators.

[…]

… The function of the SBEBA, as agent for the Public Body, is to negotiate and deal with all collective bargaining matters on behalf of the Public Body and its member School Boards. As part of its role, the SBEBA advises the School Boards of any ongoing discussion or negotiations and makes recommendations and proposals, as well as plans and negotiation strategies created specifically to fulfill this role and all SBEBA minutes and correspondence are in relation to such matters. …

[para 105] I find that most of the information in the records to which the Public Body applied section 24(1) falls within the terms of section 24(1)(a) ("advice, etc."), 24(1)(b) ("consultations/deliberations") and/or 24(1)(c) ("positions, etc. for the purpose of negotiations"). The information is essentially of two types.

[para 106] First, there is information as to whether the SBEBA should be formed. In this context, a member of the Public Body's Board of Trustees, representatives of the Affected School Boards and other School Boards – all of which are public bodies – express their views as to whether and how the SBEBA should be created and constituted. Second, following the formation of the SBEBA, some of these individuals – now Directors of the SBEBA but nonetheless acting as representatives of their respective School Boards, including the Public Body – provide advice, etc., participate in consultations/deliberations and present positions, etc. for the purpose of negotiations, this time in the context of making decisions as to what action should be taken by the SBEBA, administratively and in relation to collective bargaining with the Applicant. With respect to both types of information, the test for withholding the information under section 24(1) is met.

[para 107] The Applicant argues that the governing or founding documents of the SBEBA, which I take to be its constitution and bylaws, do not meet the criteria in order to fall under section 24(1), as they reflect an action or decision itself. The Applicant also argues that the transactional records reflect actual decisions or actions, not the path taken to arrive at them. I agree, but I found, in the preceding part of this Order, that the foregoing information was properly withheld by the Public Body in reliance on section 25(1).

2. Did the Public Body properly exercise its discretion not to disclose?

[para 108] Principles regarding a public body's exercise of discretion to withhold information under the Act were set out in the preceding part of this Order.

[para 109] The Public Body states, in its submissions, that it considered that a purpose of section 24 of the Act is to allow public body decision-makers to freely discuss the issues before them in order to arrive at well-reasoned decisions without fear of being

incorrect or having to find a way to justify the contents of deliberations that led up to the decision, should those deliberations be made public. On my review of the Public Body's submissions, and given the nature of the records at issue, I am satisfied that the Public Body properly exercised its discretion to withhold the information that I have found to fall within the terms of section 24(1).

[para 110] I conclude that the Public Body properly applied section 24(1) of the Act to many of the records at issue, as they could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for the Public Body under section 24(1)(a), reveal consultations or deliberations involving officers or employees of the Public Body under section 24(1)(b), and/or reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Public Body, or considerations that relate to those negotiations, under section 24(1)(c).

G. Did the Public Body properly apply section 27(1) of the Act (privileged information, etc.) to the records/information?

[para 111] Where the Public Body applied section 27(1) to a record, it also applied section 24(1) and/or 25(1). As I find that the Public Body properly applied section 24(1) and/or 25(1) to the records to which it additionally applied section 27(1), it is not necessary for me to decide the above issue, and I decline to do so.

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

[para 112] The Public Body applied section 17(1) to seven documents. As I found, earlier in this Order, that the Public Body properly applied section 25(1) to these records in any event, it is not necessary for me to decide the above issue, and I decline to do so.

V. ORDER

[para 113] I make this Order under section 72 of the Act.

[para 114] I find that the Public Body met its duty to assist the Applicant, as required by section 10(1) of the Act.

[para 115] I find that the Public Body properly extended the time limit for responding to the Applicant's access request, as authorized by section 14 of the Act.

[para 116] I find that section 16(1) of the Act does not apply to the records at issue, as the information that would be revealed by them relates to non-arm's length transactions between the Public Body, the SBEBA and the Affected School Boards within the terms of section 16(3)(c), meaning that section 16(1) cannot apply.

[para 117] I find that the Public Body did not properly apply section 23(1) of the Act to the records at issue, as they do not reveal the substance of deliberations of a meeting of the Public Body's elected officials, its governing body, or a committee of its governing body within the terms of section 23(1)(b).

[para 118] I find that the Public Body properly applied section 25(1) of the Act to the records at issue, as they consist of information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Public Body under section 25(1)(c)(iii).

[para 119] I find that the Public Body also properly applied section 24(1) of the Act to many of the records at issue, as they could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for the Public Body under section 24(1)(a), reveal consultations or deliberations involving officers or employees of the Public Body under section 24(1)(b), and/or reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Public Body, or considerations that relate to those negotiations, under section 24(1)(c). Where the Public Body did not properly apply section 24(1), it properly applied section 25(1) in any event.

[para 120] I find it unnecessary to decide whether the Public Body properly applied section 27(1) of the Act to the records at issue, or whether section 17(1) applies to the records at issue.

[para 121] Under section 72(2)(b) of the Act, I confirm the decision of the Public Body to refuse the Applicant access to the records at issue.

Wade Riordan Raaflaub
Adjudicator