ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2012-06

March 30, 2012

ALBERTA INNOVATES – TECHNOLOGY FUTURES

Case File Numbers F4743, F4762

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* for access to records relating to investigations regarding the causes of methane contamination in water wells in specific locations. Alberta Innovates - Technology Futures (the Public Body) applied section 17 (information harmful to personal privacy) to withhold the names of well owners, their contact information, and land descriptions. The Public Body also applied sections 16, (information harmful to business interests), 24, (advice from officials), and 25, (disclosure harmful to economic and other interests of a public body), to withhold information from the records. The Public Body required the Applicant to pay $4125 in fees for processing the access request.

The Applicant requested review by the Commissioner, including review of the search conducted by the Public Body for responsive records.

The Adjudicator determined that section 17 did not require the Public Body to withhold the personal information of well owners from the records, other than the contact information of one well owner. She determined that some of the information in the records was consistent with information subject to section 24(1)(a), but that the Public Body had not established that it had exercised its discretion reasonably when it elected to withhold information from these records under this provision.

With regard to the information the Public Body had withheld under section 25(1), the Adjudicator found that section 25(2) of the FOIP Act applied, given that the information was the "results of environmental testing" within the terms of this provision. As section 25(2) prohibits a public body from withholding environmental testing results under section 25(1), the information could not be withheld under section 25 of the FOIP Act.

The Adjudicator ordered the remaining information to be disclosed. She also determined that the Public Body had not established that it had conducted an adequate search for responsive records that might be in its control, but not its immediate possession. She found that the Public Body had not established that the records it had withheld as nonresponsive were nonresponsive. She ordered it to reconsider its decision to withhold records and information on this basis.

Regarding fees, the Adjudicator found that the Public Body had not established it spent the time preparing and searching for records for which it had required the Applicant to pay fees. The Adjudicator rejected the Public Body's argument that it was appropriate to estimate two minutes per page of preparation time for the records, and determined that it had inappropriately charged for time spent reviewing records. The Adjudicator determined that the Public Body had established in the inquiry that its costs for both preparing the records and searching for them amounted to $297. The Adjudicator considered that the unsupportable nature of the fees calculated by the Public Body and the manner in which the Public Body had severed information from the records supported ordering a complete refund of fees, given that these factors had served to undermine the Applicant's right of timely access to the records she had requested.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 6, 10, 11, 16, 17, 24, 25, 72, 93 Freedom of Information and Protection of Privacy Regulation, Alberta Regulation 200/1995, ss. 7, 11 **ON:** *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F-31, s. 18

Authorities Cited: AB: Orders 96-006, 96-016, 97-020, 99-011, 2000-017, 2001-016, 2001-025, F2002-002, F2005-011, F2007-029, F2008-018, F2008-028, F2008-031, F2008-032, F2009-010, F2009-028, F2010-001, F2010-036, F2011-001, F2011-002, F2011-015 **ON:** Orders P-1562, PO-1993, PO-2361.

Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980)

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

Barber, Katherine ed. et al. *The Canadian Oxford Dictionary* Don Mills: Oxford University Press, 2004

Cases Cited: *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *Ontario (Public Safety and Security) v. Criminal*

Lawyers' Association, 2010 SCC 23, [2010] 1 S.C.R. 815; *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)* [2004] O.J. No. 224.

I. BACKGROUND

[para 1] On June 12, 2008, the Applicant made a request for access to the following kinds of records:

> 1. All and any notes, references, documents, data, correspondence, reports and records – including drafts – used and produced by the Alberta Research Council regarding Alberta Environment Investigation NO. 7894 and / or the contaminated water wells [of named parties] or any well in TWP 27 RGE 21 W4M and TWP 27 RGE 22 W4M.
> 2. All research, data and reports – including drafts – for EnCana and or Alberta Environment by the Alberta Research Council related to groundwater contamination by the petroleum industry.
> 3. All correspondence to and from the Alberta Research Council regarding 1 and 2 above.

On June 27, 2008, the Applicant made a "revised / corrected" request for records. This request states:

> 1. 1. and 3. stay the same.
> 2. All research, studies, data and reports – by the Alberta Research Council related to groundwater contamination by CBM development as discussed in the 2007 ARC Annual Report, page 14, and in the vicinity of Strathmore, Wheatland County.

[para 2] The Public Body responded to the Applicant's access request. The Public Body withheld information from the records under sections 4, 16, 17, 24, and 25 of the FOIP Act.

[para 3] The Public Body required the Applicant to pay $4125 in fees for processing her access request. On December 10, 2008, the Applicant requested that the Public Body waive the fees it had charged her for processing her access request on the basis that her request was in the public interest. On December 16, 2008, the Public Body decided that it would not waive the fees for processing the access request.

[para 4] The Applicant requested review by the Commissioner of the Public Body's decision to withhold information from the records under sections 4, 16, 17, 24, and 25 of the FOIP Act. She also requested that the Commissioner review whether the Public Body had met its duty to assist her under section 10(1) of the FOIP Act and its decision to deny a fee waiver.

[para 5] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry. Individuals whose personal information had been withheld by the Public Body under section 17 and organizations that the Public Body stated were affected by the application of section 16 were invited to participate at the inquiry as affected parties.

[para 6] Once I reviewed the submissions and evidence of the parties, I asked the Public Body and the affected parties, to whose information the Public Body stated that it had applied section 16, questions regarding the application of the FOIP Act to the records at issue.

[para 7] The Public Body provided a response to my questions, and the Applicant was provided the opportunity to make submissions regarding its response. In its response to my questions, the Public Body stated that it was no longer withholding information under section 4 and it also released some records to which it had previously applied section 16. The Public Body also stated that it had determined that its photocopying costs had been much less than the 25 cents per page rate that it had charged the Applicant. It therefore waived the photocopying costs and refunded the Applicant $750.

II. RECORDS AT ISSUE

[para 8] The records at issue are the records the Public Body has identified as being at issue.

III. ISSUES

Issue A: Did the Public Body meet its duty to the Applicant, as provided by section 10 of the Act (duty to assist)?

Issue B: Did the Public Body comply with section 11 of the Act (time limit for responding)?

Issue C: Are records excluded from the application of the Act by section 4(1)(l) or 4(1)(q)(ii)?

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

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

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

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

Issue H: 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: Did the Public Body meet its duty to the Applicant, as provided by section 10 of the Act (duty to assist)?

[para 9] Section 10(1) of the FOIP Act establishes the obligations of public bodies in assisting applicants when applicants request access to records. It states:

> *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 10] The Public Body has the onus of establishing that it has made every reasonable effort to assist the Applicant, as it is in the best position to explain the steps it has taken to assist the Applicant within the meaning of section 10(1).

[para 11] Previous orders of this Office have established that the duty to assist includes conducting an adequate search for records. In Order 2001-016, the Commissioner said:

> In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) [now 10(1)] of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) [now 10(1)].
>
> Previous orders ... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now 10(1)] of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

[para 12] In Order F2007-029, the Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records. He said:

> In general, evidence as to the adequacy of a search should cover the following points:
>
> - The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> - The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> - The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> - Who did the search
> - Why the Public Body believes no more responsive records exist than what has been found or produced

[para 13] The scope of this portion of the inquiry is to consider whether the Public Body assisted the Applicant by responding to her access request openly, accurately, and completely, which includes consideration of whether the Public Body conducted a reasonable search for responsive records in its custody or control and determination of whether it took adequate steps to clarify the kinds of information the Applicant is seeking.

Has the Public Body conducted an adequate search for responsive records in its custody or control?

[para 14] The Public Body argues that it has met its duty to assist the Applicant. It notes that its employees contacted the Applicant to confirm and to clarify her access request. In its initial submissions, the Public Body explained its search process and documented the staff members and work units that were contacted when the search for responsive records was conducted. When the Applicant identified categories of records she considered to be missing, the Public Body conducted a follow-up search for these records, which it describes as follows:

> We felt that we did a thorough and comprehensive search, and that all responsive records had been found and provided to the Applicant (to the extent possible based on exemptions applied). We met our duty to the Applicant as provided by Section 10 of the Act (duty to assist). On December 18, 2008 and January 12, 2009, the Applicant contacted the OIPC requesting reviews of the handling of the request. During the mediation process, the Applicant identified 7 "categories" of records that [the] Applicant believed were missing from the information received. When provided the listing by the mediator, we went back to our contacts and searched again for the allegedly missing information. We considered this to be part of our duty to assist. However, we did not have any of this information – it was either in the control of someone else, such as Alberta Environment, or, as far as we knew, simply did not exist.

[para 15] The Public Body indicated in its initial submissions that it searched for further potentially responsive records when asked to do so by the mediator. However, it states that the records for which it conducted an additional search were "either in the control of someone else, such as Alberta Environment and Water, (Alberta Environment) or, as far as we knew, simply did not exist". It does not argue that the seven categories of records were not responsive.

[para 16] As it was unclear to me what the Public Body had done in relation to the records it referred to as being "in the control of someone else, such as Alberta Environment", I asked it the following questions:

> In relation to its search for responsive records, the Public Body states the following in its submissions:
>
> > We felt that we did a thorough and comprehensive search, and that all responsive records had been found and provided to the Applicant (to the extent possible based on exemptions applied). We met our duty to the Applicant as provided by Section 10 of the Act (duty to assist). On December 18, 2008 and January 12, 2009, the Applicant contacted the OIPC requesting reviews of the handling of the request. During the mediation process, the Applicant identified 7 "categories" of records that [the] Applicant believed were missing from the information received. When provided the listing by the

> mediator, we went back to our contacts and searched again for the allegedly missing information. We considered this to be part of our duty to assist. *However, we did not have any of this information – it was either in the control of someone else, such as Alberta Environment, or, as far as we knew, simply did not exist.*
>
> [My emphasis]

The Public Body indicates that it searched for further potentially responsive records when asked to do so by a mediator. However, it states that the records for which it conducted an additional search were "either in the control of someone else, such as Alberta Environment, or, as far as we knew, simply did not exist".

That another public body has control of responsive records does not mean that the Public Body itself does not also have control over the records. "Control" under the FOIP Act means that a public body has rights in relation to records, such as demanding them, or deciding what may be done with them. More than one public body may have control over the same records at the same time. If the head of a public body decides that another public body has control or custody over records, the head may transfer the access request under section 15. However, if the public body has custody or control over a responsive record and does not transfer the request under section 15, then the public body must include that record in its response, even if another public body also has control over the record.

Questions for the Public Body relating to the adequacy of search and its response to the Applicant

1. Did the Public Body identify responsive records it considered to be under the control of another public body such as Alberta Environment? If so, describe these records.

2. If the Public Body did identify responsive records under the control of another public body, where were they located? Why did the Public Body form the view that it did not have control over these records?

3. If the Public Body identified responsive records that would be in the control of another public body, why was this aspect of the Applicant's access request not transferred to that public body for response under section 15?

[para 17] In its submissions of November 29, 2011, the Public Body stated:

> We did not identify anything responsive beyond what we provided. We did a thorough and comprehensive search, both when we received the request, and again during the mediation process. We met our duty to assist under Section 10.
>
> When processing the FOIP request, we consulted with Alberta Environment, as a matter of course, regarding "their records". At that time, we also found out that the Applicant had submitted a similar FOIP request to Alberta Environment.
>
> That request to Alberta Environment was the subject of a FOIP Inquiry conducted by the same Adjudicator as these Inquiries, resulting in Order 2010-002, case file F4503.
>
> The Adjudicator is referred to our submission wherein we stated:
>
> During the mediation process, the Applicant identified 7 "categories" of records that [the] Applicant believed were missing from the information received. When provided the listing by the mediator, we went back to our contacts and searched again for the allegedly missing information. We considered this to be part of our duty to assist. However, we did not have any

of this information – it was either in the control of someone else, such as Alberta Environment, or, as far as we knew, simply did not exist.

The statement that the Adjudicator emphasized (underlined) should be taken in context. It does not indicate that we identified responsive records in the custody or control of Alberta Environment. Nor does it indicate that there was anything we should have transferred to Alberta Environment under Section 15.

We suggested that the Applicant contact Alberta Environment because the Applicant talked about what Alberta Environment had promised, we did not have the information, and, we were aware of the fact that Alberta Environment had received a similar request. Alberta Environment's request was received from the Applicant on March 29, 2007; ARC's was received over a year later on June 12, 2008, with the revised request received on June 27, 2008. If the information existed, presumably Alberta Environment would have provided it in response to the request they received. WE did not see a need, during the mediation process to re-contact Alberta Environment (as a formal transfer or otherwise.)

Specifically with respect to the allegedly missing information relating to Alberta Environment:

Notes taken when AENV wrote that applicant did not shock chlorinate her well:

> ARC's response was: "Although there was reference in the "applicant's report" (p. 7) that "Notes in the AENV complaint file indicate that the well did not have regular shock chlorination", ARC does not have a copy of this "note" and the AENV files were returned to them. The applicant should contact AENV for these notes, not ARC."

I further refer the Adjudicator to what she wrote in Order 2010-001 (my emphasis underlined)

> The Applicant also questions why she has not been provided with notes of employees of the Public Body that state she did not shock chlorinate her well. From the evidence before me, I am unable to conclude that employees made notes stating that she did not shock chlorinate her well, or were likely to have made notes stating that she did not do so. In addition, on my review of the Applicant's access request, I am not satisfied that she has requested information of this kind. The Applicant requested data and analysis of water wells and gas wells as well as copies of correspondence; it is not clear that a compliance officer's notes regarding whether an individual shock chlorinated his or her well would fall under either category.
>
> AENV's promised isotopic fingerprinting, water analysis and gas composition data on the F-14-27-22-W4M gas well
>
> > ARC's response was: "ARC referenced this well in the [name of individual] Complaint review (Tables 1 and 4). There was gas composition data but no isotopes available. These tables were included, intact, in the records provided to the Applicant. Again, if AENV promised the data, contact AENV, not ARC".

I refer the Adjudicator to Appendix 3 of AITFs initial submission to Inquiry F4762 for details about the remaining 5 "categories' of allegedly missing information and ARC's response. Whether this allegedly missing information would have been responsive to the request was not considered.

I feel that what the Adjudicator wrote in Order 2010-001 (my emphasis underlined) is relevant to these ARC inquiries as well.

[para 18] From its submissions, I understand the Public Body to take issue with my interpretation of the following statement and my decision to ask questions relating to it:

> However, we did not have any of this information – it was either in the control of someone else, such as Alberta Environment, or, as far as we knew, simply did not exist.

While the Public Body contends that it is unreasonable to conclude from this statement that it identified a category of records that were potentially responsive to the Applicant's access request in the control of Alberta Environment, it is unclear to me how this statement could be interpreted in any other way. This statement describes a category of records requested by the Applicant that were not produced by the Public Body: records in the control of Alberta Environment. Moreover, in Appendix 3 of the Public Body's submissions for Inquiry F4762, the Public Body refers specifically to records it returned to Alberta Environment, and states that if the Applicant wants these records, she should obtain them from Alberta Environment rather than the Public Body. The Public Body also states in Appendix 3 that isotopic fingerprinting, water analysis and gas composition data on the 5-14-27-22-W4M well should be obtained from Alberta Environment.

[para 19] The Public Body's submissions establish that it recognizes the possibility that Alberta Environment may possess records responsive to the Applicant's access request. The records it states that were returned to Alberta Environment would be an example of potentially responsive records in the immediate possession of Alberta Environment as would be the isotopic fingerprinting, water analysis and gas composition data to which it refers. However, the Public Body appears to take the position that because such records are now in the possession of Alberta Environment, it has no duty in relation to them.

[para 20] The Public Body has not established for the inquiry that the records it refers to as being in the control of Alberta Environment are not also in its own control. They may not be, but the Public Body did not answer my question on that point, and I am unable to find, on the evidence before me that they are not. The Public Body has knowledge of these records and was apparently able to obtain and review them at one time. It is therefore possible that it may have the power to obtain them again from Alberta Environment.

[para 21] Even accepting, for the sake of argument, that the Public Body does not have control over the records it describes in Appendix 3 of its submissions, section 15 of the FOIP Act authorizes the head of a public body to transfer an access request to the public body that does have control or custody over the records. As the Public Body has made it clear from its submissions that it is aware of records that it has not provided to the Applicant that are in the custody of Alberta Environment, it would have been appropriate for it to consider transferring the access request for those records to Alberta Environment for response in order to assist the Applicant. In making a determination whether to do so, it would have been obliged to take all relevant considerations into account. However, the Public Body did not turn its mind to the issue of control or to section 15 of the FOIP Act.

[para 22] The Public Body states that because the Applicant made what it considers to be a similar access request to Alberta Environment more than a year prior to making an access request to the Public Body, that the Applicant may be presumed to have received all information responsive to the access request in the custody of Alberta Environment. It therefore reasons that it has no further duties in relation to potentially responsive records that may be in the custody of Alberta Environment.

[para 23] As set out in Order F2010-001, the Applicant requested the following information from Alberta Environment on March 29, 2007:

> I request copies please of 1) all water well and gas well data collected under AENV's Baseline Testing Standard by EnCana or any other company or subcontractor in all sections of TWP 27-RGE 22 W4M and TWP 27-RGE 21W4M, with copies of any related correspondence and 2) all data and analysis so far collected by AENV, the Alberta Research Council, EnCana, the U of C, the U of A for AENV or any other company or subcontractor or the AEUB for AENV on any water well and any gas well or facility in all sections of TWP 27-RGE 22 W4M and all sections of TWP 27-RGE 21 W4M, with copies of any related correspondence, and 3) any data or information requested of the AEUB, EnCana, the Alberta Research Council or Wheatland County by AENV pertaining to any matters of concern or interest or contamination investigation cases in those sections listed above. Please specify all dates of AENV entry without notice onto private properties in any of the above sections, with locations & landowners listed, the type of sampling completed, name of AENV sampler and whether or not the water well was purged & all results.

[para 24] The Applicant's revised access request to the Public Body was received on June 27, 2008 and is for records of the following kind:

> 1. All and any notes, references, documents, data, correspondence, reports and records – including drafts – used and produced by the Alberta Research Council regarding Alberta Environment Investigation NO. 7894 and / or the contaminated water wells [of named parties] or any well in TWP 27 RGE 21 W4M and TWP 27 RGE 22 W4M.
>
> 2. All research, studies, data and reports – by the Alberta Research Council related to groundwater contamination by CBM development as discussed in the 2007 ARC Annual Report, page 14, and in the vicinity of Strathmore, Wheatland County.
>
> 3. All correspondence to and from the Alberta Research Council regarding 1 and 2 above.

[para 25] While I agree with the Public Body that there is potential for overlap between the access requests, where any information referred to in the access request to Alberta Environment was used by the Public Body when reviewing the water well investigations for the purposes of the access request the Applicant made to it, I find that there are significant differences between the two requests. First, any records responsive to the second access request created after March 29, 2007, or not in the control or custody of Alberta Environment until after March 29, 2007, would not be responsive to the access request made to Alberta Environment. However, the request to the Public Body includes records in its control or custody up to and including June 27, 2008. Second, the request made to the Public Body is "for notes, references, documents, data, correspondence, reports, records and drafts used or produced by the Public Body relating to investigations", while the request to Alberta Environment is limited to records consisting

of data or correspondence. Records containing notes of investigators, for example, would be responsive to the second request, if they formed part of the review of the investigations, but not the first, as discussed in Order F2010-001.

[para 26] For the reasons above, I find that the Public Body has not established that it conducted an adequate search for records that could potentially be under its control but in the possession of Alberta Environment. However, with respect to the Public Body's search of records in its own possession, I am satisfied that it conducted an adequate search for responsive records, as it has explained the steps it has taken to locate records, and the areas where it searched and provided a satisfactory explanation as to why it believes no further records exist in its possession, beyond what it has already located.

Did the Public Body respond to the Applicant openly, accurately, and completely?

[para 27] I turn now to the issue of whether the Public Body responded to the Applicant openly, accurately, and completely.

[para 28] In its letter of November 10, 2008 to the Applicant, the Public Body told the Applicant that it had applied sections 4(1)(q)(ii), 16(1), 17(1), 24(1)(a), 24(1)(b), 25(1)(c)(iii), and 25(1)(d) of the FOIP Act. It also stated that some information had "been withheld as non-responsive to your request". The Public Body did not explain why it considered the information in the records to fall outside the parameters of the Applicant's access request.

[para 29] The Public Body did not explain in its initial submissions why it considers records it included in its response to the Applicant are nonresponsive to the request, or why it selected and included them in its response, by listing them in its list of records, and including them in the records in issue in severed form, despite their nonresponsiveness. I therefore asked it the following questions:

> The Public Body has withheld information as "non-responsive". However, I am unable to conclude whether the information is responsive or not. It is conceivable that the records severed by the Public Body as "non-responsive" are responsive, given that these records may have been used by the Public Body as part of its investigations into the complaints referred to by the Applicant, or reveal information as to what was used. The Public Body may have included these records in its response to the Applicant for this reason. It is also possible that the records identified as non-responsive fall outside the parameters of the Applicant's access request and do not reveal information of the kind requested by the Applicant. As the Public Body has provided no explanation of why it considers records non-responsive in either its response to the Applicant or in its submissions for the inquiry, I am unable to determine whether the information severed by the Public Body on the basis of its non-responsiveness is non-responsive.
>
> **Why did the Public Body determine that the information it withheld as non-responsive was outside the parameters of the Applicant's access request?**
>
> **Why did the Public Body include and then sever information it considered non-responsive in its response to the Applicant's access request?**

[para 30] In its response to my questions, the Public Body provided the following explanation of its decision to withhold information as nonresponsive:

> There were 32 pages amongst those identified in the index as having been severed as nonresponsive. All 32 pages had other exceptions applied as well (s17 and/or 24).
>
> A few examples of nonresponsive information severed: on gas analysis datasheets, information about wells outside the specified geographic area was withheld; in emails, discussion about setting a meeting about a different project was withheld, as was discussion about training courses; a post-it note with financial "doodling" was withheld; the file paths for documents were withheld.

[para 31] Commissioner Clark noted in Order 97-020 that determining whether records are responsive is an important component to responding to an access request. He said:

> In Ontario Order P-880, the Office of the Information and Privacy Commissioner of Ontario had the following to say about "responsiveness":
>
> > In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.
>
> "Responsiveness" must mean anything that is reasonably related to an applicant's request for access. In determining "responsiveness", a public body is determining what information or records are relevant to the request. It follows that any information or records that do not reasonably relate to an applicant's request for access will be "non-responsive" to the applicant's request.

[para 32] The former Commissioner determined that sections 6 and 11 of the FOIP Act provide the legislative authority for determining that records or portions of records are non-responsive. He said:

> How do I reconcile section 6(1) of the Act, which speaks only of access to a record, and section 11(1) of the Act, which speaks of access to a record or part of a record?
>
> Section 6(1) and section 11(1) are both contained in that part of the Act dealing with the process of obtaining access. Those sections should be read in such a manner that they do not conflict. Consequently, I intend to read section 6(1) and section 11(1) together as supporting an interpretation that a public body may grant access to part of the record that contains the responsive information, and may remove the non-responsive information from that record.

[para 33] The "non-responsiveness" of information in records is not an exception to the right of access created by section 6 of the FOIP Act. I understand Commissioner Clark to mean that there is no duty for a Public Body to grant access to information if an

applicant has not first made a request for access to that information. A Public Body is not required to provide a response in relation to all information in its custody or under its control to an Applicant; only information that can be reasonably construed as the subject of an access request. Essentially, a Public Body's duties to an applicant regarding an access request are not engaged until an applicant first asks for the information. Information that reasonably relates to the access request engages a public body's duties to assist an applicant under section 10 of the FOIP Act.

[para 34] The Applicant's amended request is for the following information:

> 1. All and any notes, references, documents, data, correspondence, reports and records – including drafts – used and produced by the Alberta Research Council regarding Alberta Environment Investigation NO. 7894 and / or the contaminated water wells [of named parties] or any well in TWP 27 RGE 21 W4M and TWP 27 RGE 22 W4M.
>
> 2. All research, studies, data and reports – by the Alberta Research Council related to groundwater contamination by CBM development as discussed in the 2007 ARC Annual Report, page 14, and in the vicinity of Strathmore, Wheatland County.
>
> 3. All correspondence to and from the Alberta Research Council regarding 1 and 2 above.

[para 35] While the first part of the Applicant's access request refers to records "used *and* produced" by the Public Body regarding Alberta Environment Investigation No. 7894 and / or the contaminated water well of parties, it is clear from the Applicant's submissions and from the context of the access request itself that she is seeking records "used *or* produced" by the Public Body regarding the specified investigations. In addition, it is clear that the Public Body interpreted her request as one for records that it used or produced during the investigations, otherwise many of the records it identified as responsive would not be.

[para 36] Having reviewed the records, and the Public Body's explanation of its decision to withhold information as nonresponsive, I am not satisfied that all the information it withheld is nonresponsive. For example, reviewing records 1687 and 1703, I note that the Public Body withheld as nonresponsive from these records information clearly meeting the requirements of the first part of the Applicant's access request, in addition to information possibly meeting the requirements of the second part of the request. Reviewing record 1447, the context of this record, surrounded by records of well test analysis of a contaminated well of a named party under the first part of the access request would suggest that it is part of the same analysis and is therefore responsive. If it is not part of this analysis, then there is no reason for this record to have been included in the Public Body's response to the Applicant at all, or numbered and severed, with the costs of doing so charged to the Applicant. Similarly, record 1505 in its entirety appears responsive to the first part of the access request, given that it is apparently a document used by the Public Body in the investigation of a contaminated water well of one of the well owners named by the Applicant in her access request. Records 1508 – 1513, which were also withheld by the Public Body as nonresponsive, are also consistent with "documents used by the Public Body" in its investigation of a contaminated water well belonging to one of the well owners to whom the Applicant referred.

[para 37] While the Public Body's explanation that it withheld information dealing with wells other than those that were the subject of the Applicant's access request is possible in relation to record 3091, and its duplicate, record 3226, I find that this explanation does not serve to clarify its other decisions to withhold information as nonresponsive, given that what was withheld is not the kind of information to which the Public Body refers in its examples. In any event, the information the Public Body describes as nonresponsive may well be responsive if it were used or produced by employees of the Public Body in the course of the review of the investigations specified in the request.

[para 38] Essentially, the first part of the access request establishes that the Applicant is seeking all information used or produced by the Public Body's employees regarding Alberta Environment Investigation NO. 7894 and / or the contaminated water wells [of named parties] or any well in TWP 27 RGE 21 W4M and TWP 27 RGE 22 W4M. If information was reviewed or generated in the course of the Public Body's review of Alberta Environment Investigation No. 7894, it is responsive to the first part of the Applicant's access request. The Public Body has not established that the information it withheld as nonresponsive falls outside the scope of this aspect of the Applicant's access request. In some cases, the information contained in these records suggests that it does fall within the scope of this portion of the access request. In other cases, it is unclear, and evidence regarding the use to which the record was put, or the circumstances of its creation, would be necessary to make that determination.

[para 39] I must therefore order the Public Body do determine whether the information it withheld was used or produced by its employees when it reviewed Alberta Environment Investigation NO. 7894 or investigations of the water wells [of named parties] or any well in TWP 27 RGE 21 W4M and TWP 27 RGE 22 W4M. This determination would be made by asking the employees involved in the review of these investigations whether they were used or created as part of the review of these investigations, if the records themselves are silent on this point. If the Public Body is unable to determine responsiveness after reviewing the records and speaking with employees, if necessary, then it should include these records in its response to the Applicant.

Conclusion

[para 40] As set out above, I find that the Public Body has conducted a reasonable search for responsive records in its possession. However, I find that it has not established that it has conducted a reasonable search for responsive records that could possibly be in its control but in the possession of Alberta Environment. In addition, I find that it has not established that it has provided all responsive records within its custody or control to the Applicant.

[para 41] As a consequence I find that the Public Body has not responded to the Applicant completely, and has therefore failed in its duty to assist the Applicant under

section 10(1) of the FOIP Act. I will therefore order it to determine whether it has control over any potentially responsive records in the possession of Alberta Environment to which it refers in its submissions. If it finds that it does not, it must consider transferring the access request to Alberta Environment for response. I will also order the Public Body to make a new determination regarding the responsiveness of records it withheld as nonresponsive, as discussed above.

Issue B: Did the Public Body comply with section 11 of the Act (time limit for responding)?

[para 42] The Applicant argues that the Public Body failed to respond to her access request within the time limit imposed by section 11 of the FOIP Act. This provision states:

> *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.*
>
> *(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.*

The Public Body concedes that it did not meet the requirements of section 11 when it responded to the Applicant. It explains that it miscalculated the number of records and the amount of time it would take to give notice to affected parties under section 30. However, it notes that it kept the Applicant apprised of the status of her application.

[para 43] In Order F2009-028, I said:

> Although I find that the Public Body did not meet its duty to the Applicant, I do not consider it necessary or appropriate to make an order in relation to section 11 in this case. The Applicant has not requested that I reduce fees, nor is there any evidence relating to the fees charged by the Public Body, in the event that I considered this to be an appropriate case to order a reduction in fees for the purposes of section 72(3)(c). Further, as the Public Body responded to the Applicant and granted access to portions of records, this is not a case where it would be appropriate or necessary to deem the Public Body to have refused access to the Applicant for the purposes of section 11(2). Nothing can be gained by ordering the Public Body to comply with its duty to the Applicant under section 11, as it would be impossible for it to do so at this point in time. However, I draw to the Public Body's attention that section 14 has formal requirements that must be met before a Public Body can be said to have extended the time under the FOIP Act for the purposes of section 11.

[para 44] As happened in Order F2009-028, the Public Body has responded to the Applicant and granted access to records. There is therefore no reason to deem the Public Body to have refused to give access to the records. Moreover, there would be nothing to be gained by ordering the Public Body to do what it cannot do at this time. As I have

decided the issue of fees on other grounds, there is no benefit to addressing the Public Body's compliance with section 11 at this point, and I will not review the issue further.

Issue C: Are records excluded from the application of the Act by section 4(1)(l) or 4(1)(q)(ii)?

[para 45] The Public Body had argued that records 851 – 853, 1438, 4054, and 4056, were exempt from the application of the FOIP Act by virtue of sections 4(1)(l) and 4(1)(q). In my letter of October 6, 2011, I asked the Public Body for further clarification as to why it believed these records were subject to these provisions. In its submissions of November 29, 2011, the Public Body stated that it was no longer relying on these exemptions, and would provide these records to the Applicant subject to any applicable exceptions under the FOIP Act.

[para 46] As the application of section 4 is no longer in issue, I need not address it further.

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

[para 47] 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 48] 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.

This statement of the purpose of section 16 has been adopted in Orders F2009-028, F2010-036, F2011-001, and F2011-002 and found to be the rationale behind the mandatory exception to disclosure created by section 16 of the FOIP Act. In these orders, it was determined that 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 49] In Order F2005-011, former Commissioner Work 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, as a consequence, falls under section 16(1).

[para 50] The Public Body explained its application of section 16 to the records in the following terms:

> The information withheld is either scientific / technical information or a trade secret of a third party [16(1)(a)]. It was supplied in confidence and the third parties had the expectation that their proprietary information would not be released to the public. [16(1)(b)]. Disclosure could both harm the competitive position of the third party and result in similar information no longer being supplied to ARC [16(1)(c)]…
>
> …

> Examples of the types of information withheld include proprietary analytical methods and proprietary well logs – scientific and technical information and / or trade secrets.

In essence, the Public Body argues that it applied section 16 to withhold scientific or technical information or a trade secret of third parties.

[para 51] In explaining how the information it withheld is information of third parties, the Public Body argued the following in its initial submissions:

> As indicated earlier, the information that was potentially responsive [to] Part 1 of [the] request was "multi-layered" – subcontracting company 1 provided the data to subcontracting company 2, who provided it to third party 3, who provided it to public body B, who, in turn, provided it to public body A. At least some of it was supplied in confidence, either implicitly or explicitly, at one or more levels.

According to the key the Public Body provided to its submissions to explain its use of letters and numbers, rather than names in its submissions, "public body A" is the Public Body, and "public body B" is Alberta Environment. However, the Public Body did not identify "subcontracting companies 1 and 2" and "third party 3" in its submissions, or in the key it provided.

[para 52] The Public Body also indicated in its submissions that it had withheld information provided by Encana, Quicksilver (MGV), PetroBakken Energy Ltd. and Schlumberger under section 16. However, it did not refer to the records by number, and none of the records to which the Public Body applied section 16 indicated that they contained information belonging to these companies. I therefore sought clarification from the Public Body as to whose information was being withheld under section 16. I also asked the third parties participating in the inquiry, and which the Public Body had identified as being affected by its application of section 16, to provide evidence in support of the application of section 16 and to point to any information they believed belonged to them in the records.

[para 53] Encana, Quicksilver (MGV), PetroBakken Energy Ltd. and Schlumberger confirmed that they had no concerns regarding the disclosure of any information the Public Body had withheld under section 16. In its response to my request for clarification, the Public Body agreed that it "did not see any information that could be that of Schlumberger, Encana, or Petrobakken" and was "reasonably confident" that any of their information had already been disclosed to the Applicant. With respect to the information it had withheld from records 873-877, 1060, 1073, and 1152 – 1156 on the basis that it was the proprietary information of Quicksilver (MGV), the Public Body confirmed that it would now release that information to the Applicant.

[para 54] However, in its response to my questions, the Public Body stated, for the first time, the following theory for its application of section 16 to the information in the remaining records:

> Information from IHS (not designated "affected third party" status in Inquiry F4743) was fully withheld. IHS is a global information company headquartered in Denver, Colorado. The pages in question were produced using one of IHS' many proprietary databases – this speaks to the criteria of "trade secret" or "scientific / technical information" Clients have to pay to access this information – if information is made public, this could result in undue financial loss for IHS. Subscriptions include restrictions on use – this speaks to confidentiality… I refer the Adjudicator to IHS' Energy Information, Software and Solutions website if further details are required.
>
> Information from Company B [GChem] (not designated "affected third party" status in Inquiry F4743) was also fully withheld. According to their website, they are a "technically innovative company", they use "specialized equipment and techniques", they use "innovative … techniques". As indicated in our Initial Submission, this company wanted all of their information withheld, and due to the nature of their stated concerns during the consultation process, I do not think it appropriate to mention them by name in a document that is being circulated beyond the Adjudicator. I refer the Adjudicator to our initial submission for details, or, if the Adjudicator prefers, she can contact me and I will provide the information directly to her.

While the Public Body argues that GChem cannot be named, section 16 does not apply to the names of companies, but to their informational assets meeting the requirements of clauses (a), (b) and (c). Moreover, I have not accepted information concerning GChem *in camera* or made a determination that any references to GChem should be made *in camera*. For clarity, I will therefore refer to both GChem and IHS in my reasons.

[para 55] Both GChem and IHS were provided with notice of the inquiry by this office on October 12, 2010 and were invited to participate as affected parties. However, neither company responded to the notice or contacted this office to express any intent to participate. As a result, the only arguments in relation to whether the information the Public Body has withheld under section 16 is subject to that provision, are those made by the Public Body in answer to my questions. The only evidence before me in relation to the Public Body's application of section 16 is that contained in the records and its submissions.

Do the records contain the scientific or technical information of GChem or IHS within the terms of section 16(1)(a)?

[para 56] In Order 2000-017, the former Commissioner defined "scientific information" as "information exhibiting the principles or methods of science". Scientific information for the purposes of section 16(1)(a), then, is information belonging to a third party that exhibits the principles or methods of science.

[para 57] 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. Reconciling these two orders, technical

information, is information belonging to a third party regarding the applied sciences, proprietary designs, methods, and technology.

[para 58] I am unable to identify any information contained in the records that could be considered the scientific or technical information of IHS or GChem within the terms of section 16(1)(a). I accept that there is some information in these records that refers to technical or scientific principles generally, (records 924, 925, 926, 927, 1120, 1121, 1122, 1123, 1147, 1178, 1494, 2503, 2504, 2505, 2506, 2527, 2528, 2743, 2744, 2745, 2746, 2747, 2748, 2749, and 2750), or that was possibly produced through the application of computer technology, (records 526, 836, 882, 956, 957, 958, 959, 960, 961, 962, 963, 964, 1452, 3118, 3119, 3120, and 3121). However, to fall within the terms of section 16(1)(a), information must be "scientific or technical information" and it must be "*of a third party*".

[para 59] With regard to those records containing references to scientific or technical principles, I find that those references are not to "the scientific or technical information of GChem", within the terms of section 16(1)(a). These records contain a discussion of well data and opinions by a consultant of GChem as to the causes of the presence of methane in a water well. The consultant apparently provided opinions as a service to MGV Energy in some cases, and to well owners in others. However, there is nothing in the records to suggest that the scientific principles referred to in the discussions belong to GChem or are associated with GChem as an organization in any way. The references to scientific or technical principles in these discussions do not refer to the ways GChem applies science or technology in its business, but were incorporated in the discussions as a service to clients.

[para 60] In Order F2010-036, I found that information that merely reveals the kinds of services provided by a third party, but not the technical or specialized methodology of a third party, is not technical information within the terms of section 16(1)(a). I said:

> 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).

Similarly, I find that records 924, 925, 926, 927, 1120, 1121, 1122, 1123, 1147, 1178, 1494, 2503, 2504, 2505, 2506, 2527, 2528, 2743, 2744, 2745, 2746, 2747, 2748, 2749, and 2750 contain information revealing the services provided by a consultant, which happen to include some discussion of scientific principles. However, the records do not

reveal specialized designs or ways of conducting business involving the application of scientific or technical principles belonging to GChem.

[para 61] The Public Body's explanation of its decision to withhold records containing reference to GChem under section 16 is that its website states that it uses specialized equipment and techniques and is innovative. While I do not dispute that the GChem's website states these things, or that it does in fact use specialized equipment and techniques and is innovative, the question I must answer is whether the information withheld by the Public Body reveals GChem's innovative techniques and methodologies. I find that it does not.

[para 62] With regard to those records created through the application of computer technology, that is, records 526, 836, 882, 956, 957, 958, 959, 960, 961, 962, 963, 964, 1452, 3118, 3119, 3120, and 3121, I find that they do not contain scientific or technical information belonging to a third party. The records themselves do not reveal the scientific or technical methodology by which they were produced or the way in which IHS uses science or technology in its business. Moreover, while the records contain data, they do not appear to contain information "exhibiting the principles or methods of science", as described by the former Commissioner in Order 2000-017, or about a third party's specialized methodology or techniques.

para 63] For these reasons I find that the records do not contain the scientific or technical information of a third party within the terms of section 16(1)(a).

Is there information meeting the definition of "trade secret" in the records?

[para 64] "Trade secret" is defined in section 1(s) of the FOIP Act. As set out above, the Public Body argues that the information it has withheld also falls under this definition. Section 1(s) states:

> *1 In this Act,*
>
> *(s) "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process*
>
> *(i) that is used, or may be used, in business or for any commercial purpose,*
>
> *(ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use,*
>
> *(iii) that is the subject of reasonable efforts to prevent it from becoming generally known, and*
>
> *(iv) the disclosure of which would result in significant harm or undue financial loss or gain.*

To qualify as a trade secret, information must meet all the requirements of section 1(s). For the requirements to be met, there must be evidence as to the uses to which a third party puts the information, the economic value of the information, whether the third party

takes steps to protect the information from becoming known, and whether a third party would suffer harm or loss if the information were disclosed.

[para 65] I find that there is no evidence before me to establish that the records contain information that is a trade secret within the terms of section 1(s) of the FOIP Act. There is no evidence that the information in the records is used by a third party for a particular purpose, or that a third party would suffer harm or loss if the information were disclosed. The information in the records, in and of itself, does not support a finding that trade secrets, or any other information subject to section 16(1)(a), would be revealed if it were disclosed. With regard to the information of IHS, the evidence of the Public Body is that IHS offers the information in the records for purchase. This argues against finding that disclosure of the information in the records could reasonably be expected to result in harm to IHS or that IHS takes measures to prevent this information from becoming generally known.

[para 66] For these reasons, I find that the records do not contain the trade secrets of a third party.

Conclusion

[para 67] As I find that the information withheld by the Public Body does not fall within the terms of section 16(1)(a), I need not consider whether the requirements of section 16(1)(b) or (c) are met. For the reasons above, I find that section 16 does not apply to the information in the records.

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

[para 68] Section 1(n) defines personal information under the Act:

> *1 In this 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 69] Section 17 requires a public body to withhold personal information when it would be an unreasonable invasion of a third party's personal privacy to disclose the third party's personal information. This provision 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*
>
> *(a) the third party has, in the prescribed manner, consented to or requested the disclosure…*
>
> *…*
>
> *(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 70] 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 71] Section 17(2)(a) states that it is not an unreasonable invasion of personal privacy to disclose personal information if the subject of the personal information has consented to the disclosure in the prescribed form. Section 7 of the Freedom of Information and Protection of Privacy Regulation prescribes the form for providing consent to disclosure of personal information. Section 7(3) establishes the requirements for consent under section 17(2)(a) of the Act while section 7(4) establishes the formal requirements for valid written consent. These provisions state:

> *7(3) The consent or request of a third party under section 17(2)(a) of the Act must meet the requirements of subsection (4), (5) or (6).*
>
> *7(4) For the purposes of this section, a consent in writing is valid if it is signed by the person who is giving the consent…*

[para 72] If an individual who is the subject of personal information provides signed, written consent to the disclosure of personal information to a requestor, then section 17(2)(a) applies to that personal information.

[para 73] 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 74] 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 75] 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 a provision of section 17(2) applies. I will first consider whether the information severed is personal information, and then consider whether any of the provisions of section 17(2) apply to the information withheld by the Public Body under section 17. If there is personal information severed from the records that is not subject to section 17(2), I will consider whether the factors set out in section 17(5) weigh in favor of, or against, disclosing the personal information in the records.

Is the information withheld by the Public Body under section 17 personal information?

[para 76] The Public Body withheld the names of individual well owners, the land descriptions of their land, their addresses, email addresses and telephone or fax numbers from the records. The Public Body refers to these individuals as Well Owners B, C, D, and E in its submissions. The Public Body referred to the Applicant as Well Owner A.

[para 77] I agree with the Public Body that names, addresses, email addresses, telephone and fax numbers of individuals are examples of personal information within the terms of section 1(n) of the FOIP Act.

[para 78] The Public Body also severed land descriptions from the records for the following reasons:

> In a rural setting, the legal land description is equivalent to an urban residential street address – personal information that must not be disclosed.
>
> Because of the small number of landowners involved, release of legal land descriptions would allow the Applicant to easily identify the third parties and have access to their personal information.

[para 79] In some instances legal land descriptions may serve to enable an applicant to learn personal information about identifiable individuals, for example, when this information appears in the context of personal information about an individual. In such cases, land descriptions will constitute personal information.

[para 80] The Applicant argues that information regarding legal land descriptions and landowners cannot be withheld because this information is publicly available.

[para 81] In Order F2009-010, I determined that the public availability of personal information is a factor to be considered under section 17(5), when determining whether disclosure of an individual's personal information would be an unreasonable invasion of the individual's personal privacy. I decided that even though information is or was, at one time, available to the public, section 17 must still be considered when deciding to give access to the information under the FOIP Act. I said:

> The issue of whether information is publicly available is relevant for the purposes of section 40(1)(bb), which states that a public body may disclose personal information that is available to the public. However, this provision does not state that a public body must automatically disclose personal information available to the public. Further, this provision refers to the general authority of public bodies to disclose information, as opposed to the decisions they must make in relation to access requests. When making a determination as to whether personal information may be disclosed to an applicant who has made an access request under the FOIP Act, the head of a public body must consider and apply the provisions of section 17 and follow the processes set out in sections 30 and 31 of the FOIP Act. The public availability of personal information may reduce or negate an individual's expectation of privacy in that information in some cases, such as when the information is both widely reported and available; however, it will not have that effect in every case. Public availability of information is therefore a factor that may be weighed under section 17(5); whether the presumptions under section 17(4) are rebutted will depend on the extent to which the information is readily available to members of the public, and the existence or absence of other factors under section 17(5).
>
> In the present case, any exhibits at the disciplinary hearing would be public only in the sense that members of the public could have observed the hearing and members of the media could have reported on the exhibits entered at the hearing. However, there is no evidence that members of the public did attend or that the media did report the details of the evidence presented at the hearing. Rather, the evidence is that it was necessary to make an access request to obtain the information, which suggests that the personal information in the records at issue is not available to the public. The Applicant's stated purpose in requesting access to the records at issue is to release the information they contain to the public. This purpose, too, suggests that the information in the records at issue is not accessible by the public.
>
> In Order 159, the Assistant Commissioner of the Office of the Information and Privacy Commissioner of Ontario considered what it means for information to be "publicly available". He said:
>
> > After carefully considering the representations of the appellant and the institution together with the information obtained from the Registrar's office, I am of the view that the unreported decisions requested are publicly available.
> >
> > Support for the position I have taken can be found in an analysis of the way in which the Federal and various Provincial access legislation deals with publicly available information, by McNairn and Woodbury in Government Information: Access and Privacy, De Boo, 1989. At page 2-24 the authors state:
> >
> > Other information for which there is already a system of public access in place will be regarded as being available to the public. Someone who is seeking such information will normally be required to proceed in accordance with the rules of that system.

> The Assistant Commissioner of Ontario found that information may be considered publicly available if there is a system of public access in place by which the information can be obtained, other than through an access request under freedom of information legislation. I agree with this reasoning.
>
> If there is no preexisting system of public access in relation to personal information, personal information is not in fact publicly available for the purposes of the FOIP Act. Consequently, considering public availability to be a factor weighing in favor of disclosure under section 17(5) in such circumstances would be improper. On the other hand, if there is a system of public access in place in relation to personal information, in addition to making an access request under the FOIP Act, then personal information is publicly available. However, when determining whether this information should be disclosed to an applicant who has made an access request under the FOIP Act, public availability would be only one factor to weigh under section 17(5) of the FOIP Act and could be outweighed by other factors weighing against disclosure.

[para 82] In Order F2010-001, I considered whether public availability of legal land descriptions was a factor weighing in favor of disclosure under section 17(5). I determined that the public availability of land descriptions was not a factor in that case, as information of this kind had not been severed from the records. I said:

> Section 17 of the FOIP Act does not specifically address public availability of personal information. However, I agree with the Public Body that a public body must consider whether section 17 of the FOIP Act permits or prohibits giving access to personal information to an applicant before it may disclose personal information to an applicant, even in situations where the information may be publicly available.
>
> …
>
> In the present circumstances, information regarding legal land descriptions and landowners is publicly available. However, information regarding occupants and their mailing addresses, in conjunction with the results of water testing on the property they occupy, is not publicly available. Further, the Public Body severed information regarding occupants and mailing addresses, rather than information such as legal land descriptions. Consequently, the public availability of the information severed is not a factor that applies in this case.

[para 83] Given that information regarding land descriptions and landowners is available for purchase from land titles offices, I find that there is a system of public access to this information and that it is therefore publicly available.

[para 84] It is clear from the Applicant's access request that she knows the names of individuals who have made complaints regarding methane contamination in their water wells, as she refers to these individuals by name. Her access request also indicates that she knows the basis of their complaints. In her submissions, the Applicant points out that Alberta Environment published the Public Body's final draft of its review of a coal bed methane well complaint made by the individual whom the Public Body refers to as Well Owner E. Moreover, the title of this ".pdf" document includes the name of Well Owner E. As the final draft of the Public Body's review of Well Owner E's complaint is available on Alberta Environment's website, and includes the name of Well Owner E in the document title, I find that this information is also available to the public.

[para 85] As the Applicant states in her submissions, Alberta Environment has made available on the internet a searchable database, accessible to the public, of water wells located across the province. This database enables one to find out the identity of well owners from the legal land description, and to find out the legal land description from the name of the owner. The database also provides a description of the uses of the water well, and the most recent testing data. If one knows the name of a landowner, it is possible to use this database to obtain the legal land description of the landowner's well from this database, in addition to recent testing data on that water well. Given that the report published by Alberta Environment on its website contains the last name of the Well Owner E and the name of the municipality in which the well is located, the information the Applicant would need to obtain the legal land description from the database has already been made public. The question is whether she is entitled to obtain this information from the records in issue.

[para 86] I find that the information withheld by the Public Body is personal information, as it would enable an applicant to identify individuals and learn information about them, such as their addresses, and that they have made complaints about the presence of methane in their water wells. In the case of Well Owner E, it appears that some of this information is also publicly available.

[para 87] As discussed in Order F2009-010, that information is publicly available, is a factor weighing in favor of disclosure when determining whether it would be an unreasonable invasion of personal privacy to disclose personal information under section 17(5). Any factors weighing in favor of withholding the information must also be considered when conducting this analysis.

[para 88] I will now consider whether disclosing the personal information of the individual well owners to the Applicant would be an unreasonable invasion of their personal privacy under section 17.

Does section 17(2)(a) apply to the information severed by the Public Body?

[para 89] In a submission dated January 26, 2011, an individual whom the Public Body refers to as Well Owner B wrote a signed letter containing her submissions for the inquiry. This letter states:

> I totally support [the Applicant's] endeavors to obtain public data on a natural resource.
> …
> We [the disclosed affected parties] all want [the Applicant] to deservedly have the requested material she has worked so hard to obtain.

This letter indicates that Well Owner B is aware that the information would be used by the Applicant to pursue issues regarding water quality.

[para 90] It is unclear whether Well Owner B authorized the Public Body to provide her personal information to the Applicant at the time the Public Body was determining whether to withhold information under section 17. However, Well Owner B's

submissions on this point satisfy the requirements of section 7 of the Regulation, cited above, and therefore section 17(2)(a) of the FOIP Act. I find that section 17(2)(a) now applies to information about Well Owner B, even if it did not previously.

[para 91] In a signed submission dated December 15, 2010, an individual whom the Public Body refers to as "Well Owner C" states the following:

> I request and support the full, uncensored disclosure of any and all information pertaining to the water well contamination complaint I placed with EnCana Corporation and Alberta Environment in November 2005. This information needs to be complete, identifiable and sequential for each case listed on the request submitted by [the Applicant]. My permission is given to disclose publicly my name, legal land description and mailing address which may appear on any of these documents requested.

[para 92] The contents of this submission reveal that Well Owner C is aware of the use that the Applicant intends to make of this information and supports this use. It is unclear whether Well Owner C authorized the Public Body to provide her personal information to the Applicant at the time the Public Body was determining whether to withhold information under section 17. However, Well Owner C's submissions amount to a consent satisfying the requirements of section 7 of the Regulation, cited above, and therefore of section 17(2)(a) of the FOIP Act. I find that section 17(2)(a) now applies to information about Well Owner C, even if it did not previously.

[para 93] Two individuals whose personal information was severed from the records and to whom the Public Body refers as "Well Owner D" wrote this office and stated the following on October 22, 2010:

> [The Applicant] contacted us prior to her FOIP [request] and asked if we would object to our report and data being requested from ARC. We told her that we did not have a problem with her receiving the information. Our lawyer, however, did not agree and initiated a letter as our solicitor. We did not see her letter of October 28, 2008 until this year. This lawyer is no longer representing us…
>
> Since we are concerned that our water well contamination is the result of aquifer contamination, and therefore may affect more than our water well, we feel that this information must be made public, so that others may be aware of the possible dangers in their own water.

[para 94] At the time the Public Body consulted with Well Owner D, Well Owner D did not provide consent to the disclosure of their personal information to the Applicant. However, Well Owner D's correspondence to this office on October 22, 2010 is signed and is in writing, and provides consent to the disclosure of personal information to the Applicant within the terms of section 7 of the Regulation. I therefore find that section 17(2)(a) applies to the personal information of the individuals described as Well Owner D. As a result, I find that it would not be an unreasonable invasion of their personal privacy to disclose their personal information for the purposes of section 17.

[para 95] An individual whose personal information was severed from the records and to whom the Public Body refers as "Well Owner E" did not participate in the inquiry. However, the Public Body states in its submissions that it contacted him and was told that

he did not want his personal information disclosed to the Applicant. I find that section 17(2)(a) does not apply to this individual's personal information.

[para 96] I find that the personal information of Well Owners B, C, or D cannot be withheld from the records under section 17, given that they have consented to its disclosure. However, I find that section 17(2)(a), or any other provision of section 17(2), does not apply to the personal information of Well Owner E.

Would it be an unreasonable invasion of personal privacy to disclose the personal information of Well Owner E?

[para 97] As set out above, the Public Body withheld the name of Well Owner E, and a legal land description of Well Owner E's property, in addition to Well Owner E's telephone number and address, from the records under section 17. This information was severed from reports of an investigation into a complaint made by Well Owner E and other records relating to the creation of the report. From her submissions, I understand that the Applicant is primarily challenging the Public Body's decision to withhold the land descriptions from the records. She seeks the land descriptions of Well Owner E's property in order to match the well data and the conclusions of the Public Body with the location of the well so that she can evaluate the Public Body's report and conclusions.

[para 98] On its own, a legal land description is not personal information, but is a description of the location of land. However, a legal land description can be used to learn the identity the individual who owns the land. Consequently, if a land description appears with other information about the landowner, it can be argued that the land description is personal information, given that the description could serve to identify the individual whom the other information is about. For example, if one were to refer to a legal land description and then state that the owner of that land had made a complaint to the government about water quality on that land, it would be possible to identify the individual and to learn that the individual had made a complaint to the government about water quality. In the case before me, the land description would serve to identify Well Owner E and to enable the Applicant to learn that Well Owner E has made a complaint even if Well Owner E's name were removed from the records.

[para 99] The information severed by the Public Body, including the land description, is personal information as defined by section 1(n) of the FOIP Act as it conveys personal information about Well Owner E as an identifiable individual. Moreover, it is information falling under section 17(4)(g) of the FOIP Act, as it consists of the name of an individual in the context of other information about the individual. As a result, there is a presumption that disclosing the land description of Well Owner E's property would be an unreasonable invasion of Well Owner E's personal privacy.

[para 100] The Applicant did not make arguments specifically addressing section 17(5) of the FOIP Act or its application to the information she seeks. However, I infer from the arguments she did make for the inquiry that she considers water to be an important public resource and that the legal land descriptions of the wells that were the

subject of the complaints would be necessary in order to conduct an independent review of the Public Body's conclusions regarding the sources of coal bed methane contamination in wells. The Applicant confined her arguments regarding the legal land descriptions of the wells to statements that this kind of information is publicly available. However, I infer from submissions she made on other points that the legal land description of the wells would pinpoint the location of the wells, which would assist the Applicant to understand something of the topography and geology of the area of the well and to test the data and conclusions in the Public Body's reports, having gained that understanding.

[para 101] The Applicant is also concerned about the research conducted in relation to the causes of contamination to her own well, and she challenges the findings of the Public Body's researcher regarding the causes of the contamination in her well.

[para 102] The Applicant's position is consistent with an argument that disclosing the legal description of Well Owner E would assist her, and other members of her community, to hold the Public Body to account in relation to its assessment of Alberta Environment's investigation and to challenge its conclusions in relation to the sources of coal bed methane contamination in water wells in her community. In other words, disclosing the legal land descriptions would have the effect of assisting the Applicant, or other members of the public, to subject the Public Body's activities to public scrutiny within the terms of section 17(5)(a).

[para 103] As discussed above, Alberta Environment has posted a report on the internet containing the Public Body's conclusions regarding Well Owner E's complaint and Well Owner E's name appears in the document title. Moreover, from that information, it would be possible to learn the legal land description of Well Owner E's property by accessing the searchable database on Alberta Environment's website. Therefore the personal information the Applicant seeks – the land description in the context of Well Owner E's complaint, is essentially already available on the internet.

[para 104] In addition, of the five landowners whose names appear in the records, one is the Applicant herself and three have consented to the disclosure of their personal information to her. As a consequence, the Applicant would be able to determine that any information remaining in the records that has been redacted under section 17 must necessarily be that of Well Owner E, given that only Well Owner E's information could be withheld under this provision.

[para 105] I find that it would not be an unreasonable invasion of personal privacy to disclose the legal land descriptions relating to Well Owner E's property for the reasons that follow.

[para 106] I find that disclosing the legal land description of Well Owner E's property would allow the Applicant to identify the location of Well Owner E's well. It would therefore serve the purpose of subjecting the activities of the Public Body to public scrutiny, as it will assist the Applicant and other members of her community to evaluate

the findings of the Public Body with respect to the sources of water contamination, and possibly challenge them. Moreover, I find that this information is essentially publicly available. With this information, the Applicant will be able to match the particular land description with other data that she has obtained through her access request. In this case, the public availability of the information is a factor weighing in favor of finding that it would not be an unreasonable invasion of personal privacy to disclose the land description. Finally, it would be an absurd result to withhold information, when the disclosure of the information of the other landowners will serve to identify the data and records relating to Well Owner E's well. It is simply impossible to withhold the land description of Well Owner E's well or Well Owner E's name in any meaningful way.

[para 107] However, I find that this analysis does not apply to Well Owner E's contact information, such as his email address, street address, and telephone number, and I confirm the decision of the Public Body to withhold that information from the records.

The Applicant's personal information

[para 108] Having reviewed the severing conducted by the Public Body, I note that in some circumstances it withheld the name of the Applicant and the land description of her property. Section 17 requires a public body to withhold the personal information of a third party from an applicant; it provides no authority to withhold information consisting only of the personal information of an applicant from the applicant.

Conclusion

[para 109] In conclusion, I find that it would not be an unreasonable invasion of personal privacy to disclose the information of Well Owners B, C, and D to which the Public Body applied section 17(1). In addition, I find that it would not be an unreasonable invasion of personal privacy to disclose Well Owner E's name and the land description of Well Owner E's property to the Applicant. Finally, the Public Body cannot withhold the personal information of the Applicant under section 17.

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

[para 110] Section 24 creates an exception to the right of access in relation to "advice from officials". It states, in part:

> *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…*
>
> *(2) This section does not apply to information that…*

…

(c) is the result of product or environmental testing carried out by or for a public body, that is complete or on which no progress has been made for at least 3 years, unless the testing was done

(i) for a fee as a service to a person other than a public body, or

(ii) for the purpose of developing methods of testing or testing products for possible purchase…

…

(e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal, that is complete or on which no progress has been made for at least 3 years,

(f) is an instruction or guideline issued to the officers or employees of a public body…

[para 111] In Order 96-006, the former Commissioner established a test to determine whether information is advice, recommendations, analyses or policy options within the scope 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, proposals, recommendations, analyses and policy options] 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 Clark in Order 96-006 is intended to assist in identifying information meeting the requirements of section 24(1)(a).

[para 112] The *FOIP Guidelines and Practices 2009* (the FOIP Guidelines) offers the following definition of the terms included in section 24(1)(a):

> The exception provides specific coverage for advice, proposals, recommendations, analyses, and policy options developed by or for a member of the Executive Council.
>
> *Advice* includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts.
>
> *Recommendations* includes suggestions for a course of action as well as the rationale for a suggested course of action.

> *Proposals* and *analyses or policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

[para 113] Under the above interpretation, advice, proposals, recommendations, analyses, and policy options are largely synonymous terms, and describe the information employees of a public body may provide to an individual empowered to make decisions on behalf of a public body, such as a member of the executive council, in order to assist that individual or individuals, to make decisions on behalf of a public body. The information in question will put forward a course of possible action or evaluate various courses of action, in relation to an area or issue where an individual or individuals responsible for making decisions on behalf of a public body, or a member of the executive council, is considering taking action, or could consider taking action. The interpretation put forward in the FOIP Guidelines is consistent with previous orders of this office, and recognizes the public interest that section 24(1)(a) is intended to protect.

[para 114] In Order 96-006, former Commissioner Clark considered the meaning of "consultations and deliberations" in section 24(1)(b). He said:

> When I look at section 23 as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank deliberations were to be made public. Again, this is consistent with Ontario and British Columbia. I therefore believe a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of the responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice. [my emphasis]

[para 115] I agree with the interpretation Commissioner Clark assigned to the terms "consultation" and "deliberation." It is not enough that records record discussions or communications between employees of a public body; rather, a consultation takes place only when the individuals listed in section 24(1)(b) are asked for their views regarding a potential course of action, and a deliberation occurs when those individuals discuss a decision that they are responsible for, and are in the process of, making.

[para 116] The first step in determining whether section 24(1)(a) or (b) applies is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options, in the case of section 24(1)(a), or consultations or deliberations between specified individuals, in the case of section 24(1)(b).

[para 117] In its initial submissions, the Public Body explained its application of section 24(1)(a) and (b) in the following way:

> 641 pages were either severed (193 p) or completely withheld (448 p) under section 24(1)(a) and/or 24(1)(b). In all but a few instances, both sections were applied. Most were related to Part 1 of the request. Sections 17 and / or 25 were also applied to some of these records.

> The contracted work conducted under Part 1 of the request was an investigation of Alberta Environment's water well complaint review process. The results of the study included an analysis of the process, and advice, proposals and recommendations for any changes that might be appropriate. Since this is the work that was contracted for, the "advice" (in the broadest sense) was expected, was ought for the purpose of taking action and involved parties who could implement the actions. These same justifications are apropos to the criteria fro the application of section 24(1)(b).
>
> Some of the records withheld under section 24(1)(a) and 24(1)(b) were draft reports. In exercising our discretion under section 24, we did so in the interest of preserving frank deliberations conducted in private when discussing issues and arriving at decisions. The final report(s) might differ from the drafts. If we were to allow early or draft disclosure, such a disclosure could lead a reader to arrive at erroneous conclusions.

[para 118] Once I had reviewed the submissions of the Public Body and the records at issue, it was unclear to me how the information withheld by the Public Body under section 24(1)(a) and (b) met the requirements of either provision. I therefore asked the Public Body the following questions:

> The Public Body applied section 24(1)(a) and (b) to information in a number of records. I have reviewed the Public Body's application of this provision and it is unclear to me that the information to which it applied these provisions could reasonably be expected to reveal, advice, proposals, recommendations, analyses, policy options, or consultations or deliberations within the terms of these provisions.
>
> The Public Body applied section 24(1)(a) to withhold records 692 and 693, and records 2189 – 2190. The information in these records indicates that it is intended to provide directions to staff as to how to respond to certain questions that might be posed by members of the public or the media.
>
> **Questions for the Public Body regarding section 24(1)**
>
> **1. What is the Public Body's rationale for applying section 24(1)(a) or (b) to withhold information from the records?**
>
> **2. How could the information to which the Public Body applied these provisions be expected to reveal information subject to section 24(1)(a) or (b)?**
>
> **3. Do sections 24(2)(c) or (e) apply to the draft reports withheld by the Public Body under section 24(1)(a) and (b)? If not, why not?**
>
> **4. Does section 24(2)(f) apply to records 692 and 693, and 2189 and 2190? If not, why not?**

[para 119] The Public Body prefaced its answers to all my questions with the following:

> While welcoming the opportunity to provide clarifications to the Adjudicator for her deliberations in these [inquiries], I must state that for many of the questions asked, there is little I am able to add beyond what was included in our initial and/or rebuttal submissions. The person who processed the FOIP request at issue in these Inquiries is no longer employed at AITF. She moved out of province shortly after processing of the request was completed. I was the Applicant's initial contact in 2008, was involved in the mediation process conducted by the

> OIPC and have continued to be the organization's FOIP contact for the purposes of these inquiries. However, I can in no way recreate the thought processes of another individual from 3 years ago, so there are gaps in what I can provide. Some details from the earlier submissions have been repeated herein; in other instances I have simply referred the Adjudicator back to the Initial and /or rebuttal submissions.

[para 120] With respect to my questions in relation to its application of section 24(1)(a) and (b) the Public Body stated:

> One could consider a sequence of activities in these water well complaint investigations as: proposals, analyses, recommendations / advice and final report – the exact information that can be excepted under 24(1)(a).
>
> With respect to proposals: There are 5 separate investigations. Each had a separate proposal, with, in fact, several iterations for each. All of these project proposals were withheld. Instead, the final terms of reference from the contracts were provided to the Applicants in their entirety – these were relatively anonymous in terms of personal information, did not include budget numbers (which are nonresponsive) and provided the actual scope of work undertaken. See Appendix 2 for a sample of one of the Terms of Reference documents, previously released to the Applicant. The Terms of Reference include a confidentiality statement with respect to the information reviewed – see page 107 in the Appendix.
>
> An investigation of "already-gathered" scientific and technical data necessitates two-way communications. These communications can include recommendations and analyses developed by and for the public bodies involved. It is an iterative process. There are clarifications of details required.
>
> The information severed or withheld was comprised of consultations (and/or) deliberations involving employees of public bodies – ARC, Alberta Environment, and Energy Resources Conservation Board – section 24(1)(b)(i).
>
> The information severed or withheld under section 24(1)(a) and / or (24(1)(b) reveals confidential consultations and discussions between the Public Bodies with the common objective of identifying the potential for the water wells to be impacted by oil and gas wells in the areas. We therefore consider the information to contain advice and recommendations as well as consultations and deliberations that are protected under section 24.
>
> With respect to Part 2 of the request, ARCs research activity related to groundwater contamination and coalbed methane was comprised of the work in Part 1, and a joint research project in partnership with others (both public body and private sector). The joint project was still underway when the request was received. Consultations occurred as part of the project. And again, the contract included a confidentiality clause. I refer the Adjudicator to Appendix 1 of our Initial Submission for samples of the standard confidentiality clauses that are part ARCs contracts.

[para 121] The Public Body specified the records to which it had applied sections 24(1)(a) and (b), but it did not explain why it applied these provisions to the particular records. It did not tell me, for instance, to whom the part of the information consisting of "reports" was conveyed, nor what decision or course of action to be made by the person or persons receiving them would be informed by the reports.

[para 122] The records provided for my review, which are voluminous, can be roughly divided into several categories.

Proposals

[para 123] The first category is of a series of "proposal" documents, prepared by what appears to be an employee of the Public Body, containing a plan of work to be done in order to make certain determinations or reach certain conclusions about particular subject matters. Some of the proposals contemplate that the determinations or conclusions will assist Alberta Environment (for whom the work is to be done, in a particular way. Although the Public Body has not told me this directly, I presume these documents, or some of them, were conveyed by employees of the Public Body to Alberta Environment (the body for whom the work was to be done).

[para 124] When a public body engages another public body to give advice that will help it to make a decision or take an action, this will in some circumstances fall under sections 24(1)(a) or (b) of the Act, in the sense that the advice is being created by the second public body "on behalf of" the first one, to be given to the latter for the purposes of its decision making. However, here, it is not clear that any of these proposals reflect "advice, etc." within the terms of section 24(1)(a), or that they are "consultations of deliberations" within the terms of section 24(1)(b).

[para 125] The substantive content of whatever advice might yet be given did not exist at the time the proposals were created or offered – they are merely work plans.

[para 126] In some circumstances, an argument might be made that a proposed work plan is "advice" in the sense that it could be characterized in the following way: "if you accept the proposed work plan, you will get the information you require; I suggest you accept it". However, it is by no means clear that the work plan was developed by the Public Body's employee, in contrast to simply documenting what Alberta Environment had said would be required. It is possible that the "proposals" were the result of instructions from Alberta Environment, (which might have been of any level of detail), that a document be created setting out what work would be done to answer particular questions. It would not be "advice", or a "proposal" in the terms of section 24(1)(a), for the Public Body to document what Alberta Environment had asked it to do. If there were discussions, it is not clear which party contributed what content. Furthermore, even if the Public Body developed the proposals unilaterally, it is not clear that the Public Body was urging Alberta Environment to accept them; it may simply have been saying: "we understand you want certain work to be done; this is what we can offer you".

[para 127] Moreover, at the time the "proposals" were written, and conveyed to Alberta Environment, it was not yet the responsibility of the person conveying them to Alberta Environment to advise or propose courses of action to it; at that time, the Public Body had not yet entered a contractual relationship with Alberta Environment to provide it with services. Therefore these records were not created "by or on behalf of" Alberta Environment, the body who – assuming the decision that was to be made on the basis of the proposals was whether to accept them – would be making that decision, within the terms of section 24(1)(a); neither, at the time, did the person whose name appears on the

proposals have the responsibility to provide "advice, etc." to Alberta Environment, within the terms of the test set out by Commissioner Clark in Order 96-006. In other words, if the "proposals" were responses to requests for proposals, this was not, in my view, "advice, etc.", nor was it "consultations or deliberations"; responding to a request seeking *advisors* does not constitute "*advice*".

[para 128] Thus, with respect to the proposals, I am unable to conclude that the proposals withheld by the Public Body contain the kind of information contemplated by sections 24(1)(a) and (b).

Résumé

[para 129] A second category of records consists of several copies of the résumé of a Public Body employee (which may have been attached to the proposals). Possibly, the details of this document were provided to inspire confidence as to the competence of this individual. However, I cannot assume this to have been the purpose of the document in this case, and even if it were, it does not constitute advice as to what action was to be taken or decision to be made. There is nothing in this record, or its many duplicates, to suggest that the researcher's competence was in question and that he was providing the information to urge Alberta Environment to retain him to do the work. Further, his competence and experience are factual matters and are not advice.

Contracts

[para 130] A third category of records is the contracts that were reached between the parties as to the nature of the work to be done. For some of the same reasons that I cannot find that the proposals constitute advice, I cannot find that the concluded agreements between the parties as to what would be done constitute advice. Moreover, the contract document concluded decisions. Though many decisions reflect advice that was given in reaching them, decisions themselves do not fall within the terms of section 24(1)(a) and (b). (See Orders F2008-028 andF2008-031)

[para 131] Blank certificates of insurance that were possibly attached to the contracts do not contain the kind of information contemplated by sections 24(1)(a) and (b).

Reports and draft reports

[para 132] The fourth, and largest, category of documents withheld under sections 24(1)(a) and (b) is the reports that were created pursuant to the contracts. These reports are in draft form and are, with the exception of records 606 – 614 and 636 - 644, the results of the application of scientific and technical knowledge. I recognize that section 24(a) contains the term "analysis". However, in my view, the scientific analysis or evaluation of physical data by the application of professional knowledge reaches what are in essence conclusions about physical facts, which in my view are not advice within the terms of sections 24(1)(a) and (b). Even if the conclusions might vary based on the knowledge of the analyst, they are still conclusions about physical facts. In my view, the

"analysis" contemplated by section 24(1)(a) refers to the analysis of options or potential courses of action or decisions that have a subjective or opinion element, not to the application of scientific principles to physical data.

[para 133] I am supported in this view by a decision of the Ontario Information and Privacy Commissioner's office, which was upheld by the Ontario Divisional Court in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)* [2004] O.J. No. 224. In Order PO-1993, the Adjudicator considered whether technical and objective evaluations of proposals made by experts applying their professional expertise constituted "advice or recommendations". In concluding that it did not, the Adjudicator stated:

> As I noted above, the purpose of the exemption in section 13(1) is to protect the free flow of advice or recommendations within the deliberative process. The importance of protecting this type of information is to ensure that employees do not feel constrained by outside pressures in exploring all possible issues and approaches to an issue in the context of making recommendations or providing advice within the deliberative process of government decision-making and policy-making. Ultimately, it is the recipient of the advice or recommendations who will make the decision and thus be held accountable for it.
>
> Support for this approach to the interpretation of section 13(1) can be found in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) at p. 292:
>
> > A second point concerns the status of material that does not offer specific advice or recommendations, but goes beyond mere reportage to engage in analytical discussion of the factual material or assess various options relating to a specific factual situation. In our view, analytical or evaluative materials of this kind do not raise the same kinds of concerns as do recommendations. Such materials are not exempt from access under the U.S. act, and it appears to have been the opinion of the federal Canadian government that the reference to "advice and recommendations" in Bill C-15 would not apply to material of this kind.
> >
> > Similarly, the U.S. provision and the federal Canadian proposals do not consider professional or technical opinions to be "advice and recommendations" in the requisite sense. Clearly, there may be difficult lines to be drawn between professional opinions and "advice." Yet, it is relatively easy to distinguish between professional opinions (such as the opinion of a medical researcher that a particular disorder is not caused by contact with certain kinds of environmental pollutants, or the opinion of an engineer that a particular high-level bridge is unsound) and the advice of a public servant making recommendations to the government with respect to a proposed policy initiative. The professional opinions indicate that certain inferences can be drawn from a body of information by applying the expertise of the profession in question. The advice of the public servant recommends that one of a possible range of policy choices be acted on by the government.
>
> According to the Ministry, its evaluators are "Ministry staff with the requisite education and knowledge of the construction industry needed to evaluate the consultants' proposals". In conducting their review of the proposals submitted to the Ministry pursuant to RFP's, these individuals are, as I noted above, establishing the factual basis upon which advice and/or recommendations may ultimately be made.

[para 134] The Court upheld the Adjudicator's interpretation in that case. It agreed that an objective assessment of factual information is not, in itself, advice. In my view, there might be situations in which objective assessments implicitly suggest a particular decision or course of action, and if that is the case, arguably, that might constitute advice or analysis within the terms of section 24(1)(a). However, that is not the case here.

[para 135] In the present case, the reports consist for the most part of objective, scientific, analysis or evaluations of factual information, consisting of environmental testing data. This does not, in my view, constitute the type of "analysis" contemplated in sections 24(1)(a) and (b), because it simply reveals an objective state of affairs; ultimately, someone might use this information to develop advice that is directed toward taking an action, but an objective state of affairs is not, in itself, within the terms of the test set by Commissioner Clark, "directed toward taking an action".

[para 136] In saying this, I acknowledge that sections 24(2)(c) and (e) provide that certain kinds of scientific or technical information are not subject to section 24, which might be taken as an indicator that section 24(1) addresses such information. However, if that is so, it does not mean that it is addressed by sections 24(1)(a) and (b). Rather, such information would potentially fall into section 24(1)(h), which the Public Body did not rely upon, and which would not apply in this case in any event since the reports have now been completed.

[para 137] Moreover, the Public Body has also withheld the bibliographic information in the reports under section sections 24(1)(a) or (b); however, this information clearly does not does not fall within either provision.

[para 138] With respect to the portion of the reports that consisted of the review and assessment of technical conclusions that had been reached earlier, it is not clear at all what decision or action the information resulting from the completion of the work would inform. The Public Body referred to "identifying the potential for the water wells to be impacted by oil and gas wells in the areas". This does not suggest any decision or course of action to be accepted or rejected by the recipient of the information.

[para 139] The Public Body provided the following explanation of its decision to apply section 24(1)(a) and (b) to draft versions of the reports:

> The rationale for withholding of the draft reports, from our Initial Submission in Inquiry F4743: "In exercising our discretion under section 24, we did so in the interest of preserving frank deliberations conducted in private when discussing issues and arriving at decisions. The final report(s) might differ from the drafts. If we were to allow early or draft disclosure, such a disclosure could lead a reader to arrive at erroneous conclusions.

[para 140] That a draft may differ from a final version of a report does not transform the information in a draft into advice, proposals, recommendations, analyses, policy options, consultations or deliberations: information must have that character to begin with. I acknowledge that the differences between a draft version and a final version may allow a reader to determine what was changed and to speculate about the reasons for the

changes. However, it does not follow from this possibility that any changes that were made are the result of information subject to section 24(1)(a) or (b), or that such information would be revealed by disclosing the draft version. Further, in many instances, where the records indicate the reasons for changes in the drafts, such as in emails discussing the reports, the changes appear to be the result of an instruction from the recipient of the report to the contracted creator of the report, rather than advice. Instructions to employees cannot be withheld under section 24(1)(a) or (b), not only because they are not information meeting the requirements of these provisions, but because section 24(2)(f) specifically prohibits applying section 24 to information of this kind.

[para 141] The Public Body also argues that the Applicant, or members of the public, might draw erroneous conclusions from the information in the draft reports, should they be released. In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, the Supreme Court of Canada rejected the potential for misinterpretation of information as a legitimate reason for refusing access. Cromwell J., speaking for the majority, stated:

> Moreover, M's submission that the release of some of the information could give an inaccurate perception of the product's safety cannot be accepted. Courts have often — and rightly — been skeptical about claims that the public misunderstanding of disclosed information will inflict harm. Refusing to disclose information for fear of public misunderstanding undermines the fundamental purpose of access to information legislation; the public should have access to information so that they can evaluate it for themselves.

In any event, the possibility that information may be misinterpreted does not transform information that does not otherwise conform with the requirements of section 24(1)(a) or (b) into information that does.

Data and technical information

[para 142] Another category of records consists of sheets of technical, physical or scientific data. For such records, I have been told nothing as to by whom they were produced, to whom they were directed, or how they might conceivably meet the elements of the test for sections 24(1)(a) and (b). I am unable to speculate as to the Public Body's reasons for withholding this information under either section 24(1)(a) or (b) and I find that this kind of information does not meet the requirements of these provisions.

Editing suggestions; tracked changes; various handwritten marginal notes, etc.

[para 143] A further category of withheld records consists of emailed suggestions for edits to documents. As already mentioned above, some of these are addressed to the employee of the Public Body who appears to be writing the reports, but the Public Body did not establish the identities or roles of the people suggesting changes, or giving directions, or in what capacity these persons were acting, nor to what documents the changes were to be made. Possibly, for some of the changes, the edits are being directed by Alberta Environment, and are therefore not advice to a decision maker, but rather are requirements imposed by the requestor of the reports as to what they are to contain. In

that sense, emails that refer to potential changes could be said to fall within the terms of section 24(2)(f).

[para 144] The same point applies to various handwritten notations on documents of unknown significance and origin, some of them consisting of calculations, entries into formulas, and the like. With regard to the tracked changes appearing on drafts, there is no evidence as to who placed them on the record or why.

[para 145] Furthermore, while in other contexts a suggestion for a change to a document might aptly be termed "advice", and the incorporation of such suggested changes might aptly be termed "decisions" or "actions", minor changes in wording will often not be "actions" (for which advice is given) of the type contemplated by the test for inclusion in section 24(1)(a) and (b) that was set out in Order 96-006. Further, even for more substantive suggestions, for the reasons given above, suggested changes to technical or scientific analysis or conclusions respecting physical data do not constitute advice, etc., or consultations or deliberations, within the terms of sections 24(1)(a) and (b).

Communications re media releases

[para 146] Some of the documents that consist of emails between individuals relate to media releases. With the exception of record 670, I am unable to conclude that any of these emails constitute advice, etc. or consultations or deliberations. Rather, these emails appear to have been created for the purpose of providing background information and, in the cases of 692 and 693, and 2189 and 2190, instructions or directions to employees of the Public Body, direction. Neither quality brings these emails within the terms of sections 24(1)(a) or (b). However, that information is an instruction or direction to employees brings information into the scope of section 24(2)(f), with the result that it cannot be withheld under section 24.

[para 147] I note that the Public Body severed information from the emails in which media releases were discussed which could be construed as the personal information of employees. I say this because in some cases the emails contain personal details about employees such as references to vacations. While it may not necessarily be the case that it would be an unreasonable invasion of personal privacy to disclose this information, the Public Body will not be precluded by my order from considering whether section 17 applies to some of the information in these emails that it withheld under section 24(1) before releasing it to the Applicant.

General Arguments

[para 148] The Public Body points to a confidentiality clause in a sample contract template that it offers its clients, as supporting its decision to apply section 24(1)(a) and (b) to information in the records generally. Assuming that Alberta Environment imposed conditions of confidentiality on the Public Body with regard to the information it provided, and assuming that this sample contract template formed the basis of an

agreement with Alberta Environment, the fact that parties seek to treat information confidentially does not have the effect of transforming the character of information not meeting the requirements of section 24(1)(a) or (b) into information that does.

Conclusion

[para 149] To conclude, of the 641 pages of records to which the Public Body applied sections 24(1)(a) and (b), I find that 612 of them do not contain information consistent with information subject to section 24(1)(a) or (b). With the exception of the email (record 670) and a portion of a draft document (records 606 – 614 and records 636 – 644), I am unable to identify information falling within the terms of section 24(1)(a) or (b) in these records and, for the most part, I remain uncertain as to why the Public Body considered these provisions applicable.

Section 24(2)

[para 150] In my letter of October 6, 2011, I questioned the Public Body regarding the potential application of section 24(2)(c) and (f) to the information in the records. While there is information in the records that is consistent with information following under these provisions, given my finding that the information is not consistent with information falling under section 24(1)(a) or (b), I need not decide whether sections 24(2)(c) or (f) apply. With regard to the information I have found to be consistent with information subject to section 24(1)(a), I find that the provisions of section 24(2) do not apply to this information.

Exercise of Discretion

[para 151] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that are involved.

> A discretion conferred by statute must be exercised consistently with the purposes underlying its grant: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 53, 56 and 65. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.
>
> …
>
> In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[para 152] As I find that section 24(1)(a) applies to the information severed from record 670, I must now consider whether the Public Body appropriately exercised its discretion when it decided to withhold information from this record.

[para 153] The Public Body explained that it exercised its discretion in order to "preserve frank deliberations conducted in private when discussing issues and arriving at decisions". While I acknowledge that this statement describes a legitimate purpose for withholding information under section 24(1)(b), I cannot ignore that this statement was also intended to support withholding information under both section 24(1)(a) and (b) that did not contain information described in the Public Body's rationale. As discussed above, the Public Body also withheld information under section 24(1)(a) and (b) such as blank forms, data, résumés, and contracts. Moreover, the Public Body has also explained in the inquiry that its decision to withhold information was made by someone who no longer works there, and, for that reason, it is unable to provide details of its reasons for withholding information. As a consequence, it is unclear whether the Public Body's reasons for withholding information are to "preserve frank deliberations" or for the reason that a previous employee elected to do so for reasons unknown to it. In addition, as it has stated that a reason for not wishing to provide this information to the Applicant is that it might be misunderstood, it is possible that it has withheld the information for this reason as well. As discussed above, that there is a potential for information to be misunderstood by a requestor is not a proper reason for withholding information, and is therefore an irrelevant consideration under section 24(1)(a).

[para 154] From my review of records 606 – 614, 636 – 644, and 670, it is unclear to me whether disclosure of the information which I find to be subject to section 24(1)(a) would have the effect of compromising the Public Body's policy or decision making processes if it were disclosed, or those of Alberta Environment. Finally, the Public Body's submissions do not indicate whether it turned its mind to disclosing the information it withheld under section 24(1)(a). It therefore follows that it has not established that it exercised discretion appropriately within the terms of *Ontario (Public Safety and Security)* (*supra*).

[para 155] As I am unable to confirm that the Public Body exercised its discretion reasonably, I will therefore order the Public Body to reconsider its decision to withhold information from records 606 – 614, 636 – 644, or 670.

Conclusion

[para 156] To summarize, I find that section 24(1)(a) applies to an email contained in record 670 and to records 606 – 614 and 636 - 644. However, I find that neither section 24(1)(a) nor (b) apply to the remaining information severed by the Public Body under these provisions.

[para 157] As I am unable to conclude that the Public Body exercised its discretion appropriately when it withheld information from records 606 – 614, 636 – 644, or 670

under section 24(1)(a), I will order it to reconsider its decision to withhold this information.

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

[para 158] The Public Body applied sections 25(1)(c)(iii) and 25(1)(d) to withhold information from the records.

[para 159] 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*
>
> *…*
>
> *(iii) interfere with contractual or other negotiations of, the Government of Alberta or a public body;*
>
> *(d) information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee or the public body of priority of publication.*
>
> *(2) The head of a public body must not refuse to disclose under subsection (1) the results of product or environmental testing carried out by or for a public body, unless the testing was done*
>
> *(a) for a fee as a service to a person, other than the public body, or*
> *(b) for the purposes of developing methods of testing or testing products for possible purchase.*

[para 160] In Order 96-016, former Commissioner Clark considered 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 (my emphasis). 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 161] Section 25(1) recognizes that there is a public interest in withholding information that could harm the economic interests of the Government of Alberta or a public body or the Government of Alberta's ability to manage the economy. 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 the Government of Alberta or a public body, or the Government of Alberta's ability to manage the economy.

[para 162] Section 25(2) prohibits a public body from withholding information under section 25(1) if the information is the "results of product or environmental testing". Even if environmental testing results otherwise meet the requirements of section 25(1), such information cannot be withheld under section 25. As with section 24(2)(c), section 25(2) establishes that the public interest in disclosing findings of product or environmental testing will outweigh the rationale for withholding information reflected in section 25(1).

Is the information the Public Body seeks to withhold subject to the exemption created by section 25(2)?

[para 163] Section 25(2) creates an exemption to the exception created by section 25(1). If the information in question is "the results of product or environmental testing carried out by or for a public body" and the testing was not done for a fee as a service to a person, or for the purpose of developing testing methods, then the information may not be withheld under section 25(1), even though it may otherwise fall under section 25(1). In my view, the purpose of this exemption is to create a higher degree of transparency in relation to product or environmental testing results.

[para 164] In Order P-1562, a former Assistant Commissioner of Ontario decided that the phrase "results of product or environmental testing" as set out in section 18 of Ontario's *Freedom of Information and Protection of Privacy Act* refers to both the conclusions of researchers and to raw data. He said:

> I accept the appellant's submission that tests undertaken by Hydro in order to produce the record at issue in this appeal are properly characterized as "environmental tests". The only remaining issue is whether the raw data collected from this process constitute test results.
>
> The term "results" is defined in a similar manner in various dictionary sources as follows:

> "the effect, issue or outcome of some action, process, design etc." (Shorter Oxford English Dictionary, p. 1813)
>
> "something that results as a consequence, effect, issue or conclusion" (Webster's Third New International Dictionary, p. 1937)
>
> "the consequence of a particular action, operation or course; an outcome" (The American Heritage Dictionary of the English Language.

> I do not dispute that the raw data gathered by Hydro may need to be further reviewed, analyzed, interpreted and reported, as Hydro claims, or that the report Hydro proposes to release may also contain "results" of the environmental testing process. However, this does not alter the fact that the raw data constitutes "results" as that word is ordinarily defined. The raw data are the "outcome" or "consequence" of a particular course of action or process, that is, the testing carried out for the purpose of identifying the levels of tritium at the BNDP site. As such, I find that this raw data constitutes "results" for the purposes of section 18(2).

[para 165] Section 18(2) of Ontario's legislation and section 25(2) of Alberta's legislation are substantially similar. Under both Ontario's and Alberta's legislation the results of product or environmental testing would include the findings or conclusions of researchers arrived at through reviewing testing data and the data derived through research. I also agree with the reasoning of the Adjudicator in Order P-1562 that water sampling is environmental testing. Moreover, while the testing was not completed by the Public Body, it was completed by or on behalf of Alberta Environment, which is a public body for the purposes of section 25(2).

[para 166] In my letter of October 6, 2011, I asked the Public Body the following question regarding section 25(2):

> The Public Body applied section 25(1) to records 4038 – 4052, 4057, 4059, 4068 – 4070, 4073, 4075, 4084 – 4322, 4327 – 4370, 4372, 4374 – 4376, 4393 – 4396, and 5236 – 5331. Section 25(2) is an exemption to the application of section 25(1). It states:
>
> *25(2) The head of a public body must not refuse to disclose under subsection (1) the results of product or environmental testing carried out by or for a public body, unless the testing was done*
>
> *(a) for a fee as a service to a person, other than the public body, or*
>
> *(b) for the purpose of developing methods of testing or testing products for possible purchase.*
>
> It appears that the information to which the Public Body applied provisions of section 25(1) may fall under section 25(2). If that is so, then the information cannot be withheld under section 25(1).
>
> Question for the Public Body regarding the application of section 25:
>
> 1. Does section 25(2) apply to the information withheld by the Public Body under section 25(1)? If not, why not? Please provide evidence to support your answer, if possible.

[para 167] In its submissions dated November 29, 2011, the Public Body provided the following answer:

> As explained above with respect to section 24(2)(c), ARC did not do any product or environmental testing. For these same reasons, section 25(2) does not apply.

[para 168] The Public Body appears to argue that environmental testing must be conducted by the same public body that is responding to an access request before section 25(2) applies. However, section 25(2) states that it applies to the results of product or environmental testing carried out *by or for a public body*. There is no requirement within this provision that the public body to which this provision refers need be the public body responding to an access request. The evidence of the Public Body is unequivocal that Alberta Environment either created or commissioned the water sampling data the Public Body's scientist reviewed. Alberta Environment is a public body. Moreover, Alberta Environment retained the Public Body to review the environmental testing data to make findings and conclusions. Both the data, and any conclusions derived from it, are therefore "the results of environmental testing".

[para 169] On the evidence before me, I find that the testing was not done for a fee as a service to any person, and was not conducted for the purpose of developing methods of testing or testing products for possible purchase.

[para 170] Having reviewed the information the Public Body seeks to withhold under section 25(1)(c)(iii) and 25(1)(d), and its submissions, I am satisfied that the information is "the results of environmental testing" for the purposes of section 25(2), as it is data generated through environmental testing. I therefore find that the Public Body cannot withhold this information under the provisions of section 25(1).

Section 25(1)(c)(iii)

[para 171] Had I not found that section 25(2) applies to the information the Public Body seeks to withhold, I would not have found that section 25(1)(c)(iii) applies to it for the reasons that follow.

[para 172] The Public Body argues the following in support of its application of section 25(1)(c)(iii):

> If we were a post-secondary educational body, our research information would not even be subject to the FOIP Act (section 4(1)(i)). However since ARC is not a post-secondary institute, section 25 of the Act best applies to the protection of our economic interests with respect to scientific/technical information.
>
> …
>
> The Commissioner, in Order 96-003 (p 6) attempted to explain what is meant by "harm" and what is expected of the public body to show that harm may occur should a record be disclosed. To paraphrase:
>
> 1) there must be a clear cause and effect relationship between the disclosure and the harm
> 2) the disclosure must cause harm and not simply interference or inconvenience
> 3) the likelihood of harm must be genuine and conceivable.

> 95 pages were withheld under section 25(1)(c)(iii). These pages were also withheld under section 25(1)(d). The information that was withheld under this section is part [of] a joint research project in partnership with others. This joint project is still underway.
>
> As mentioned at the beginning of this submission, the ARC was 60% funded by external organizations, ARC dealt with 800-950 partners annually.
>
> Scientific research information is proprietary. It should not be released prematurely or in an inappropriate manner. If ARC / AITF were to do so, we would lose credibility, and the number of clients and resultant funding drop. This would seriously impact our ability to carry out our mission.
>
> Order 2001-025 deals, in part, with a public body's severing of information under section 25(1)(c)(iii). [para 50] …The programs and services that are funded through external organizations number well over a thousand. The disclosure of the information could limit the future negotiations and relationships with these organizations.
>
> The Commissioner ruled [para 51] that: Given the Public Body's dealing with external organizations and the number of contracts the Public Body negotiates, I find that the Public Body has met the criteria of Section 25(1)(c)(iii) [previously section 24(1)(c)(iii)]. I also find that the Public Body met the general rule that disclosure of the information could reasonably be expected to harm the economic interest of the Public Body.
>
> This ruling supports our withholding of information under section 25(1)(c)(iii).

[para 173] In Order 2001-025, on which the Public Body relies, the Commissioner also said:

> In Order 96-016, the Commissioner also said that there must be direct harm, meaning that (i) a public body must show a clear and direct linkage between the disclosure of the specific information and the harm alleged, and (ii) the public body must explain how or why the harm alleged would result from the disclosure of the specific information. It is not reasonable to expect harm will result from disclosure of information already in the public domain.

[para 174] In both Orders 96-016 and 2001-025 the Commissioner stressed that harm within the terms of section 25(1) must result from the disclosure of the information to which the head is considering applying this provision, rather than the act of disclosure itself.

[para 175] The Public Body argues that disclosure of the information in the records will harm its contractual negotiations, yet also maintains that the disclosure of the same information would deprive one of its employees of priority of publication. There is tension between these arguments, given that the first argument requires the Public Body to establish that disclosure of the information will result in harm to its negotiations, while the other argument requires the Public Body to establish that it, or the researcher that conducted the testing, intends to publish the same information.

[para 176] The Public Body provides no explanation as to how its economic interests, or its contractual negotiations will be harmed by disclosure of the information to which it applied section 25(1)(c)(iii). I accept that it is possible that it enters funding agreements

with between 850 and 900 partners each year, as it argues it does; however, the Public Body has not provided any evidence or argument to support a finding that these relationships would be in any way affected by the disclosure of the information it seeks to withhold. The content of records 5236 – 5331 does not provide any support for the Public Body's application of section 25(1)(c)(iii) and is not information of the kind that one would expect would have any place in negotiations or that could have any effect on them. In any event, as the Public Body, to support its arguments under section 25(1)(d), has referenced an email from an employee indicating his intent to publish the information in records 5236 – 5331, with the support of the Public Body, I find that the Public Body does not have any genuine concerns that disclosure of the information will harm its negotiations.

Section 25(1)(d)

[para 177] Had I not found that section 25(2) applies to the information the Public Body seeks to withhold under section 25(1)(d), I would not have found that section 25(1)(d) applies to it.

[para 178] Section 25(1)(d) serves to protect information obtained through research by an employee if disclosure of the information could reasonably be expected to deprive the employee or the public body of priority of publication regarding the research.

[para 179] *FOIP Guidelines and Practices (2009)* states the following in relation to the application of section 25(1)(d) on p. 193:

> Public bodies employ a wide range of researchers, including professional scientists, technicians and social scientists. Their reputations are often dependent on the research they publish.
>
> The fact that the employees have a professional reputation is of considerable value to public bodies that employ them. In addition, their research often has monetary and program value for the public bodies. For these reasons, the Act protects the priority of publication for all types of research.
>
> Examples include scientific and technical research carried out at research institutes or universities; historical research connected with the designation or preservation of historical or archaeological resources; and epidemiological and other medical studies carried out in health care bodies. A public body would have to be able to provide some proof that publication is expected to result

The foregoing analysis puts forward the view that section 25(1)(d) is intended to ensure that the researcher who conducted the research that resulted in the creation of the information in issue, does not lose priority of publication over his or her research in the event of an access request. In my view, this interpretation is supported by the wording of section 25(1)(d) which contemplates that the employee who would be deprived of priority of publication is the same employee that obtained the information through research. I say this because section 25(1)(d) refers to "*the* employee" being deprived of priority of publication, suggesting that the employee referred to in this part of the provision is the same employee that conducted the research in the first part of this provision. In any event, there would be no obvious public policy reason for protecting priority of

publication in an employee or public body if the employee or public body did not conduct the research that would be the subject of the publication.

[para 180] As noted above, the Public Body made the following argument in response to my questions regarding the potential application of section 25(2):

> As explained above with respect to section 24(2)(c), ARC did not do any product or environmental testing. For these same reasons, section 25(2) does not apply.

The records and the arguments of the Public Body indicate that an employee of the Public Body did not obtain the information to which the Public Body applied section 25(1)(d) by conducting research. Rather, the records indicate that Alberta Environment conducted the research that generated the data contained in records 4038 – 4052, 4057, 4059, 4068 – 4070, 4073, 4075, 4084 – 4322, 4327 – 4370, 4372, 4374 – 4376, 4393 – 4396, and 5236 – 5331 and that the Public Body's employee obtained them as part of the Public Body's contractual arrangement with Alberta Environment to study its water well complaint investigation methodology. Section 25(1)(d) is intended to ensure that an employee or the public body employing the employee who conducts research has priority of publication over the employee's own research findings. However, as discussed above, I do not interpret this provision as protecting priority of publication in an employee who has not conducted the research giving rise to the data or results that would be the subject of the publication.

Conclusion

[para 181] I find that section 25(1) does not apply to the information withheld by the Public Body under this provision. Moreover, I find that section 25(2) does apply to this information, as I find that the information falls within the scope of "results of environmental testing". As a consequence, I find that the Public Body cannot withhold this information under section 25(1).

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

[para 182] Section 93 authorizes the head of a public body to charge fees for services. It states, in part:

> *93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.*
>
> *…*
>
> *(3) If an applicant is required to pay fees for services under subsection (1), the public body must give the applicant an estimate of the total fee before providing the services.*
> *…*

(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.…

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

[para 183] Section 93(1), permits the head of a public body to require fees for services as provided for in the regulations, while section 93(6) prohibits a public body from charging fees in excess of the actual costs of providing services. Consequently, a public body must be in a position to calculate its actual costs for providing services if it intends to require payment of fees.

[para 184] As the method with which the Public Body calculated the fees it charged the Applicant for processing her access request was unclear to me from its submissions, I asked it the following questions:

I note that the Public Body required the Applicant to pay $4125 in fees.

The Public Body's letter of July 7, 2008 indicates that it spent 25 hours searching for records, at a rate of $27 per hour and 100 hours preparing records, at a rate of $27 per hour, and that photocopying costs were calculated at .25 per page. These amounts were estimates relating to 3000 pages; however, the Public Body notes that the total number of records was 5972. It therefore appears that the Public Body charged roughly 50% less per page for photocopying costs than it originally estimated.

I also note that the Applicant requested that the Public Body not provide duplicate records, but the Public Body explained that it would take more time to process her request if duplicates were removed. The Public Body states:

> In the Applicant's revised request dated June 27, 2008, Applicant advised that duplicate records were not required. However, [the Public Body's designated FOIP Coordinator] spoke to the Applicant upon receipt of the modified request about the difficulty of identifying and removing duplicate pages and the amount of time that would be required to do so. The Applicant agreed to accept duplicate pages rather than adding additional time to that required to process the request.

Section 93(6) of the FOIP Act states that the fees charged by a public body may not exceed the actual costs for providing a service. Schedule 2 of the Regulation lists the maximum amounts that may be charged for providing services. If the actual cost to a public body of providing a service is less than the maximum set out in the Regulation, section 93(6) of the FOIP Act prevents a public body from charging the maximum or any amount greater than its actual cost.

Questions for the Public Body regarding fee calculation

Section 11(6) of the Regulation prohibits a public body from charging fees for the time spent reviewing records.

1. What activities were included in calculating the time spent "preparing" the records? Please provide a breakdown of the time spent conducting each of these activities.

2. How did the Public Body arrive at the rate of $27 per hour or $6.75 per quarter hour for preparing and searching for records as its actual costs for preparing and searching for the records?

3. What activities were included in calculating the time spent "searching for records?" Why did it take 25 hours to locate responsive records?

4. Why would it have taken longer to search for and prepare the records if duplicate records had been excluded from the response?

5. How was the cost per page for photocopying calculated? Does the cost charged per page reflect the Public Body's actual costs? Please provide evidence regarding the Public Body's actual costs for making photocopies.

6. It appears that the costs of producing duplicate and non-responsive records are included in the fees charged to the Applicant. What were the costs to the Applicant of the Public Body's decision to include these kinds of records in its response to her access request?

The Public Body's breakdown of costs

[para 185] In its response, the Public Body explained that it had included the following activities in the calculation of the time it would spend "preparing records": photocopying, numbering pages, and severing records. With regard to how it calculated the time spent preparing records, it stated:

> Included as part of "preparation of records" was the time spent making a single copy of the original records provided to the FOIP office. We also factored in the time that was spent numbering the pages sequentially. It is unclear whether this time should be included here under "preparation of records' or as part of "searching for records'.
>
> The Ontario Information and Privacy Commissioner established a guideline of two minutes per pages as a reasonable time for severing records where *only a few severances* [emphasis in original] per page are being made. In IPC Order 99-011 the Alberta Information and Privacy Commissioner endorsed this guideline as a reasonable estimate of the time involved in severing. The total number of records processed as 5,972 pages. Of these, 4,848 responsive pages were released either in their entirety or with partial severing of information. Doing a quick count of severed pages in the index table, approximately 1,400 pages had severing applied. Two of the staff who were seconded to work on the request did some preliminary severing for section 17, the remainder of the severing was done by the FOIP Coordinator. At the very conservative 2 minutes per page, this totals 2800 minutes… 46.6 hours. I submit, however, that at least double that amount of time was spent taping and inserting explanations of exceptions applied. There were many section 17 exceptions per page and many pages with more than one section applied. And we interpreted the 2 minutes per page as a guideline only, not as a mandatory, maximum time allocation.
>
> I am unable to provide a breakdown of time spent on each activity.

The Public Body also explained that its actual costs per hour for its employee time ranged from $30.37 per hour to $85.85 per hour. For that reason, it charged $27 per hour, which

is the maximum that may be charged under Schedule 2 of the Freedom of Information and Protection of Privacy Regulation. I note that 93.2 hours, (double 46.6 hours) at a rate of $27 per hour totals $2516.40.

[para 186] With regard to the time spent searching for records, the Public Body states:

> The records administrators were directed to search their portions of AITFs record management database – Stellant – for relevant records. One administrator also searched a former records management database for earlier records, just in case.
>
> When we contacted the program areas and asked them to search for potentially relevant records, we asked them to keep track of the time spent. We also provided them with the FOIP cost centre code to use for charging their time. The administrative assistant in the program area that was our primary source of information, did, however, track her time – 9 hours to search and retrieve potentially relevant records.
>
> Rather than providing details for the few others who tracked their time, I suggest the following as a simple calculation of time spent searching. It is reasonable to assume that each of the 14 remaining people contacted spent at a minimum, 15 minutes searching for records at each stage of the request, 30 minutes per person in total.
>
> Program areas' time
> 14 x .5 hr = 7 hours
> 1 x 9 hr = 9 hours
> 16 hours
> …
>
> It is not unreasonable to assume that at least 9 hours were spent by the FOIP Coordinator and those seconded to assist her. [emphasis in original]
>
> Program staff 16 hours + FOIP Coordinator 9 hours = 25 hours.

[para 187] I note that the 25 hours multiplied by $27 per hour is $675.

[para 188] As set out in the background above, the Public Body had charged $750 for photocopying costs, but refunded these once it determined that its photocopying costs were less than the 25 cents per page. I note that the total amounts that the Public Body calculates as its costs for processing the Applicant's access request do not add up to the total amount it charged the Applicant. $2516.40 plus $675 plus $750 is $3941.40, and not $4125, which is the amount the Applicant was required to pay.

[para 189] As discussed above, section 93(6) prohibits a Public Body from charging an applicant more than the actual costs of services. It is therefore not entirely clear why the Public Body charged the Applicant $4125, when its calculation of the costs of processing the access request totals $3941.40. I accept that the $4125 figure was an estimate of the total fee made under section 93(3); however, so too is the $3941.40 figure, given that it is not based on measurements of the actual time spent processing the Applicant's access request, but rather on the application of a guideline to calculate the amount of time spent preparing the records, and on assumptions regarding the time employees spent searching for records.

Time spent preparing records

[para 190] The Public Body relies on Order 99-011 and a decision of the Ontario Office of the Information and Privacy Commissioner in support of its position that it is reasonable to estimate that it will take two minutes per page to sever information from records when moderate severing is required and to charge that amount accordingly.

[para 191] In Order 99-011, on which the Public Body relies, former Commissioner Clark decided that it would be reasonable to estimate 2 minutes per page for severing as part of the fees for preparing records for disclosure. He said:

> Schedule 2 of the Regulation allows a public body to charge a maximum of $6.75 per ¼ hour for preparing and handling a record for disclosure ($27.00 per hour). The Public Body said that it took 50 hours to prepare and handle the 5000 pages of records for disclosure, at a total cost of $1,350.00. Although the Public Body was not able to provide me with a breakdown of only the cost of preparing and handling the records for viewing, that cost would have included physically deleting text in preparing records for viewing and the cost of reconstructing the file after viewing had occurred.
>
> The Bulletin sets out some criteria for a public body to follow in determining those two costs: (i) two minutes per page is a reasonable time for severing records where only a few severances per page are being made, and (ii) an estimated processing time of four feet of records in a 7.25 hour day is a reasonable starting point where about a third of the records have to be replaced. These criteria seem reasonable, and I intend to follow them in this case.
>
> Of the 219 pages of records the Applicant viewed, only 161 of those pages required severing. At two minutes per page for severing, the severing would have required 322 minutes or 5.37 hours, which I have rounded to 5.5 hours. At $6.75 per ¼ hour ($27.00 per hour), the cost to sever the 161 pages for viewing would be $148.50.
>
> The 219 pages of records are about 1.5 inches of records. If processing time is four feet of records (48 inches) in a 7.25-hour day, then I calculate the time to replace the 219 pages in this case, as follows:
>
> > 1.5/48 x 100 = 3.125% x 7.25 hours = .23 hours (rounded to ¼ hour)
>
> At $6.75 per ¼ hour, the cost to replace the records viewed would be $6.75.
>
> Therefore, the total cost of preparing and handling the records for disclosure would be $155.25, consisting of $148.50 to sever 161 pages for viewing and $6.75 to replace the 219 pages viewed.

[para 192] In Order F2011-015, I rejected the argument that Order 99-011 contains a formula that may reasonably be used to estimate the costs associated with preparing records. I said:

> As discussed in my letter to the Public Body, cited above, the bulletin to which the Commissioner referred in Order 99-011 was based on policy created by the Ontario Information and Privacy Commissioner's office. As Ontario's legislation regarding fees has significant differences to Alberta's, it is not clear to me that it is useful in interpreting Alberta's fee calculation provisions.

> The former Commissioner did not address what is now section 11(6) of the Regulation in Order 99-011, or provide detailed reasons for deciding that physically removing information from records would reasonably be expected to take two minutes per page in situations where minimal severing is required. The method of severing that was under consideration in Order 99-011 is unclear. In addition, the former Commissioner did not explain what was meant by "minimal severing". Consequently, I am not satisfied that Order 99-011 can be interpreted as establishing that it is always reasonable to estimate two minutes per page for removing information from records. Moreover, I am not satisfied that the calculations in that order serve as an accurate or reasonable guideline for estimating fees for severing information from records.

[para 193] In Order F2010-036, I noted that Alberta's legislation does not permit a public body to charge fees for reviewing records:

> 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.
>
> 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.
>
> 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.
>
> 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 194] In that case, I found that the time spent severing information from the records could not have taken 21 hours unless time spent reviewing records had also been included in the calculation. I ordered the public body to recalculate the fees charged for preparing and handling records by excluding the time spent reviewing records. Essentially, I found that reviewing records includes reading records in order to assess their contents and decide what to sever. However, I did not disallow the time charged for redacting information as a cost associated with preparing and handling records.

[para 195] As discussed in Orders F2010-036 and F2011-015, section 11(6) of the Regulation prohibits public bodies from charging applicants for the time spent reviewing records. It states:

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

[para 196] In Order F2011-015, I found that the method of calculating the time spent preparing records adopted by the Ontario Office of the Information and Privacy Commissioner included time spent reviewing records, and was therefore unsuitable as a means of estimating the time spent preparing records under Alberta's legislation. I said:

> In Order MO-1421, an adjudicator with the Office of the Ontario Information Privacy Commissioner explained the "two minute rule" in the following way:
>
> > Although this amount of time [two minutes per page] has generally been recognized as the appropriate standard in most cases, the circumstances of each case must be considered in determining whether it is appropriate in any given situation. The amount of time required to sever a page of a record is generally based on a variety of considerations, such as *the nature of the record, the amount of information on the page, and the nature and amount of information to be severed, for example whole paragraphs as opposed to many interspersed words*. [emphasis in original]
>
> This passage indicates that two minutes per page for severing should not be charged if the circumstances do not warrant it. In this, Ontario's legislative scheme is similar to Alberta's. However, Order MO-1421 also indicates that reviewing the amount of information a record contains is a factor calculated into the rate of two minutes per page, given that the amount of text on a page, its location and its nature, and not merely the amount that will be severed, are included considerations. As section 11(6) of Alberta's Regulation prohibits a public body from charging fees for reviewing records and the "two minute rule" incorporates time spent reviewing records, I find that it is an improper method for calculating time spent severing records under Alberta's legislation.

[para 197] Not only is the "two minute rule" an inaccurate method for estimating costs under Alberta's legislation, but it is unsuited to the calculation of actual costs. Rather than keep track of the time employees spent redacting information from records and numbering them, the Public Body appears to have based its calculation of the time spent preparing records on the assumption that preparing records usually takes between two and four minutes per page. While the Public Body argues that two minutes per page underestimates the time its employees may have spent preparing each record, it does not provide a factual basis for this argument. Moreover, my review of the records supports a finding that two minutes per page is, for the majority of records that have had information redacted from them, a greatly inflated estimate of the time that would reasonably be required to prepare them. If one excludes the time spent reviewing the records, and considers only the amount of time required to redact text from the records, and to number and record section numbers, as the Public Body did in this case, between five and ten seconds per record where information was removed, on average, would be a more reasonable estimate of the time it would take to perform these tasks.

[para 198] The Public Body also removed draft reports and other documents with multiple pages from the records and replaced them with a single blank page indicating the

number of pages removed and the provisions on which the Public Body relied. However, the Public Body has also calculated two minutes per page preparation time for each of these records, even though it did not redact information from them or number them individually. The single page inserted to replace these records would have taken at most ten seconds to prepare. As a specific example, the Public Body severed records 590 to 615, and duplicates of this record, by withholding the entire report and replacing it with a single page that states that records 590 to 615 have been withheld under section 24(1)(a) and (b). By its arguments, the Public Body estimated that it spent 52 minutes preparing these records and charged $27 per hour for this time, given that it included two minutes preparing each of the severed records comprising the document in its calculation. However, an employee of the Public Body simply removed records 590 – 615, which constituted a draft report, and inserted a page to replace them. This is not to say that this not an acceptable method of severing information when the FOIP Act permits a public body to sever a document in its entirety; however, leaving aside the time that was spent reviewing the record to decide to withhold it, the actual time spent redacting and numbering would more reasonably be estimated at ten seconds – the time spent preparing the replacement page. I accept that the Public Body applied the two minute rule in the belief that it is a reasonable way to calculate the time and cost of preparing records; however, the result is that the calculation of the time it spent preparing records, and consequently the amount of fees it charged the Applicant, are inflated and unsupportable.

Time spent searching for, locating and retrieving responsive records

[para 199] I am also unable to support the amount of time that the Public Body argues was spent searching for, locating, and retrieving records, and therefore the amounts it charged for these activities. From its submissions, I understand that not all employees documented the time spent searching for records. Of those that did, with the exception of an administrative assistant, the Public Body elected not to provide the amounts of time these employees spent searching for records, but suggested an alternative means of calculating their time. As cited above, it stated:

> When we contacted the program areas and asked them to search for potentially relevant records, we asked them to keep track of the time spent. We also provided them with the FOIP cost centre code to use for charging their time. The administrative assistant in the program area that was our primary source of information, did, however, track her time – 9 hours to search and retrieve potentially relevant records.
>
> Rather than providing details for the few others who tracked their time, I suggest the following as a simple calculation of time spent searching. It is reasonable to assume that each of the 14 remaining people contacted spent at a minimum, 15 minutes searching for records at each stage of the request, 30 minutes per person in total.
>
> Program areas' time
> 14 x .5 hr = 7 hours
> 1 x 9 hr = 9 hours
> 16 hours
> …
>
> It is not unreasonable to assume that at least 9 hours were spent by the FOIP Coordinator and those seconded to assist her. [emphasis in original]

[para 200] The Public Body's reasons for providing assumptions of time spent locating records, rather than the actual time employees spent doing so are unclear. However, I find that its assumptions are not reasonable given that they may not reflect the actual time spent searching for responsive records.

[para 201] If, as the Public Body states, employees were instructed to keep track of the time spent searching for records, then it is reasonable to expect that employees would do so. A failure to provide the time spent searching is consistent with an employee not spending any time searching or spending an insignificant amount of time searching. In saying this, I do not mean to suggest that the employees performed an inadequate search. However, if the employees determined quickly, for example, through inquiry, that there were no responsive records located in the area they were responsible for searching, there would be no need to search the area further. There is no reason to assume that responsive records were located in every area that the Public Body chose to search, or that it would take each employee 30 minutes to search for records in these areas.

[para 202] While I accept that the administrative assistant spent nine hours searching for and retrieving potentially responsive records, given that the Public Body states that she tracked her time and it came to that amount, there is no reason to assume that the FOIP Coordinator also spent 9 hours engaged in these tasks. Rather, it is possible that the FOIP Coordinator delegated the searching responsibilities to the assistant. Moreover, as the FOIP Coordinator was apparently one of the individuals who instructed employees to keep track of their time and provided the "FOIP cost centre code" for that purpose, it would seem likely that she was aware of the need to track time, and would have kept a record of any time she spent searching for records.

[para 203] Although the Public Body has not provided direct evidence regarding the administrative assistant's search time, I accept that nine hours was spent searching for, locating, and retrieving records. However, the Public Body has not established that an additional sixteen hours was spent searching for records.

Nonresponsive and Duplicate records

[para 204] In its submissions the Public Body stated:

> In the Applicant's revised request dated June 27, 2008, Applicant advised that duplicate records were not required. However, [an employee of the Public Body] spoke to the Applicant upon receipt of the modified request about the difficulty of identifying and removing duplicate pages and the amount of time that would be required to do so. The Applicant agreed to accept duplicate pages rather than adding additional time to that required to process the request.

[para 205] In my letter of October 6, 2011, I asked the Public Body the following questions regarding the foregoing statements:

> **Why would it have taken longer to search for and prepare the records if duplicate records had been excluded from the response?**

> **It appears that the costs of producing duplicate and non-responsive records are included in the fees charged to the Applicant. What were the costs to the Applicant of the Public Body's decision to include these kinds of records in its response to her access request?**

[para 206] The Public Body stated the following in response:

> We handled a total of 5792 potentially responsive records, received from the program areas, from the central records office etc. We numbered them sequentially. A significant portion of the records were 5 water well complaint review files. Each complete review had similar sections, similar graphs, similar tables etc. Information was received from a variety of sources. Going through thousands of pages of "similar-looking" information to ensure that, for example, each "figure 2" was unique, rather than a duplicate would require huge amounts of time and become an extremely unwieldy process. The sheer number of pages was overwhelming. The similarity between pages was huge. To wade back and forth between them would have been a daunting task and would have added a significant time to completion of the request. That is why we proposed leaving duplicates in the package. The Applicant accepted this proposal.
>
> ...
>
> It is impossible to respond to the question of cost incurred for the copying and provision of duplicate pages because I do not have a count of the number of duplicate pages involved…

[para 207] I agree with the Public Body that many of the pages among the 5792 pages it located were similar. From my review of the records, I find that the cause of the similarity between records is, in many cases, the result of the fact that the records are duplicates of one another. I do not accept that eliminating duplicates from the response would have taken more time, or required "wading back and forth" between the records. In most cases, duplicates could have been eliminated simply by reviewing the date of a document and its subject or title line. Moreover, it would have been simpler to begin the search by asking the creator of the reports that were the subject of the access request for the originals of his records. Once the source records were located, the need to retrieve copies of these records that might be in the possession of other employees would have been reduced or eliminated.

[para 208] By its own admission, the Public Body told the Applicant that it would save time if duplicates were included in the response, and she agreed to the inclusion of duplicates for the sake of expedience. However, it is unclear from the Public Body's submissions that including duplicate records did in fact save time, particularly as the Public Body has not provided an account of the time it spent searching for, locating, and retrieving responsive records. The Public Body included duplicates in the response because it had already located them. It is therefore difficult to understand how excluding duplicates would have increased the time required to search for records. In addition, had it not spent time retrieving these records, which were nonresponsive to the original terms of the access request, it would have reduced any time spent retrieving records.

[para 209] I also note that the Public Body does not indicate that it told the Applicant it would spend time preparing the duplicate records, or that it would estimate the time it spent preparing these records to be at least two minutes per page.

[para 210] Assuming that one hundred of the records are duplicates, the Public Body would have estimated two hundred minutes of preparation time at a rate of $27 per hour, when it included them, with the result that it charged the Applicant $90 for each 100 pages of duplicates. However, from my review of the records, it appears that there are several hundred duplicate pages, given that the Public Body included multiple versions of the same proposals, contracts, resumes, and draft reports in its response.

[para 211] The result of the Public Body's decision to include duplicates is that the response is disorganized, difficult to navigate, and repetitive. In addition, this decision resulted in added charges to the Applicant for the time spent preparing records she had originally excluded from her request.

[para 212] The Public Body also withheld whole records from the Applicant on the basis that they are nonresponsive, but also calculated two minutes per page of time spent preparing these records. While I am not satisfied that these records are necessarily nonresponsive, and there are not many of these records, I am unable to understand the Public Body's rationale for preparing them and including them in its response, given its view that the Applicant had not requested them.

Conclusion

[para 213] Although the Public Body's evidence is not ideal, given that it did not provide direct evidence from the administrative assistant who coordinated its search, I accept that the assistant spent nine hours searching for records. However, the Public Body has not established that the other amounts of time for which it charged the Applicant were spent either searching for, locating, or retrieving records, or preparing them. As set out above, a Public Body may charge only the actual costs of providing services; however, the Public Body has calculated the fees based on assumptions that are not borne out by its evidence and that cannot reasonably be expected to reflect its actual costs. I am therefore unable to support the fees it charged for time spent searching for, locating, or retrieving records in excess of nine hours.

[para 214] In Orders F2010-036 and F2011-015, I ordered the public bodies involved to recalculate the fees they had charged based on the actual time spent searching for and preparing records exclusive of the time spent reviewing records. However, such an order would not have the effect of resolving the dispute between the parties in this case, given that the Public Body did not keep track of the time spent searching for records or the time spent preparing them. In any event, with the exception of a portion of record 670 and the contact information of Well Owner E, I have not confirmed any of the Public Body's decisions to withhold information from the records. Consequently, it would be contradictory to order it to recalculate the time it spent severing information, when I have found it was not authorized to do so under the FOIP Act.

[para 215] Given that the fees charged by the Public Body did not reflect the actual time and costs associated with processing the access request, and also included time spent

reviewing records, the amounts charged could have served to dissuade the Applicant from pursuing her access request had she been less determined to obtain the records.

[para 216] I also cannot ignore that the Public Body has provided very little justification for its decisions to sever information from the records. In cases where it did provide justification, the justification was not borne out by the information in the records. This can be explained by the statement in its submissions that the individual who initially made the initial severing decisions three years ago is no longer an employee of the Public Body. Elsewhere in its submissions, the Public Body has stressed that the access request giving rise to this inquiry was its first "major request" and it has very little experience processing access requests. This inexperience may also have contributed to the manner in which the Public Body applied exceptions to disclosure. However, public bodies have ongoing duties to applicants under the FOIP Act that do not cease because employees leave or lack experience.

[para 217] The decisions to withhold the information from the records are ongoing and have resulted in the Applicant being denied access to information that she has been entitled to receive under the FOIP Act for over three years. I cannot fault the Public Body's decision to withhold information under section 17, given that it consulted with the individuals whose personal information was contained in the records and was apparently told that it should not be released. However, with regard to the other exceptions it applied, the records do not contain the kinds of information the Public Body claims it withheld in its submissions.

[para 218] Section 72 of the FOIP Act gives the Commissioner the authority to confirm or reduce a fee or to order a refund in appropriate circumstances. It states, in part:

> *72(1) On completing an inquiry under section 69, the Commissioner must dispose of the issues by making an order under this section.*
>
> *…*
>
> *(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:*
>
> *…*
>
> *(c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met…*

Section 72(3)(c) establishes that the Commissioner may reduce a fee or order a refund in appropriate circumstances. The provision sets out failure to meet a time limit as an example of a circumstance in which it may be appropriate to do so. However, the provision does not limit the circumstances in which it is appropriate to reduce fees or order a refund to only those situations in which a public body has not met a time limit. As

a result, there may be other circumstances in which it is appropriate to order a refund of fees.

[para 219] As the inquiry relates to the Public Body's decision to charge fees, and its calculation of them, it is open to me to order a refund, if I consider it appropriate to do so.

[para 220] The manner in which the Public Body calculated the fees and the manner in which it severed information in this case had the effect of undermining a central purpose of the FOIP Act: the right of timely access to records in the custody or control of a Public Body. I say this because the Public Body withheld information for reasons that were not borne out by the records, and charged inflated costs for processing the access request. In saying this, I do not mean that every time a public body makes a decision that is not confirmed at an inquiry that a complete refund of fees must necessarily be ordered as a result. However, in this case, the amount of severing done, and the lack of justification for it, has resulted in the Applicant being deprived of her rights under the FOIP Act.

[para 221] As discussed above, the Public Body has charged fees for time it did not actually spend preparing records or searching for them. While the Public Body charged the Applicant $4125 in fees, less the photocopying costs it recently refunded, its submissions establish only that an administrative assistant spent 9 hours searching for records and that time was spent numbering and redacting information from the records. I have already disallowed the time spent redacting information, as this was done, in almost all cases, without authorization under the FOIP Act. While the actual amount of time spent numbering records is not documented, I find that an employee of the Public Body would be likely to spend between one and two seconds per page numbering the records. Given that there are 5972 pages of records, it would have taken an employee of the Public Body roughly two hours to number the records. At a rate of $27 per hour, the total amount that the Public Body has established could be charged for searching for and preparing the records would be approximately $297.00, (nine hours plus two hours). The discrepancy between what was charged and the costs the Public Body has established that it incurred processing the access request alone warrants an order requiring the Public Body to refund fees.

[para 222] Before concluding this part of the Order, I wish to comment that the exercise I have undertaken with respect to the records at issue in this case, has been to review the voluminous numbers of records one-by-one, to determine whether, on their face, they fall within the exceptions in the Act as the Public Body has claimed they do. This is not, in my view, an exercise that I was obliged to undertake. As has been said in earlier orders of this Office, the Public Body has the onus to justify its withholding of records. Vague generalizations that do not refer to specific records will not normally meet this test and did not do so in this case. In my view, it is the responsibility of a Public Body claiming the authority to withhold records to address every such record and to say exactly how the provision it is claiming applies; if it does not do so, it is open to an adjudicator to simply order disclosure of the records for which no specific explanation has been given. I undertook this onerous task in recognition of the public interests

protected by the exceptions to disclosure and the fact that sometimes the records themselves will constitute evidence of a public body's reasons for applying an exception. However, I found only a relatively small handful of instances to which an exception, in my view, could be said to apply; if there were others, I was unable to discern them. It is more properly the work of the Public Body to explain why it has withheld information under exceptions, not only because it has the onus as a matter of law, but because it is better placed to perform this task given its knowledge of the records and its ability to access this knowledge directly.

[para 223] While the Applicant has requested that the fees be waived on the basis that the records relate to the environment and are therefore a matter of public interest, within the terms of section 93(4)(b), I have decided that the circumstances are appropriate, within the terms of section 72(3)(c), for reducing the fees, which I consider would have been properly set at $297, to zero, and ordering the Public Body to refund all fees it required the Applicant to pay that it has not already refunded. I make this finding on the basis that the manner in which the Public Body responded to the Applicant and charged fees, served to defeat the Applicant's right under the FOIP Act to timely access to the information she requested from the Public Body. In addition, I make this finding on the basis that when asked directly to explain its rationale for withholding information from the Applicant, the Public Body was unable to do so. While I accept that the Public Body did not do so intentionally, but rather as the result of inexperience, inexperience in processing access requests cannot be permitted to undermine the rights of a requestor under the FOIP Act. I will therefore order the Public Body to issue a complete refund to the Applicant of all fees she has paid to the Public Body in relation to this access request.

V. ORDER

[para 224] I make this Order under section 72 of the Act.

[para 225] I order the Public Body to determine whether there are records in the possession of Alberta Environment and Water that are responsive to the access request and within its own control. If there are, the Public Body must take measures to obtain these records and include them in its response to the Applicant. If there are responsive records, but the Public Body does not have control over them, it must consider whether to transfer this portion of the Applicant's access request to Alberta Environment and Water for response.

[para 226] I order the Public Body to reconsider its decision to withhold information as nonresponsive. In making the new decision, it must consider whether the information was used or produced by an employee in the course of the investigations referred to in the Applicant's access request.

[para 227] I order the Public Body to disclose to the Applicant all information it withheld under section 24(1) but for records 606 – 614, 636 – 644, and record 670. I order the Public Body to reconsider its decision to withhold records 606 – 614, and 636 –

644 and record 670. The Public Body is not precluded from applying section 17(1) to any personal information contained in emails from employees regarding media releases if the head of the Public Body 1) determines that there is personal information in these records and 2) considers that such personal information may properly be withheld under this provision.

[para 228] I confirm the decision of the Public Body to withhold the contact information of Well Owner E, but not the name of Well Owner E or the land description of Well Owner E's property.

[para 229] I order the Public Body to disclose all remaining information in its entirety to the Applicant.

[para 230] I order the Public Body to refund all fees to the Applicant that were paid by the Applicant in relation to this access request that it has not already refunded.

[para 231] 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