ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2012-17

July 16, 2012

ALBERTA TREASURY BOARD AND FINANCE

Case File Numbers F5274 and F5454

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act*, (the FOIP Act), to Alberta Treasury Board and Finance, (the Public Body), for records regarding the Boilermakers' National Pension Fund, (the pension plan).

The Public Body gave notice to the Board of Directors of the pension plan (the plan administrator) of the Applicant's access request. The plan administrator objected to the disclosure of records to the Applicant.

The Public Body withheld information from the records under sections 16, (information harmful to business interests), 17, (information harmful to personal privacy), and 24 (advice from officials).

In relation to the information that had been withheld under section 16, the Adjudicator found that some of the information met the requirements of section 16(1)(a) in that it referred to the assets of the pension plan. However, the Adjudicator found that it had not been established that any of the information had been supplied in confidence or that any of the harms enumerated in section 16(1)(c) were likely to result from disclosure of the information. She therefore found that the information was not subject to section 16.

In relation to the information that had been withheld under section 17, with the exception of three instances, the Adjudicator found that the information was not personal information.

The Adjudicator found that none of the information withheld under sections 24(1)(a), (b) or (h) met the requirements of these provisions.

The Adjudicator ordered the Public Body to disclose the information it had withheld, but for the personal information she identified in the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 16, 17, 24, 30, 31,71, 72; *Employment Pension Plans Act*, R.S.A. 2000, c. E-8, ss. 8, 13, 90; **CA:** *Access to Information Act* R.S.C., 1985, c. A-1, s. 20, 27

Authorities Cited: AB: Orders 96-006, 96-019, 99-018, F2005-011, F2008-028, F2008-031, F2009-015, F2009-026, F2009-028, F2010-036, F2011-001, F2011-002, F2011-003, F2011-014, F2011-018, F2012-06, F2012-10

Cases Cited: *Canadian Broadcasting Corporation v. Northwest Territories (Commissioner)* [1999] N.W.T.J. No. 117; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *Mount Royal University v. Carter*, 2011 ABQB; *University of Alberta v. Pylypiuk*, 2002 ABQB 22

Other Sources Cited:

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.

I. BACKGROUND

[para 1] On September 17, 2009, the Applicant made the following request for access to Alberta Finance and Enterprise, (the Public Body):

> The following documents are sought pertaining to the Boilermakers National Pension Fund (Canada), registered with Alberta Finance and Enterprise under number 46433:
>
> Any resolutions enacted by the Trustees of the Pension Fund in connection with an amendment of the Pension Plan in 2009;
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> Any correspondence of the Trustees or their representatives with the office of the Alberta Superintendent of Pensions in the years 2006 through 2009;
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> Any written record of oral communications of the Trustees or their representatives with the office of the Alberta Superintendent of Pensions in the years 2006 through 2009;

Any actuarial valuation reports for the pension Plan for the years 2006 through 2009.

[para 2] The Public Body located responsive records. On January 29, 2010 the Public Body wrote the Applicant and stated that it had made a decision to grant "partial access" to the records. It also stated that the "affected parties" now had up to 20 days to appeal this decision under section 31(3) of the FOIP Act. However, the Public Body did not grant access to the records or portions of the records to which an exception did not apply and which were not in dispute.

[para 3] The Public Body determined that the Board of Trustees for the Boilermakers National Pension Fund was an affected party. As this entity is an "administrator" under the *Employment Pension Plans Act* (EPPA), and the records at issue were created in the course of the Public Body's administration of that legislation, I have decided to refer to the affected party as the "plan administrator" for the inquiry. The Applicant and the plan administrator both requested review by the Commissioner of the Public Body's decision. The Applicant requested review of the Public Body's decisions to withhold records, while the plan administrator requested review of the decision to disclose records.

[para 4] On May 13, 2011, the Commissioner issued Order F2011-003. The Commissioner ordered the Public Body to comply with the terms of sections 12 and 13 of the FOIP Act by granting the Applicant access to any records to which it had not applied an exception to disclosure under the FOIP Act and that were not the subject of a request for review to the Commissioner.

[para 5] Following Order F2011-003, the Commissioner delegated authority to me to conduct an inquiry into the Applicant's and the plan administrator's requests for review. The plan administrator made an objection that the Public Body had not provided a copy of the records to it that the plan administrator regarded as affecting its interests under section 16 within the terms of section 30(4) of the FOIP Act. I therefore required the Public Body to comply with section 30(4). The Public Body provided descriptions of all the records and provided copies of the records in its possession that representatives of the plan administrator had sent to it. However, the Public Body did not provide copies of records that it had sent to representatives of the plan administrator.

[para 6] On September 20, 2011 this office issued the notice of inquiry. The parties exchanged submissions. In its submissions, the plan administrator objected that it had not been provided copies of the records at issue that had been sent to it by the Public Body prior to the inquiry. The Public Body agreed to provide the plan administrator with copies of these records. Once the plan administrator received these records, it provided additional submissions for the inquiry.

II. INFORMATION AT ISSUE

[para 7] The information at issue is the information that the Public Body identified as responsive to the Applicant's access request and has withheld under exceptions to the

FOIP Act, and the information which the Public Body decided not to withhold but the plan administrator of the pension plan argues is subject to section 16 of the FOIP Act.

III. ISSUES

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

Issue B: Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the information in the records?

Issue C: Does section 24 of the Act (advice from officials) apply to the information in the records?

IV. DISCUSSION OF ISSUES

Issue A: Does section 16 of the Act apply to the information in the records?

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

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party,*
>
> *(b) that is supplied, explicitly or implicitly, in confidence, and*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
> *(iii) result in undue financial loss or gain to any person or organization, or*
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[para 9] The purpose of mandatory exceptions to disclosure for the proprietary 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.

[para 10] This statement of the purpose of section 16 has been adopted in Orders F2009-028, F2010-036, F2011-001, F2011-002, and F2012-06, and found to inform 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 11] 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).

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

[para 12] In its exchangeable submissions, the Public Body states:

> Section 16(1) operates to prevent the disclosure of information that is harmful to the business interests of a third party. In order for a record to qualify for this exception, subsections 16(1)(a), (b) and (c) must all be satisfied.
>
> Section 16(1)(a):
>
> For section 16(1)(a) to be satisfied the disclosure of the information must reveal trade secrets of a third party, or commercial, financial, labour relations, scientific and technical information of a

> third party. The words "commercial, financial, labour relations, scientific" and "technical" are to be given their ordinary dictionary meanings.
>
> In determining whether this section is satisfied, in addition to looking at the content of the record, the nature, context and aggregate of the record as a whole must also be considered.

"Trade secrets, commercial, financial, labour relations, scientific and technical information" are terms that have all been assigned meanings in previous orders of this office. The Public Body did not explain why it takes the position that the dictionary definitions of the terms set out in section 16(1)(a) are to be preferred, or to which dictionary definition it refers and considers preferable. In any event, as these terms have been interpreted in previous orders, I intend to follow those orders, which are discussed below.

[para 13] In its arguments as to why it believes the information it withheld from the records is subject to section 16 of the FOIP Act, the Public Body states:

> During the processing of the Applicant's request it was noted that many of the responsive records contained commercial or financial information regarding the administration and operation of the Boilermakers' pension plan which was collected from various plan officials and agents with an expectation of confidentiality by all parties.

[para 14] The Public Body and the plan administrator also argue that labour relations information of the pension plan is present in the records, in addition to financial or commercial information.

[para 15] In Order F2009-028, I reviewed the definitions of "financial" and "commercial" information and said:

> In Order 96-018, the former Commissioner adopted the following definition of "financial information" and determined that information is not the financial information of a third party for the purposes of section 16(1)(a) if the information does not allow an applicant to draw an accurate inference about a third party's assets or liabilities, past or present:
>
> > In keeping with my decision in Order 96-013, I attribute ordinary meaning to the word "financial". I also reiterate that careful consideration must be given to the content of the document in determining whether or not the information falls within this section. Financial information, in my opinion, is information regarding the monetary resources of the third party and is not limited to information relating to financial transactions in which the third party is involved.
> >
> > As such, the information in the record is not of a "financial" nature because it reveals nothing of the third party's financial capabilities beyond its commitment to raise the dollar amount specified. Similarly, I find that the record reveals nothing of the third party's assets or liabilities, either past or present.
>
> In Order MO-2496, an order of the Office of the Information and Privacy of Commissioner of Ontario, the Adjudicator considered the meaning of "commercial" and "financial" information as they appear in Ontario's equivalent of the FOIP Act's section 16. The Adjudicator stated:
>
> > These terms have been defined in previous orders of this office as follows:
> > …

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

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

[para 16] In Order F2011-018, the Adjudicator reviewed previous decisions which considered the "commercial" and "labour relations" information within the terms of section 16(1)(a). He said:

> Definitions for "commercial information" and "labour relations information" were noted in Order F2010-013 (at paras. 19 and 24), being the Order that dealt with the Applicant's right of access to the AHW Notices. I refer to those same definitions for the purpose of reviewing the content of the Objection Letter. I find that the Objection Letter does not contain or reveal information about the "buying, selling or exchange of merchandise or services" (commercial information), and that it does not contain or reveal information about "employer/employee relations including especially matters connected with collective bargaining and associated activities" or "relationships within and between workers, working groups and their organizations and managers, employers and their organization" (labour relations information).

[para 17] In addition, to fall within the terms of section 16(1)(a), financial, commercial, or labour relations information must be "of a third party" in the sense that the information must belong to a third party and be about the third party's monetary resources and its use and distribution of them, its exchange of merchandise or services, or its own employer / employee relations.

[para 18] The Applicants argue:

> With respect, as a result of the lack of information available to the Applicant to make meaningful submissions. [sic] If the Applicant did have sufficient information with which to conduct a meaningful assessment, the Applicant questions how the stringent requirements of ss. 16, 17, and 24 could be met. For example, s. 16 requires that the information at issue relate to trade secrets or "commercial, financial, labour relations… of a third party". In this case, the only information that could be at issue is financial information relating to the pension trust.

[para 19] I agree with the Applicant that any information in the records about use and distribution of monetary resources would be the financial information of the pension plan managed by the plan administrator.

[para 20] From its arguments, I understand that the plan administrator is primarily concerned that harm to itself would result from disclosure of the information in the records, rather than to the pension plan and its beneficiaries. Although I accept that information about the assets of the pension plan is financial information of the pension plan, it is not clear to me that information regarding the plan's assets would also be the financial information of the plan administrator, given that the assets do not belong to it.

[para 21] Possibly, the plan administrator is concerned that disclosure of the records would reveal its method of managing the plan's assets and that this method of managing assets is specialized, such that it meets the requirements of technical information falling under section 16(1)(a). However, I am unable to identify a specialized technique or method of managing assets adopted by the plan administrator in the records, and I have not been referred to any by the plan administrator.

[para 22] As discussed above, section 16(1)(a) refers to specific kinds of information belonging to a "third party". Section 1(r) of the FOIP Act defines "third party" for the purposes of the Act. It states:

> *1 In this Act,*
>
> *(r) "third party" means a person, a group of persons or an organization other than an applicant or a public body;*

"Third party" is defined so as to include a group of persons, but also so as to exclude an applicant. If information of the kind enumerated in section 16(1)(a) belongs to a group of persons, such as the beneficiaries of the pension plan, then it belongs to a third party for the purposes of that provision. However, if information belongs to an applicant, it follows that this information cannot be withheld under section 16, for the reason that an applicant is not a third party.

[para 23] If, as the plan administrator argues in its submissions, the Applicant is making the access request on behalf of beneficiaries on whose behalf the plan administrator administers the pension plan, then any financial information in the records is information belonging to them, as they are the beneficial owners of the assets referred to in the records. If this were the case, the financial information in the records would not be information "of a third party" for the purposes of section 16(1)(a), but would be the information of an applicant, and could not be withheld under section 16. However, any relationship between the Applicant and the financial information in the records has not been stated to me conclusively in this inquiry and I am therefore unable to decide that section 16 does not apply on this basis.

[para 24] I will now review each record that one of the parties argues is subject to section 16 and consider whether it contains information subject to section 16(1)(a).

Records 45 – 46 and 128 – 129

[para 25] Records 45 – 46, and its duplicates records 128 – 129, consist of a letter written by a representative of the Superintendent of Pensions to a representative of the plan administrator.

[para 26] The plan administrator argues that these records contain financial information within the terms of section 16(1)(a). I agree that these records do contain financial information regarding the pension plan. I therefore find that section 16(1)(a) is met in relation to the financial information in the records.

[para 27] However, I find that the names and titles of the sender and the recipient of the letter are not financial information, and I find that the first paragraph and the final two paragraphs of the letter do not contain financial information of a third party. This information cannot be held under section 16.

Records 90 – 98

[para 28] The Public Body withheld records 90 – 98 on the basis that they were not the subject of the Applicant's access request. The summary of the records prepared by the Public Body describes the date of these records and the identities of the sender and the recipient. The summary indicates that the information these records contain is unrelated to the Applicant's access request.

[para 29] As the Applicant does not challenge the Public Body's decision that these records are nonresponsive, I need not consider the plan administrator's argument that these records should be withheld under section 16, given that they are not at issue in the inquiry.

Records 101 – 103

[para 30] The Public Body states that record 101 contains information that was not requested by the Applicant. The Applicant does not challenge that assertion. Therefore, record 101 is not in issue.

[para 31] With regard to records 102 and 103, the plan administrator does not point to any information it considers to be the financial information of a third party, although it argues that the information may cause those reviewing the information to draw conclusions regarding the practices of the plan administrator. I find that financial information relating to the pension plan is present in these records. I therefore find that the requirements of section 16(1)(a) are met with regard to these records.

Records 110 - 111

[para 32] Records 110 – 111 consist of an email sent by a representative of the plan administrator to a representative of the Superintendent of Pensions. The Public Body withheld portions of this email under both sections 16 and 17 of the FOIP Act.

[para 33] I accept that the portions of the records severed by the Public Body contain information consistent with information that is subject to section 16(1)(a), in that it reveals financial information regarding the assets of the pension plan.

[para 34] The plan administrator argues that this record contains labour relations information within the terms of section 16(1)(a). While I note that this record contains a comment as to what members of a trade union are likely to do, and could be construed as labour relations information in the sense that trade unions engage in labour relations and the information in question discusses a trade union, I find that the information is not "of a third party" for the purposes of section 16(1)(a). There is nothing to suggest that the information described as "labour relations information" belongs to the pension plan, or the plan administrator, or any other third party, or was otherwise developed by such a party for use in collective bargaining.

Record 112

[para 35] Record 112 is an email.

[para 36] The plan administrator does not refer to the presence of financial information, or any other information subject to section 16(1)(a) as being present in this record. I find that record 112 contains no information subject to section 16(1)(a). As a result, this record cannot be withheld under section 16.

Records 113 - 117

[para 37] Records 113 – 117 consist of a chart of questions and answers drawn from an interview with a representative of the plan administrator. The Public Body withheld these records in their entirety under sections 16, 17, and 24 of the FOIP Act. In its summary of its reasons for withholding these records, the Public Body refers to the contents of the records as "business information" of the plan administrator. However, section 16(1)(a) is not met simply because information is, or may be, categorized as "business information"; rather, information meets the requirements of section 16(1)(a) if it is of the kind enumerated in this provision and can be said to be "of a third party". The records do not contain details regarding the assets of the pension plan or their transfer or disposition. Any discussion of finances is in hypothetical terms. Having reviewed these records, I was unable to identify information set out in section 16(1)(a). As a result, I find that these records cannot be withheld under section 16.

Records 121 – 124

[para 38] Records 121 – 124 consist of emails between a representative of the Superintendent of Pensions and a representative of the plan administrator.

[para 39] The plan administrator does not argue that these records contain information subject to section 16(1)(a). Rather, it argues that the information in these records was supplied and received with an expectation of confidence.

[para 40] I am unable to identify any information in these records that is subject to section 16(1)(a). As a result, I find that these records cannot be withheld under section 16.

Records 133 – 135

[para 41] Records 133 – 135 consist of an email sent from the plan administrator's actuary to a representative of the Superintendent of Pensions. This email addresses specific questions that were raised in an interview recorded on records 159 – 220. These records contain financial information about the pension plan falling within section 16(1)(a).

Records 138 – 155

[para 42] Records 138 – 155 consist of a chart of questions and answers prepared by the Public Body to record questions and answers from interviews. The chart was apparently prepared for ease of reference. These records contain some information that is financial information about the pension plan falling within the terms of section 16(1)(a).

Records 159 - 220

[para 43] Records 159 – 220 consist of the transcript of an interview involving representatives of the Superintendent of Pensions and the actuary for the plan administrator. The Public Body withheld these records in their entirety under sections 16, 17, and 24. The Public Body has provided no explanation as to which information it considers subject to sections 16, 17, or 24. As a result, it appears that it considers all withheld information to be entirely subject to each of these provisions.

[para 44] The Public Body made no specific arguments on its own behalf in relation to the application of section 16 to these records, and instead made a general argument that the records it withheld contain commercial or financial information regarding the "administration and operation of the Boilermakers' pension plan collected from various plan officials and agents with an expectation of confidentiality by all parties". The Public Body adopted the submissions of a representative of the plan administrator in its *in camera* submissions. These submissions present the argument that the records contain financial and labour relations information.

[para 45] Having reviewed these records, I am satisfied that they contain financial information within the terms of section 16(1)(a), although I find that not all the information in these records is subject to this provision. (However, as I find below that this information does not meet the requirements for withholding under other subsections of section 16, it is unnecessary for me to specify which information is subject to section 16(1)(a). This point applies to the remaining records in which I find that some information, but not all of the information in the records, is subject to section 16(1)(a) in that it is financial information.) I find that there is no information consistent with labour

relations information of a third party present in these records.

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Records 221 – 314

[para 46] Records 221 – 314 consist of the transcript of an interview involving representatives of the Superintendent of Pensions and a representative of the plan administrator. The Public Body withheld these records in their entirety under sections 16, 17, and 24.

[para 47] As with records 159 – 220, the Public Body made no arguments to support its decision to apply section 16, but adopted the reasoning of the plan administrator.

[para 48] The plan administrator argues only that the records contain financial and labour relations information.

[para 49] In the absence of argument or explanation from either the Public Body or the plan administrator, records 221 – 314 have been left to speak for themselves and I am required to guess reasons why the Public Body or the plan administrator might view information in these records is subject to section 16(1)(a). Having reviewed the records, I am satisfied that some, but not all of them contain information consistent with financial information about the pension plan, as it refers to the status of the assets of the pension plan. However, I was unable to identify information consistent with "labour relations information of a third party".

Records 315 – 316

[para 50] Records 315 – 316 consist of an email created by the representative of the plan administrator whose interview is recorded in records 221 – 314 and sent to representatives of the Superintendent of Pensions.

[para 51] The Public Body withheld this email in its entirety under sections 16, 17, and 24.

[para 52] Having reviewed these records, I am satisfied that numbered points 1 through 4 appearing in these records contain information consistent with financial information about the pension plan. I therefore find that this information falls within the scope of section 16(1)(a). I find that point 5 does not reveal financial information of the pension plan, but refers, generally, to other pension plans. I find that the remaining information in these records does not fall within section 16(1)(a) and cannot be withheld under section 16(1).

Records 317 – 364

[para 53] Records 317 – 364 consist of an interview taking place between a representative of the plan administrator and representatives of the Superintendent of Pensions. The Public Body withheld these records in their entirety under sections 16, 17,

and 24. However, as with other records it withheld under these provisions, it elected not to make submissions on its own, but to offer instead the submissions of the plan administrator, with which it indicated it did not agree.

[para 54] The plan administrator argues that the records contain financial and labour relations information.

[para 55] Having reviewed these records, I find some of the records contain information consistent with information falling within the scope of section 16(1)(a), in that they contain financial information about the pension plan. However, I find that the remaining information in these records does not fall within section 16(1)(a) and cannot be withheld under section 16(1). I was also unable to identify information that could be said to be the labour relations information of the plan administrator, the pension plan, or anyone else.

Records 365 – 418

[para 56] Records 365 – 418 consist of an interview taking place between a representative of the plan administrator and representatives of the Superintendent of Pensions.

[para 57] The Public Body withheld these records in their entirety under sections 16, 17, and 24. However, as with other records it withheld under these provisions, it elected not to make submissions on its own, but to offer the submissions of the plan administrator and to indicate unspecified disagreement with its arguments.

[para 58] The plan administrator argues that the records contain financial and labour relations information.

[para 59] Having reviewed these records, I find that some of the records contain information consistent with information falling within the scope of section 16(1)(a), in that they contain financial information regarding the pension plan. However, I find that the remaining information in these records does not fall within section 16(1)(a) and cannot be withheld under section 16(1).

Records 419 – 457

[para 60] Records 419 – 457 consist of an interview taking place between a representative of the plan administrator and representatives of the Superintendent of Pensions.

[para 61] The Public Body withheld these records in their entirety under sections 16, 17, and 24. However, as with other records it withheld under these provisions, it elected not to make submissions on its own, but to offer the submissions of the plan administrator.

[para 62] The plan administrator argues that the records contain financial and labour relations information.

[para 63] Having reviewed the records, I find that some of the records contain information consistent with information falling within the scope of section 16(1)(a), in that they contain financial information about the pension plan. However, I find that the remaining information in these records does not fall within section 16(1)(a) and cannot be withheld under section 16(1).

Records 469 – 471

[para 64] Records 469 – 471 consist of a letter written by the Superintendent of Pensions to representatives of the plan administrator. The plan administrator argues that these records should be withheld under section 16 and 17.

[para 65] Having reviewed these records, I am unable to identify information in them belonging to a third party that could be said to fall within the terms of section 16(1)(a). I therefore find that these records cannot be withheld under section 16.

Records 475 – 520

[para 66] Records 475 – 521 consist of a review of the pension plan. The Public Body withheld these records under section 16 of the Act. The plan administrator argues that these records contain financial information regarding the pension plan and how it is administered.

[para 67] Having reviewed these records, I find that some of them contain information falling within the terms section 16(1)(a), in that they contain financial information about the pension plan.

Record 562

[para 68] Record 562 consists of an email written by a representative of the Superintendent of Pensions to a representative of the plan administrator.

[para 69] I am unable to identify any information subject to section 16(1)(a) in this record. As a result, I find that this record cannot be withheld under section 16.

Records 563 - 646

[para 70] Records 563 – 646 consist of a draft management report dated July 2008, prepared by the Superintendent of Pensions regarding the administration of the pension plan and its compliance with the Alberta *Employment Pension Plans Act* (EPPA). The records establish that this draft report was sent to the plan administrator.

[para 71] Neither the Public Body nor the plan administrator has made arguments that would support withholding records 563 – 646 under section 16.

[para 72] Having reviewed the records, I am satisfied that some of them contain information consistent with information that is the subject of section 16(1)(a) in that it refers to financial information about the pension plan.

[para 73] I note that the Public Body was right to include this draft report as responsive, as it consists of information contained in correspondence, which is a subject of the access request.

Record 649

[para 74] Record 649 is a letter written by a representative of the Superintendent of Pensions to a representative of the plan administrator.

[para 75] The plan administrator objects to the release of this record. The plan administrator does not refer to information contained in this record that would be subject to section 16(1)(a) and I am unable to identify information of this kind. As a result, I find that this record cannot be withheld under section 16.

Records 650 – 653

[para 76] Records 650 – 653 contain the draft summary of a meeting. The Public Body applied section 16 so as to withhold all but the first and final paragraphs of these records.

[para 77] Neither the Public Body nor the plan administrator made specific arguments in relation to the Public Body's decision to withhold information from these records under section 16. Neither party has pointed to information subject to section 16(1)(a) in these records and I am unable to identify information of this kind. As a result, I find that these records cannot be withheld under section 16.

Records 654 – 662

[para 78] Records 654 – 662 contain the minutes of a meeting. The Public Body withheld the contents of these records, except for the identities of representatives of the Superintendent of Pensions and the plan administrator who attended the meeting and the topic of the meeting.

[para 79] Neither the Public Body nor the plan administrator made submissions in support of the Public Body's decision to withhold information from these records under section 16. Having reviewed these records, I find that the paragraph constituting point 4 on record 658 is consistent with financial information. However, I find that no other information in these records is consistent with information subject to section 16(1)(a). It

therefore follows that I find that the remaining information cannot be withheld under section 16.

Records 670 – 673

[para 80] Records 670 – 673 consist of a record of a meeting. The Public Body withheld these records in their entirety. The Public Body did not make any submissions regarding its decision to withhold this information, but provided submissions the plan administrator made to it when it was deciding whether to grant access to the information within the terms of section 30 of the FOIP Act.

[para 81] The submissions of the plan administrator do not point to any information that is the subject of section 16(1)(a).

[para 82] I am unable to identify any information in these records that is consistent with information subject to section 16(1)(a). As a result, I find that the information in these records cannot be withheld under section 16.

Records 674 – 675

[para 83] Records 674 – 675 consist of a letter written by a representative of the plan administrator to the Superintendent of Pensions.

[para 84] The plan administrator objects to disclosure of this record because of the presence of the second paragraph. The plan administrator did not argue that this information was subject to section 16(1)(a), and, in any event, I find that there is no information in these records falling within section 16(1)(a). As a result, I find that the information in these records is not subject to section 16.

Records 678 – 701

[para 85] Records 678 – 701 consist of a report and a presentation accompanying the report. While the plan administrator does not point to information that is subject to section 16(1)(a) in these records, I find that the records contain financial information regarding the pension plan administered by the plan administrator. I therefore find these records contain financial information.

[para 86] I find that information consistent with information that is subject to section 16(1)(a) is present in these records.

Record 702

[para 87] Record 702 is an email from a representative of the Superintendent of Pensions to representatives of the plan administrator. The plan administrator objects to the disclosure of the final paragraph of the email. However, the plan administrator made no arguments in relation to whether the paragraph in question contains information

subject to section 16(1)(a). Having reviewed the information in question, I am satisfied that it does not contain information subject to section 16(1)(a). As a result, I find that this information cannot be withheld under section 16(1).

Records 704 – 712

[para 88] Records 704 – 712 consist of a letter written by a representative of the Superintendent of Pensions to a representative of the plan administrator. The plan administrator made no arguments as to the presence of information subject to section 16(1)(a). However, I find that these records do contain financial information regarding the pension plan within the terms of section 16(1)(a).

Records 716 – 717

[para 89] Records 716 – 717 consist of a letter sent by the Superintendent of Pensions to a representative of the plan administrator. The plan administrator did not refer to an exception to disclosure under the FOIP Act that it considered applicable. However, as the arguments it makes in relation to these records are similar to those made in support of the application of sections 16 and 17 to the records, I assume it makes its arguments in relation to these records in support of the application of these same provisions. However, I am unable to identify any information in these records meeting the requirements of section 16(1)(a). As a result, I find that this information cannot be withheld under section 16(1).

Records 741 - 744

[para 90] Records 741 – 744 consist of a letter written by the Superintendent of Pensions to a representative of the plan administrator. The plan administrator states that it objects to disclosure of these records, in part, for the same reasons as it objected to the release of records 716 – 717. It did not state any other reasons for objecting to the disclosure of these records, so I assume that its objection is wholly based on the reasons it put forward for objecting to the release of records 716 and 717. Having reviewed the records, I find that there is no information contained in them that is subject to section 16(1)(a). I therefore find that these records are not subject to section 16(1).

Records 792 - 796

[para 91] These records consist of a letter written by a representative of the Superintendent of Pensions to a representative of the plan administrator.

[para 92] The plan administrator objects to the disclosure of these records on the basis that they contain a reference to the name of an actuarial firm and it is of the view that the name of this firm is not relevant. The name of a firm is not information, in and of itself, that can be withheld under the FOIP Act. There is no exception to disclosure that would permit a Public Body to withhold the name of a firm, simply because it is the name of a firm and because another third party objects to its inclusion in records on the basis of

relevance. I find that this information cannot be withheld under section 16(1), or any other provision of the FOIP Act.

Records 850 – 851

[para 93] Records 850 – 851 consist of an email written by an employee of the Superintendent of Pensions to a representative of the plan administrator. The plan administrator objects to the disclosure of this email on the basis of sections 16 and 17. Having reviewed the email, I am unable to find that it contains any information subject to section 16(1)(a). While the email does discuss hypothetical financial figures, it does not discuss actual ones, so that the financial information in the email cannot be said to be "of a third party."

[para 94] For these reasons, I find that records 850 – 851 cannot be withheld under section 16.

Was the financial information of a third party supplied explicitly or implicitly in confidence?

[para 95] As I have found that there is information subject to section 16(1)(a) in the records, I will now consider whether this information was supplied in confidence for the purposes of section 16(1)(b).

[para 96] The plan administrator asserts that all information it supplied to the Superintendent of Pensions is presumptively supplied in confidence under the EPPA. I will therefore address this argument.

Does the EPPA create a presumption that any information supplied by a plan administrator to the Superintendent of Pensions is supplied in confidence?

[para 97] The plan administrator argues the following:

> As is contained in section 16(1)(b) of the Act, records that are subject to the application of section 16 are those that were "supplied, explicitly or implicitly, in confidence". It is the position of the Third Party that section 16 applies to all records of correspondence, and their related attachments, between the Public Body and a plan administrator. The Third Party asserts that there is an automatic expectation of confidentiality in respect of correspondence between a public body and third parties, particularly when such correspondence is entered into at the request of the public body and under the auspices of a mandatory relationship that is subject to regulation.
>
> Unless operative legislation explicitly provides otherwise or the public body advises the third party, in advance, that the correspondence or related documentation may be subject to disclosure under the Act, the Third Party argues that it has a reasonable expectation of confidentiality in its dealing with the Public Body. It is unreasonable to expect open and transparent dealings between a public body and a third party if the third party is under constant threat of having the information at the core of those dealings potentially subject to disclosure. From a public policy perspective, this threat would discourage open and frank dialogue between plan administrators and their governing regulator. Consequently, the Third Party asserts that the open and frank

> communications between the public regulatory body and plan administrators should outweigh the public policy objective of access to government records in a pension context where the interests of third parties could be impacted.

[para 98] The plan administrator expresses the position that communications between itself and the Superintendent of Pensions are presumed confidential, unless the EPPA, or other operative legislation, requires the information in the communications to be disclosed. It reasons that the public interest in ensuring that the Superintendent of Pensions receives the necessary information to evaluate pension plan compliance is served by presuming that communications between the Superintendent of Pensions and plan administrators are confidential.

[para 99] In my view, the objective of ensuring that the Superintendent of Pensions obtains necessary information from plan administrators is achieved by giving the Superintendent the power to investigate, to demand the production of documents, to require persons to attend interviews, and to take measures in the event of non-compliance, which sections 8 and 90 of the EPPA achieve. There is no reason to impose a presumption that any communications between the Superintendent and a plan administrator are confidential to achieve what these provisions of the EPPA already accomplish.

[para 100] Section 6 of the FOIP Act creates a right of access to all records in the custody or control of a public body unless an exception to disclosure applies. Moreover, section 71(3) of the FOIP Act places the burden of proof to establish that section 16 applies to records on a third party alleging that this provision applies. Even assuming that there is a principle that information is subject to a presumption of confidentiality, unless operative legislation explicitly provides otherwise, section 6 of the FOIP Act would be considered to be operative legislation rebutting the notion that information submitted to a public body pursuant to a statutory scheme is presumptively confidential.

Was the information supplied in explicit confidence?

[para 101] The Public Body states that the records it has withheld under section 16 were supplied in confidence. However, it does not point to information in the records that it views to have been supplied in confidence or explain why it has formed that opinion. It has not provided any evidence from employees with knowledge of the terms under which the Public Body received any information supplied by the plan administrator.

[para 102] Similarly, the plan administrator asserts that the information it seeks to have withheld was supplied in confidence but did not provide the direct evidence of anyone with knowledge as to the terms under which information was supplied or received to support its assertion.

[para 103] With the exception of several emails sent by the representative of the pension plan who created record 1, the records do not contain any statements or assurances regarding confidentiality. The records do not indicate that any limits were

imposed on the Public Body's ability to disclose or disseminate the information it received.

[para 104] The emails (records 90, 91, 92, 93, 94, 95, 96, 97, 98, 101, 102, 103, 110, 111, 121, 122, 123, 124, 133, 134, 137, 136 sent by the representative of the plan administrator, discussed above, contain a standard warning stating that the email may contain privileged information and should be kept confidential if received by an unintended recipient. Of these records, I have found that records 101 – 103 and records 110 – 111 contain information subject to section 16(1)(a). The confidentiality warning accompanies all email communications sent by this representative, regardless of the kind of information being sent. Moreover, I note that none of this representatives' letter correspondence in the records contains a similar caution.

[para 105] I find that this caution is evidence that this representative takes steps to ensure the confidentiality of emails that are sent in error; however, I find that the caution does not, on its own, support a finding that the records containing this caution were supplied with an explicit expectation of confidence. I make this finding because the caution states only that the emails *may* contain confidential information, and this caution is clearly directed at any unintended recipients of the emails, rather than the Public Body.

[para 106] As I find that the information that I have found to be subject to section 16(1)(a) was not supplied in explicit confidence, I must now consider whether the information was supplied with an implicit expectation of confidence.

Was the information supplied with an implicit expectation of confidence?

[para 107] The plan administrator brought to my attention the test in *Canadian Broadcasting Corporation v. Northwest Territories (Commissioner)* [1999] N.W.T.J. No. 117 (*Canadian Broadcasting Corporation*) for determining whether information has been supplied with an implicit expectation of confidence. In *Canadian Broadcasting Corporation*, Vertes J. stated:

> The Federal Court has held that the test for confidentiality should be determined on an objective basis: *Maislin Industries Ltd. v. Canada (Minister of Industry)* (1984), 80 C.P.R. (2d) 253 (F.C.T.D.). Whether information is confidential will depend upon its content, its purposes, and the circumstances in which it was complied. It seems to me that the same test applies when, as here, the respondents contend that information has been supplied and obtained in a situation of implicit confidentiality. Merely saying it is confidential does not make it so. In *Air Atonabee Limited v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (F.C.T.D.), MacKay J. outlined what have been described as indicators of confidentiality (at page 210):
>
> a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,
>
> b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and

> c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.

[para 108] The plan administrator argues that the test set out in the foregoing case is met because the EPPA does not require the disclosure of the information it submitted to the Superintendent of Pensions. I have already rejected this argument, above.

[para 109] In Order 99-018, former Commissioner Clark adopted a similar test to that stated in *Canadian Broadcasting Corporation* to determine when information is supplied in implicit confidence for the purposes of section 16(1)(b). He said:

> The Third Party did not present evidence of any explicit statement or agreement with the Public Body concerning the confidentiality of the information in the Records. There is nothing on the face of the Records that would lead one to conclude that the Third Party was supplying the information on the condition that it remain undisclosed.
>
> The issue then turns to the question of whether the information can be said to have been supplied implicitly in confidence. In my view, the word "implicit" denotes a particular state of understanding: a belief in a certain set of facts.
>
> The 1998 Freedom of Information and Protection of Privacy Policy and Practices Manual published by the Information Management and Privacy Branch at Alberta Labour (now Municipal Affairs) states, at page 64:
>
> > Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement or other physical evidence of the understanding that the information will be kept confidential. In such cases, all relevant facts and circumstances need to be examined to determine whether or not there is an understanding of confidentiality.
>
> In Ontario Order M-169, Inquiry Officer Holly Big Canoe made the following comments with respect to the issue of confidentiality in the equivalent of section 15(1) found in the *Municipal Freedom of Information and Protection of Privacy Act* of Ontario:
>
> > In regards to whether the information was supplied in confidence, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.
>
> In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:
>
> > (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
> > (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization.
> > (3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

> Here, the Public Body says there was no understanding of confidentiality. Other than stating its expectations that the Records would be held in confidence, the Third Party has not provided evidence in support of this assertion. I find that the Third Party has not pointed to any particular circumstance or facts that would give rise to a reasonable expectation that the information was communicated on the understanding that it was supplied, explicitly or implicitly, in confidence.

[para 110] Order 99-018 addressed a situation in which a third party had supplied information to a public body without stating expressly that the information had been supplied in confidence. However, the third party argued that it had supplied the information at issue with an implicit understanding that it would be held in confidence. The former Commissioner considered whether the third party had established that it had objectively reasonable grounds for its expectation that the information it had supplied would be kept confidential, even though it had not expressly stated that it was supplying information in confidence. He determined that the third party in that case had not established that it had communicated its expectations that the information it had submitted was supplied explicitly or implicitly in confidence and that it was not objectively reasonable for the third party to expect that the information would be held in confidence. He decided that making a determination as to whether information has been supplied in confidence, or not, will depend on consideration of the four factors reproduced above.

[para 111] I will now consider whether the plan administrator had implicit expectations of confidentiality regarding the information supplied by the plan administrator to the Superintendent of Pensions, and whether these expectations were objectively reasonable, by considering the factors set out in Order 99-018.

Was the information communicated to the Public Body on the basis that it was confidential and was to be kept confidential?

[para 112] Other than bare arguments made by the Public Body and the plan administrator that any information supplied by the plan administrator was supplied with an expectation of confidence, there is no evidence before me that would support a finding that the plan administrator supplied information to the Public Body on the basis that the information was confidential and was to be kept that way. For example, at no time during the interviews of representatives of the plan administrator did the parties discuss maintaining the confidentiality of any information supplied. No limits were imposed by representatives of the plan administrator as to the extent the Public Body could disclose or disseminate the information supplied.

Was the information treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization?

[para 113] The plan administrator has not provided any evidence regarding its prior treatment of the information it seeks to withhold.

Has the information been disclosed or is it available from sources to which the public has access?

[para 114] Some of the information the plan administrator seeks to withhold is contained in annual reports regarding the status of the pension plan. With regard to information that is not present in the annual reports, there is no evidence before me to support a finding that this information has not been disclosed, as the plan administrator has not provided direct evidence on this point.

Was the information prepared for a purpose which would not entail disclosure?

[para 115] The Superintendent of Pensions collected information from the plan administrator regarding the pension plan fund under the authority of the EPPA. The EPPA does not prohibit the Superintendent of Pensions from disclosing information about a pension plan, or require the Superintendent of Pensions to disclose such information. It is neutral in this regard. However, the Superintendent of Pensions is also given wide ranging powers under that Act to ensure a pension plan's compliance with the EPPA, which could potentially entail disclosure of the information gathered by the Superintendent of Pensions in the course of an investigation into the compliance of a pension plan. The information I have found to be subject to section 16(1)(a), and to the disclosure of which the plan administrator objects, was gathered in the course of investigating whether the Boilermakers' pension plan complies with the EPPA. It is possible that this information could have been disclosed, for example, to pension plan members, if the Superintendent of Pensions considered it necessary to do so in order to ensure compliance of the pension plan with the EPPA.

[para 116] Having considered the factors set out in Order 99-018, I am unable to conclude that the information I have found to be subject to section 16(1)(a) was supplied in implicit confidence for the purposes of section 16(1)(b).

[para 117] The records before me do not support a finding that the issue of confidentiality was considered when information regarding the pension plan was supplied to the Public Body, as confidentiality is never addressed between the parties. If confidentiality was addressed or considered, I would expect to see an indication of this in the records. However, the records are silent in this regard.

[para 118] The only reference to confidentiality that I note in the records appears in record 562. This email indicates that a draft of a confidential report is being sent by the Superintendent of Pensions to the plan administrator. However, for section 16(1)(b) to apply, a third party must supply information meeting the requirements of section 16(1)(a) in confidence. Section 16(1)(b) does not apply in situations where a public body imposes terms of confidentiality on information it supplies to a third party.

[para 119] For the reasons above, I find that the requirements of section 16(1)(b) are not met in relation to any of information at issue in this inquiry.

Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

[para 120] I find that disclosure of the information at issue cannot reasonably be expected to bring about or result in one of the outcomes in section 16(1)(c) for the reasons that follow.

[para 121] Section 16(1)(c), reproduced above, describes the harms that must reasonably be expected to result from disclosure of information before section 16 can be said to apply. Section 16(1)(c) contains an exhaustive list of harmful outcomes; as a result, it is not open to me to find that section 16(1)(c) is met on the basis of harms that parties anticipate will result from disclosure, if those harms are not enumerated in section 16(1)(c). Section 16(1)(c) lists only four potential harms arising from disclosure that section 16 is intended to protect against. To qualify, disclosure of information meeting the requirements of section 16(1)(a) and (b) must be reasonably expected to result in one or more of the four following outcomes:

> *(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 122] None of the harms the plan administrator argues may result from disclosure corresponds with a provision of section 16(1)(c). As I noted above, section 16(1)(c) contains an exhaustive list of harmful outcomes that the legislature has chosen to recognize.

[para 123] It may be that the plan administrator is concerned that disclosing information about the pension plan's assets, which I have found to be subject to section 16(1)(a), would harm its competitive position or interfere significantly with its negotiating position for the purposes of section 16(1)(c)(i), by leading persons to draw erroneous conclusions about the abilities of the plan administrator or its representatives to administer the pension fund, which would in turn harm its own competitive or negotiating position as a plan administrator.

[para 124] If the plan administrator means to argue that its competitive position could be harmed by disclosure of the information in the records that reveals how it manages the plan assets, then that is an argument that can be made under section 16(1)(c)(i). However, the board that comprises the plan administrator is made up of a collection of individuals who act collectively as a board. The sole function of the board is to administer the Boilermakers pension plan. The plan administrator does not compete with others to

administer the plan or administer any other plans: administering the Boilermakers pension plan is its only purpose. I therefore find that the plan administrator cannot argue that its competitive position would be subjected to harm within the terms of section 16(1)(c), as it is not involved in competition.

[para 125] If the plan administrator's argument is that its negotiating position would be harmed by disclosure, no evidence or argument that the plan administrator is involved in negotiations has been provided for the inquiry. In addition, it has not been established that disclosure of the information in the records would be harmful to any such negotiations.

[para 126] The plan administrator's anticipation that harm will result from disclosure may be based on the theory that others may misinterpret the information it seeks to withhold, and that harm will result from this possible misinterpretation.

[para 127] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (*Merck Frosst*), the Supreme Court of Canada rejected the potential for misinterpretation of information as a legitimate reason for refusing access under section 20 of the federal *Access to Information Act*, which is a provision equivalent to section 16 of Alberta's FOIP Act. Cromwell J., speaking for the majority, stated:

> That leaves for consideration Merck's submission that release of some of the pages could give an inaccurate perception of the product's safety. Merck says that refusal to disclose this sort of information under s. 20(1)(c) is not problematic because proper information in proper context is provided in the Product Monograph. Moreover, there are reporting requirements relating to information where public safety is concerned and, in an appropriate case, the public interest override could be invoked to release such information even if it is found to be exempt under s. 20(1)(c), providing disclosure is in the public interest.
>
> I do not accept the principles inherent in these submissions. The courts have often — and rightly — been sceptical about claims that the public misunderstanding of disclosed information will inflict harm on the third party: see, e.g., *Air Atonabee*, at pp. 280-81; *Canada Packers*, at pp. 64-65; *Coopérative fédérée du Québec v. Canada (Ministre de l'Agriculture et de l'Agroalimentaire)* (2000), 180 F.T.R. 205, at paras. 9-15. If taken too far, refusing to disclose for fear of public misunderstanding would undermine the fundamental purpose of access to information legislation. The point is to give the public access to information so that they can evaluate it for themselves, not to protect them from having it. In my view, it would be quite an unusual case in which this sort of claim for exemption could succeed.

[para 128] In my view, the Supreme Court of Canada's decision in *Merck Frosst* applies equally to section 16 of Alberta's FOIP Act, given that section 20 of the *Access to Information Act* contains similar wording and is intended to protect similar interests. As a result, I conclude that arguments regarding the potential for misinterpretation of information do not serve to bring information within the scope of section 16(1)(c). Moreover, the plan administrator has not pointed to information it considers would lead people to draw erroneous conclusions, such that I could evaluate the likelihood that people would misinterpret the information or draw such conclusions.

[para 129] In relation to the arguments that disclosure of the information in the records may have an impact on, or harm, labour relations, I note that this is not a harm set out in section 16(1)(c). If the argument is that disclosure of the information in the records would result in harm to labour relations, with the result that one of the harms set out in section 16(1)(c) would occur, it has not argued to me which provision the plan administrator believes would be engaged. Moreover, neither the pension plan, nor the plan administrator, appears to engage in labour relations or collective bargaining, and so it is unclear to me how disclosure of the information could affect labour relations, or result in harm to labour relations.

[para 130] For these reasons, I find that section 16(1)(c) does not apply to the information to which the Public Body has applied section 16, or to the information to which the plan administrator seeks to have section 16 applied.

The plan administrator's procedural argument

[para 131] The plan administrator makes the following argument:

> It is the position of the Third Party that section 16 applies to all records at issue in relation to Inquiries F5454 and F5472. As stated in the submissions of the Third Party, dated October 17, 2011, and exchanged between the parties … the Third Party contends that in requiring the Public Body to provide notice to the Third Party in accordance with section 30, the applicability of section 16 to all records deemed responsive to the disclosure request is automatically invoked by the operation of law.

[para 132] The plan administrator argues that the requirements of section 30 have not been met if the Public Body has not provided all records at issue in the inquiry for its review, or records that are not at issue but that might be provided to the Applicant. It also reasons that since the Public Body did not immediately provide it with copies of records, that there has been a failure to comply with section 30 for that reason as well. Finally, it appears to argue that section 16 applies in situations where a public body elects to provide notice under section 30.

[para 133] In *Merck Frosst* (*supra*), the Supreme Court of Canada reviewed the notice provisions under section 27 of the federal *Access to Information Act*, which are similar to those set out in section 30 of the FOIP Act. Merck Frosst, a third party, argued that Health Canada had not complied with section 27 when it granted access to records containing information it sought to have withheld, without first providing it with notice and had failed to meet the spirit of that legislation for this reason. Cromwell J. stated:

> In this case, the Health Canada head disclosed some documentation without giving notice to Merck. Merck complains that it should have been given notice before any disclosure was made. In the Federal Court, the reviewing judge (after dealing with a number of procedural arguments that are not in issue before this Court) found that this disclosure without prior notice contravened the spirit of the legislation. Since disclosure without notice could result in irreparable harm to the third party concerned, such disclosure should not have taken place (2006 FC 1201, at para. 64). The Federal Court of Appeal disagreed. It found that s. 27(1) requires notice only if the record contains or might contain information the disclosure of which is

> prohibited by s. 20(1). In the Court of Appeal's view, both the object of the Act as articulated in s. 2 and the contextual and grammatical analysis of s. 27(1) favour this conclusion.
>
> Before this Court, Merck argues that the Federal Court of Appeal's decision has the effect of unduly limiting the scope of the s. 20(1) exemptions by narrowing the procedural right conferred on third parties by s. 27. Merck suggests that the test for giving notice and the test for actually applying the exemption must be different. To have procedural fairness in this legislative scheme, s. 27(1) must set a low threshold for notice to affected parties. Merck therefore maintains that certain categories of records, because of their nature, should automatically trigger a right to notice. In its view, NDS and SNDS records, in light of the confidentiality and competitive value of the information they contain, fall within such a category where notice is required.
>
> In my view, the text of the statute and the considerations identified by the reviewing judge and by Merck in its submissions support a fairly low threshold to trigger the obligation to give notice. However, I do not accept Merck's submission that there is any "automatic" right to notice with respect to certain categories of records. Such a right to automatic notice is not supported by the text or purpose of the provisions or by the jurisprudence that has interpreted them.

[para 134] The Court considered that when the head of a public body is considering giving access to information that may contain informational assets of a third party organization, the head has four options:

> In considering a request for disclosure of third party information under the Act, the institutional head has four main possible courses of action (aside from the exercise of discretion under s. 20(6)), two of which engage the notice provisions. He or she may decide to: (i) disclose the requested information without notice; (ii) refuse disclosure without notice; (iii) form an intention to disclose severed material with notice; or (iv) give notice because there is reason to believe that the record requested might contain exempted material. I will review each option briefly.

[para 135] In the case before me, the Public Body gave notice to the plan administrator and provided copies of the records to the plan administrator. It also decided that it would disclose some of the requested information. Both are decisions that the head of a public body is entitled to make, under either Alberta's legislation or the federal legislation.

[para 136] Section 30 of the FOIP Act, like section 27 of the federal *Access to Information Act*, contains a "low threshold" for providing notice to a third party. Under section 30 of the FOIP Act, the head need only form the opinion that a record he or she is considering disclosing *may* contain information *affecting a third party's interests* under section 16 before the duties under this provision are engaged. There is no requirement in this provision that the head must form the opinion that the requirements of section 16 are actually met before providing notice. There is nothing in section 30 to suggest that the requirements of section 16 are met if the head of a public body elects to provide notice to an affected party under its authority. Moreover, the notice requirements in section 30 are engaged *only* when the head is considering granting access *and* the head forms the opinion that the records *may* contain information *affecting interests* under section 16 or 17 of the FOIP Act.

[para 137] The Public Body has supplied copies of the records at issue for the inquiry to the plan administrator to assist the plan administrator to make submissions for the inquiry. The decision to provide notice to the plan administrator did not have the effect of transforming the information in the records to information meeting the requirements of section 16.

Conclusion regarding the application of section 16 to the records

[para 138] For the reasons above, I find that information subject to section 16 is not present in the records.

Issue B: Does section 17(1) of the Act apply to the information in the records?

[para 139] Section 17 requires a public body to withhold the personal information of an identifiable individual when it would be an unreasonable invasion of the individual's personal privacy to disclose his or her personal information.

[para 140] The Public Body applied section 17 to withhold, in their entirety, many of the records it also withheld under sections 16 and 24(1)(b). The Public Body also withheld portions of records 110 and 126, 667 and 668, and 676 and 677, solely under section 17, although it did not withhold names or other personally identifying information from these records.

[para 141] The Public Body states the following regarding its application of section 17:

> The Public Body determined that personal information about identifiable individuals in the records at issue was collected or compiled in the course of examining or auditing the Boilermaker's pension plan in accordance with pension legislation (EPPA), would relate to education or employment history, and includes the individual's name along with other personal information about the individuals.

[para 142] 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;*

For the purposes of the FOIP Act, personal information is confined to information about identifiable individuals. As the Commissioner noted in Order 96-019, while corporations are persons, they are not individuals within the meaning of the FOIP Act. Moreover, the types of information set out in section 1(n) are the kinds of information that could be about an individual human being, but not about a corporation or other organization. Consequently, corporations and other organizations cannot have "personal information" under the FOIP Act. As a result, section 17, which applies to personal information, cannot be applied to information about organizations.

[para 143] The plan administrator consists of a board of directors who are responsible for administering a pension plan under the EPPA by acting collectively. I find that the plan administrator, while it may be a legal person, is not an identifiable individual capable of having personal information under section 1(n) of the FOIP Act. As a result, arguments to the effect that the plan administrator has personal information, or that disclosure of information about the plan administrator could result in harm to the personal privacy of the plan administrator are without merit.

[para 144] I will now consider whether the information about the individual board members of the plan administrators appearing in the records is their personal information.

[para 145] In Order F2008-028, the Adjudicator reviewed previous decisions of this office addressing information about individuals acting in their official capacities, including individuals representing organizations. He concluded that information about individuals that is solely about them acting in an official or representative capacity is not personal information that can be withheld under section 17.

[para 146] In Order F2009-026, I said:

> If information is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. As noted above, the definition of "third party" under the Act excludes a public body. In Order 99-032, the former Commissioner noted:
>
> > The Act applies to public bodies. However, public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.

> In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of section 17 may apply to the information. I must therefore consider whether the information about employees in the records at issue is about them acting on behalf of the Public Body, or is information conveying something personal about the employees.

In that case, I found that information solely about an employee acting as a representative of a public body was information about the public body, and not information about the employee as an identifiable individual. In *Mount Royal University v. Carter*, 2011 ABQB 28 Wilson J. denied judicial review of Order F2009-026.

[para 147] In Order F2011-014, I concluded that the name and signature of a Commissioner for Oaths acting in that capacity was not personal information, as it was not information about the Commissioner for Oaths acting in her personal capacity. I said:

> Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.
>
> However, individuals do not always act on their own behalf. Sometimes individuals may act on behalf of others, as an employee does when carrying out work duties for an employer. In other cases, an individual may hold a statutory office, and the actions of the individual may fulfill the functions of that statutory office. In such circumstances, information generated in performance of these roles may not necessarily be about the individual who performs them, but about the Public Body for whom the individual acts, or about the fulfillment of a statutory function.

[para 148] To determine whether information about a representative is personal or not, one must determine whether the information in question is about a public body, organization or statutory function, in which case it is not personal information, or reveals information of a personal dimension about the representative, in which case it is personal information.

[para 149] A plan administrator is a statutory entity created under the EPPA. To determine whether information about members of the board of directors who comprise the plan administrator is their personal information, I must consider whether the information is about them acting as individuals, or as representatives of the plan administrator in the performance of its statutory function.

[para 150] I also note that the Public Body withheld information about the Superintendent of Pensions from records 667 and 676. The Superintendent of Pensions is also a statutory entity created under the EPPA. I must also consider whether information about the Superintendent of Pensions is about him acting in his personal capacity or in his statutory role.

[para 151] Having reviewed the records, I find that, with the exception of lines 30 – 32 on record 239, lines 4 – 15 on record 310, and lines 7 – 9 on record 366, the information withheld by the Public Body under section 17, and the information the plan

administrator seeks to have withheld under section 17, is not personal information under section 1(n).

[para 152] I find that in all instances where a representative of the plan administrator supplied information to the Superintendent of Pensions, or received correspondence from the Superintendent of Pensions, or was interviewed by representatives of the Superintendent of Pensions, that the representative wrote, was written to, or was interviewed, as a representative of the plan administrator, and not in any other capacity. I also find that the Superintendent of Pensions acted in his statutory role.

[para 153] The records at issue were generated as the result of an investigation conducted by the Superintendent of Pensions to determine whether the pension plan complied with the requirements of the EPPA. Section 90 of the EPPA gives the Superintendent of Pensions the authority to demand records relating to a pension plan from an administrator, a non-administrator employer, a fund holder, a custodian or any other person, or to require an interview with such a person in order to as part of such an investigation.

[para 154] The scope of the Superintendent of Pension's investigation was to determine whether the pension plan itself was in compliance with the EPPA and to determine whether the pension plan was properly administered by the plan administrator. The Superintendent of Pensions has no authority to require records or interviews with individuals not involved in a pension plan in some way. The context provided by the records establishes that the only reason the representatives of the plan administrator were interviewed or were required to provide information was because they represent, or form part of, the plan administrator and could, in that capacity, answer questions as to how the plan administrator administers the pension plan.

[para 155] All information supplied by the representatives of the plan administrator was supplied for the purposes of satisfying the administrator's duties to answer the Superintendent of Pension's questions regarding compliance. In saying this, I include the descriptions of work experience and educational history appearing in the records. I find that this information was offered for the purpose of satisfying the Superintendent of Pensions as to the collective experience of the board of directors. There is nothing in the records to suggest that the information they contain could give rise to any personal consequence to the individual members of the plan administrator, nor to suggest any other possible personal dimension in the information.

[para 156] I find that the information supplied by members of the board of directors, to which the plan administrator argues is personal information, is about decisions made by the board of directors acting as the plan administrator. That this is so is supported by the way in which the individual board members frequently refer to themselves as "we" when answering questions from representatives of the Superintendent of Pensions as to what was decided or done. As discussed above, the plan administrator is not an individual, and cannot have personal information for the purposes of the FOIP Act. This

is equally true when its representatives discuss decisions they have made and actions they have taken on its behalf.

[para 157] In contrast, lines 30 – 32 on record 239, lines 4 – 15 on record 310, and lines 7 – 9 on record 366, contain information about members of the board of trustees acting as individuals, as these lines contain descriptions of family relationships and personal finances. I will therefore consider whether section 17(1) requires the Public Body to withhold this information.

Does section 17(1) require the Public Body to withhold the information it severed?

[para 158] Section 17 states in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy…*
>
> …
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> …
>
> *(e.1) the personal information consists of an individual's bank account information or credit card information,*
>
> …
>
> *(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 159] 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) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 160] 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 161] 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 162] I find that the information in lines 30 – 32 on record 239, lines 4 – 15 on record 310, and lines 7 – 9 on record 366 is subject to the presumption created by section 17(4)(g), as it consists of the names the individual board members in the context of other information about them.

[para 163] I find that none of the factors set out in section 17(5) apply to this information. As a result, the presumption that it would be an unreasonable invasion of personal privacy to disclose the information in lines 30 – 32 on record 239, lines 4 – 15 on record 310, and lines 7 – 9 on record 366 is not rebutted. I therefore find that the Public Body is required by section 17 to withhold this information.

Conclusion

[para 164] With the exception of information appearing in lines 30 – 32 on record 239, lines 4 – 15 on record 310, and lines 7 – 9 on record 366, I find that the information the Public Body has withheld under section 17, and the plan administrator seeks to have withheld under this provision, is not personal information and cannot be withheld under section 17.

Issue C: Does section 24 of the Act apply to the information in the records?

[para 165] The Public Body withheld information including interviews with members of the board of directors of the plan administrator and a draft management report prepared by the Superintendent of Pensions under sections 24(1)(a), (b) and (h). These provisions state:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(b) consultations or deliberations involving*
> *(i) officers or employees of a public body,*
> *(ii) a member of the Executive Council, or*
> *(iii) the staff of a member of the Executive Council,*
>
> *…*
>
> *(h) the contents of a formal research or audit report that in the opinion of the head of the public body is incomplete unless no progress has been made on the report for at least 3 years.*
>
> *(2) This section does not apply to information that*
> *…*
>
> *(b) is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function,*
> *…*
>
> *(3) In this section, "audit" means a financial or other formal and systematic examination or review of a program, portion of a program or activity.*

[para 166] The Public Body provided the following arguments to support its application of sections 24(1)(a), (b), and (h) to the records.

> Alberta Finance staff, as indicated in the records at issue, used a variety of means to gather and obtain information as they were examining or seeking to determine the degree to which the Boilermaker's National Pension Fund was compliant with pension legislation (EPPA). Their research and audit activities culminated in the issuance of a Superintendent's Report in 2011. All work prior to that time was draft, incomplete and potentially inaccurate. The audit activities of the Public Body are consistent with the definition provided in section 24(3), which indicates that "audit" means a financial or other formal and systematic examination or review of a program, portion of a program or activity. Therefore, section 24(1)(h) would apply to the information.
>
> In addition, there were a number of consultations or deliberations involving Alberta Finance officials and the Third Parties regarding various aspect[s] of the management and administration of the Plan. In some instances, section 24(1)(b) would apply to this information. In other instances, draft or incomplete analysis prepared by Alberta Finance officials was shared with the Third Parties to obtain their input and response. In those instances, section 24(1)(a) would apply to the information.

[para 167] The Applicant argues the following:

> With regard to section 24, the Applicant respectfully submits that the section has not been properly applied. The Public Body submits that its examination of whether the Third Party was compliant with the EPPA, its research and audit activities in relation thereto, and the issuance of a Superintendent's Report in 2011 as a result of that review, fit with s. 24. The Public Body suggests that the audit activities are consistent with the definition in s. 24(3)…
>
> …
>
> The information withheld is information on which the report is based, and the report has been completed. The research and audit activities underlying the 2011 Superintendent's Report is properly discloseable. Further, the Applicant notes s. 24(2)(b) which states: "This section does not apply to information that …(b) is a statement of the reasons for a decision that is made in the exercise of a discretionary power or adjudicative function."
>
> With regard to the Public Body's statement that s. 24(1)(a) and (b) apply to various records, the Applicant submits that the purpose of s. 24 and its application have been misconstrued. S. 24 is intended to cover "advice" to the Public Body, such that it can engage in a review of its programming, for example. It is not properly applied to determinations by the Public Body as to whether the Third Party is in compliance with the EPPA. It is submitted that consultations or deliberations involving the Third Party and regarding the Third Party, as opposed to consultations within the Public Body regarding matters specific to the Public Body and its programs, are not protected by s. 24.

Does section 24(1)(a) apply to the information withheld by the Public Body?

[para 168] 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 assists one to determine when advice, proposals, recommendations, analyses or policy options are "*developed by or for a public body*" within the terms of section 24(1)(a).

[para 169] 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 170] 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 171] Having reviewed all the information to which the Public Body applied section 24, I am unable to identify any information that is consistent with information falling within the terms of section 24(1)(a).

[para 172] The evidence of the records establishes that the Superintendent of Pensions was required to determine whether the pension plan was compliant with the terms of the EPPA. The records also establish that the Superintendent of Pensions appointed employees of the Public Body and members of an external accounting firm to

conduct an audit of the pension plan. These employees and external appointees also conducted interviews with members of the plan administrator and the plan's actuary. These interviews were clearly conducted for the purpose of determining whether the pension plan complied with the EPPA.

[para 173] The Public Body withheld information from an email prepared by a Boilermaker Plan Trustee (records 315 -316), an email prepared by the plan administrator's actuary (records 133 – 135), interviews with the members of the plan administrator, and charts documenting interviews with members of the plan administrator under section 24. It also withheld information from a document entitled the "draft management report".

[para 174] With regard to records 315 – 316, which consist of an email from a member of the plan administrator to the Superintendent of Pensions, I find that the purpose of the author was not to prepare advice for the Superintendent of Pensions. Rather, it was to clarify information provided in an earlier interview. It is not the function of a member of a plan administrator to advise the Superintendent of Pensions or the Public Body, and I find that the email did not serve this purpose. Similarly, the purpose of the recorded interviews was not to obtain the advice from members of the plan administrator, but to obtain information regarding the plan's compliance. The charts documenting questions and answers from the interviews (records 113 – 115 and 138 – 155) do not contain information subject to section 24(1)(a), and appear to have been developed as a means of keeping track of information obtained from the interview process.

[para 175] As I understand the Public Body's arguments, it takes the position that section 24(1)(a) applies to records 563 – 646 because these records contain a document to which it refers as "the draft management report" and which it argues is potentially inaccurate. It also submits that any information provided to the plan administrator, including the report that comprises records 563 – 646, was done so as to obtain input or response, and therefore falls within the terms of section 24(1)(a) for that reason.

[para 176] In turn, the Applicant argues that any information supplied or received from the plan administrator in the course of investigating the pension plan's compliance with the EPPA is not advice within the terms of section 24(1)(a). I agree.

[para 177] I find, based on the contents of the draft report, and the summary and minutes of a meeting discussing this report (records 650 – 664), that its presentation to the plan administrator was to further the Superintendent's goal of ensuring that the pension plan complied with the EPPA. Put simply, the Superintendent sought compliance with what he had decided.

[para 178] The Public Body argues that the plan administrator was provided with the draft report to provide input. Providing the report to the plan administrator did not bring the report or the other information within the scope of section 24(1)(a). As set out above, only advice, proposals, recommendations, analyses and policy options developed by or

for a public body fall within the terms of this provision. That information is provided to a third party for its input or response would not have the effect of transforming the information so provided into information falling within the terms of section 24(1)(a) if it did not already have this character. I will discuss below in my discussion of section 24(1)(b) whether this exchange of information may be considered a "consultation."

[para 179] It is not entirely clear from its arguments why the Public Body takes the position that the draft status of the report appearing on records 563 – 646 and the possibility that it contains inaccurate information brings the report within the terms of section 24(1)(a). However, it may be that it takes the position that if a reader were to see the draft report and a final report containing different content, the reader could draw conclusions regarding the differences and speculate as to why changes were made. In order F2012-06 at paragraphs 140 – 141 I considered this argument in relation to a draft report and said:

> 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.
>
> 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.

In any event, I am unable to say whether there are differences between the draft report and the report referred to as having been completed in 2011, as the report of 2011 has not been submitted for the inquiry.

[para 180] There are several reasons why a draft report may differ from a final report. The author may decide on his or her own volition to present information differently or to include other information, the author may be directed by a supervisor to make changes, or the author may seek the advice of others and act on that advice. Of these three possibilities, only the last could reveal information subject to section 24(1)(a), depending on the identities of the parties and the purpose in seeking advice. For this inquiry, I have not been told whether changes were made to the report or what such changes may have been. Given that there is more than one possibility as to why changes may be made, and given that I have not been presented with evidence that changes were actually made to this report, I am unable to conclude that disclosing the draft report would serve to reveal advice regarding changes. Finally, as discussed in Order F2012-06, the potential inaccuracy of information does not have the effect of transforming that information into advice, proposals, recommendations, analyses or policy options developed by or for a public body.

[para 181] It is not clear from the Public Body's submissions why it believes that information gathered as part of an audit would be advice, proposals, recommendations, analyses or policy options. It may be that the Public Body means that the information it gathered from the board of directors of the plan administrator is advice or recommendations made to the plan administrator as to what the Superintendent of Pensions should decide regarding pension plan compliance and falls under section 24(1)(a) for this reason. However, if that is the Public Body's argument, then it fails to meet the first aspect of the test set out in Order 96-006, which requires information to be "sought or expected, or be part of the responsibility of a person, by virtue of that person's position." It is not the function of the plan administrator to develop advice or recommendations as to the conclusions the Superintendent of Pensions should reach; moreover, it clear from the context created by the records that any information in them that was supplied to the Superintendent of Pensions was supplied because the Superintendent invoked his power under section 90 of the EPPA to conduct an oral interview with members of the board of directors in order to obtain information regarding the pension plan's compliance with the EPPA. Finally, the plan administrator is not a public body for which information that is the subject of section 24(1)(a) can be developed.

[para 182] It is also unclear to me why the Public Body takes the view that disclosing the interviews would "harm future plan examination processes", given that the Superintendent of Pensions has the statutory authority to compel production of records and to require parties to attend interviews of the kinds contained in the records under section 90 of the EPPA. As discussed by the Director of Adjudication in Order F2009-015, when a public body has the power to demand production of records, it is not open to it to argue that its ability to obtain information in the future will be harmed by disclosure.

[para 183] While it is true that the draft management report refers to "recommendations", it is clear that these recommendations are not steps that the Superintendent of Pensions was suggesting a public body should take, but rather, had decided that the plan administrator should take. As discussed in Orders F2008-028,

F2008-031, and F2012-10, although a decision may reflect the advice or recommendations on which it is based, a decision does not fall within the terms of sections 24(1)(a) or (b).. Records 647 and 648 establish that the board of directors of the plan administrator recognized the draft management report as a decision requiring action.

[para 184] I will now address the Applicant's argument that section 24(2)(b) applies to the draft management report. I am satisfied that the "draft management report" contains the reasons for a decision made in July 2008 by the Superintendent of Pensions in the exercise of a discretionary power or adjudicative function granted to the Superintendent under the EPPA. Although the draft management report may have been an interim decision, in the sense that some future report might have different content, reflecting actions or activities subsequent to its issuance, section 24(2)(b) does not exclude interim decisions from its scope. Moreover, the report was communicated to the plan administrator so that the plan administrator would be aware of what had been decided and take steps. The Superintendent's decision and the reasons for it are contained in the draft management report, which was communicated to the plan administrator. As a result, I agree with the Applicant that the draft management report is subject to section 24(2)(b).

[para 185] Given that I find that section 24(2)(b) applies to the draft management report, it follows that I find that it cannot be withheld under section 24(1)(a) for that reason as well.

Does section 24(1)(b) apply to the information withheld by the Public Body?

[para 186] In Order F2012-10, I found that sections 24(1)(a) and (b) apply to different kinds of information. I said:

> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.
>
> In my view, the test the former Commissioner developed to assist in determining whether advice, proposals, recommendations, analyses and policy options have been developed by or on behalf of a public body for the purposes of section 24(1)(a), is not useful in determining whether information is subject to section 24(1)(b). I say this because it does not make grammatical sense to suggest that a consultation or deliberation would be made to someone who can take an action, given that only the person charged with making a decision can consult or deliberate regarding it. Moreover, I find that the test, as the Public Body has stated it, for determining whether section 24(1)(b) applies is arguably too narrow. There is no requirement in section 24(1)(b) that a decision maker consult with only those whose delineated responsibility or duty it is to provide advice to that decision maker. A consultation or deliberation falls under section 24(1)(b) so long as one of the individuals enumerated in section 24(1)(b) consults or deliberates. However, unsolicited views regarding a decision will not fall under section 24(1)(b).

[para 187] The Public Body argues that section 24(1)(b) applies to the interviews it conducted with members of the board of directors of the plan administrator, which it characterizes as "consultations or deliberations". The Public Body did not explain what it means by "consultations and deliberations", but I infer from the information to which it applied section 24(1)(b) that it takes the position that a consultation or deliberation takes place whenever information is exchanged. However, as discussed in the foregoing excerpt, a consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits views regarding a decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action.

[para 188] For the interviews with the members of the board of directors of the plan administrator to amount to consultations, as the Public Body argues, I would have to find that the Superintendent of Pensions, who had the statutory responsibility of determining whether the pension plan was compliant with the EPPA, asked the plan administrator for its opinion as to what he should decide regarding compliance and interviewed the board of directors for that purpose.

[para 189] In my view, this argument is problematic for two reasons. First, the function of the Superintendent of Pensions in the EPPA is that of an independent, neutral investigator and decision maker. It would be inconsistent with this statutory function to consult with a party before him, such as the plan administrator, regarding a decision he had to make, when the plan administrator's activities regarding a pension plan are the subject of the investigation and subsequent decision. While I accept that the Superintendent of Pensions gathered evidence from the board of directors of the plan administrator, and that this evidence informed his decision, as this is borne out by the records, I am not prepared to accept, in the absence of evidence, that the Superintendent of Pensions consulted with the plan administrator as to what he should decide regarding its activities in relation to the pension fund prior to making a decision about those activities. While the Superintendent of Pensions invited input from the plan administrator, inviting parties to provide input – or even persuasive input or argument – is not the same thing as seeking their advice as to what should be decided. Second, the Public Body's argument is not borne out by the records. The evidence provided by the records is clear that the Superintendent of Pensions did not conduct interviews with members of the plan administrator in order to consult or deliberate regarding decisions he had to make, but rather to investigate compliance.

[para 190] Having reviewed the records to which the Public Body applied section 24, I am unable to identify any information consistent with information subject to section 24(1)(b).

Does section 24(1)(h) apply to the information withheld by the Public Body?

[para 191] I have already found that the report constitutes the reasons for a decision made in the exercise of discretionary power or adjudicative function within the terms of

section 24(2)(b). If a provision of section 24(2) applies to information, then it cannot be withheld under a provision of section 24(1). I therefore find that the draft report cannot be withheld under section 24(1)(h), even if I were to find that it fell within the terms of this provision. However, even if I found that section 24(2)(b) did not apply, I would not find that section 24(1)(h) applies in any event.

[para 192] The Public Body argues that the draft management report comprising records 563 – 646 is subject to section 24(1)(h) as it is a "draft audit report". The draft management report is dated July 2008.

[para 193] As cited above, section 24(1)(h) states:

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

[para 194] Even if I were to accept the Public Body's statement that the draft report is consistent with an audit report meeting the requirements of section 24(3) of the FOIP Act, (reproduced above), and I do not, I would find that the audit report does not fall within section 24(1)(h) for the reasons that follow.

[para 195] The Applicant states in his submissions that the report was finalized in 2011. It is not clear to me, as I have not been shown the report, that it is the final version of the draft report appearing in the records at issue. However, the Public Body also refers to the Superintendent's report having been completed in 2011 and indicates that the July 2008 draft report is an earlier version of this completed report.

[para 196] In Order F2010-036, I considered whether a draft version of a report can be withheld under section 24(1)(h) when a final version of the report has been completed. I said;

> The Public Body relies on the view that each draft of a formal research or audit report may be considered to be distinct from the final research or audit report. Therefore, even though the final report has been completed, and could not be withheld on the basis of section 24(1)(h), it reasons that earlier drafts of the report may be, as they remain incomplete. In essence, it takes the position that progress made on a subsequent draft, is not progress made on an initial draft. A contrary view would be that section 24(1)(h) protects the process of completing a formal research or audit report. As a result, progress may be seen to be made on a report through the creation of subsequent versions of a report, including the final report. However, once the formal audit or research report is complete, section 24(1)(h) may not be applied.
>
> I accept the Public Body's evidence that the final audit report, which is complete, contains more information than the draft versions it withheld. Therefore, the draft versions are incomplete, in the sense that they do not contain all the information in the final version. However, section 24(1)(h) refers to the completion of a formal *report*, not the completion of drafts of the report.

> When applying section 24(1)(h), the key point is to consider whether the report has been completed. Once the final version of the report has been completed, the report is no longer incomplete within the terms of this provision.
>
> Section 24(1)(h) cannot be applied to a report on which progress has not been made for over three years. In the case before me, if one is to consider the incomplete draft reports to be distinct from the final report, in the sense that completing the final version of a report does not amount to making progress on earlier versions, then the last dates on which progress was made on these reports was March 7, 2008 and March 31, 2008, as the Public Body indicates in its submissions. As a result, more than three years have now passed since progress was made on the draft reports, and section 24(1)(h) does not apply to the contents of reports on which progress has not been made for at least three years. While the Public Body argues that the information it severed under section 24(1)(h) is "clearly a working document and a work in progress" it is only clear that this information had that character in March 2008. It is difficult to imagine that that the Public Body would have made any recent progress in relation to those drafts, given its evidence that they lack the information that appeared in later versions, such as the final version, and it has already completed the final audit report.
>
> A difficulty with considering early drafts to be distinct from each other for the purpose of assessing whether progress has been made on them is that this interpretation would have the effect of undermining the purpose of section 24(1)(h). For example, if it took more than three years between creating an initial draft of a report and the final report, then the initial report could not be withheld under section 24(1)(h), even though a public body was still making progress on later versions of the report. However, the purpose of the provision, as discussed above, is to ensure that a public body may complete a formal research or audit report, free from the interference that could result if an incomplete draft were released.
>
> In my view, the better approach is to consider draft reports to be part of the process of creating the final audit report. As a result, progress made on a subsequent draft of a research or audit report, remains progress on the formal research or audit report contemplated by section 24(1)(h). Consequently, I find that further progress was made on the drafts withheld by the Public Body under section 24(1)(h) after March 2008. However, I also find that the Public Body's evidence establishes that it completed the audit report. Therefore, section 24(1)(h) cannot be applied to the contents of the draft reports, as the audit report is complete.

[para 197] The Public Body states that is has completed a final version of the draft report in its submissions. Consequently, following the rationale in Order F2010-036, it cannot withhold the draft report, as the report is now complete.

[para 198] Moreover, the Public Body has not provided me with evidence to establish that the "Draft Report" is not complete. While it refers to a report issued in 2011, I have not been told that there are any changes made to the report of 2011 such that it is different from the report of July 2008. Certainly, the Superintendent of Pensions contemplated that the 2008 report would stand unchanged, unless the plan administrator provided input. I have not been shown a copy of the 2011 report, nor have I been told what changes, if any at all, were made to the 2008 report. As a result, I am unable to conclude that the 2008 report is not, in itself, a complete report.

[para 199] To return to the point of whether the draft management report is an "audit report" within the terms of section 24(3) of the FOIP Act, I note that section 24(3) defines the term "audit" as a "financial or systematic examination or review of a program, portion of a program or activity." In the context of section 24, I find that the

programs or activities that can be the subject of an audit must be a public body's own programs or activities. I say this because all the other provisions of section 24 address situations where a public body gives or receives advice for its own purposes, programs or activities, or develops plans or proposals for its own programs or activities. Given its context, there is no reason to interpret section 24(1)(h) as intended to address situations other than when a public body conducts an audit in order to review, improve, or provide advice regarding its own programs or activities, when all other provisions of section 24 do not address such situations. The draft management report addresses the findings of an investigation of a program or activity other than the Public Body's own program or activity. I therefore find that it is not an audit report within the terms of section 24(1)(h).

[para 200] For all these reasons, I find that section 24(1)(h) does not apply to draft management report.

V. ORDER

[para 201] I make this Order under section 72 of the Act.

[para 202] I confirm the decision of the Public Body to withhold lines 30 – 32 on record 239, lines 4 – 15 on record 310, and lines 7 – 9 on record 366 under section 17.

[para 203] I order the Public Body to disclose all other information at issue to the Applicant.

[para 204] 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.

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Teresa Cunningham
Adjudicator