ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-23

August 9, 2013

CITY OF LETHBRIDGE

Case File Number F5720

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), the Applicant asked the City of Lethbridge (the "Public Body") for documents regarding its purchase of certain investments that became "frozen" in August 2007 when the market for them ceased functioning, for records dealing with the fact that the investment would not be fully redeemed at maturity, for documents reflecting the sale of the Public Body's investments, and for certain minutes of *in camera* meetings.

The Public Body gave the Applicant access to most of the requested information, but withheld portions of the meeting minutes under section 23 (local public body confidences) and section 24 (advice, etc.). The Applicant requested a review of the Public Body's decision to withhold the information, as well as a review of the adequacy of its search for responsive records. He also raised the possibility that disclosure of the withheld information was required under section 32 of the Act (disclosure in the public interest).

The Adjudicator found that the Public Body had made every reasonable effort to search for records responsive to the Applicant's access request, and had met its duty to assist the Applicant under section 10(1) of the Act.

The Adjudicator found that the Public Body had properly applied section 24(1) of the Act to some, but not all, of the information in the meeting minutes, as disclosure could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy

options developed by or for the Public Body, or consultations or deliberations involving its officers or employees.

The Adjudicator also found that the Public Body had properly applied section 23(1) of the Act to the same information in the meeting minutes, as disclosure could reasonably be expected to reveal the substance of deliberations of meetings of the Public Body's elected officials or governing body or committee of its governing body, the *Municipal Government Act* and FOIP Regulation authorized the holding of those meetings in the absence of the public, and the subject-matters of the deliberations were not considered in meetings open to the public.

The Adjudicator accordingly confirmed the decision of the Public Body to refuse the Applicant access to the information falling within the terms of sections 23(1) and 24(1) of the Act. Conversely, he required the Public Body to give the Applicant access to the information that did not fall within the scope of either of those sections.

Statutes and Regulation Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10(1), 17, 22(1), 23, 23(1), 23(1)(b), 23(2), 23(2)(a), 24, 24(1), 24(1)(a), 24(1)(b), 24(1)(b)(i), 24(2), 24(2)(b), 24(2)(f), 32, 32(1)(b), 71(1), 72, 72(2)(a) and 72(2)(b); *Municipal Government Act*, R.S.A. 2000, c. M-26, ss. 180, 181, 197, 197(2) and 250(2); *Freedom of Information and Protection of Privacy Regulation*, Alta Reg. 186/2008, ss. 18, 18(1), 18(1)(c), 18(1)(e) and 18(2). **CAN:** *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. **BC:** *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 12(1).

Orders Cited: AB: Orders 96-006, 97-007, 99-001, 2001-016, 2001-040, F2003-001, F2004-024, F2004-026, F2005-019, F2006-010, F2007-013, F2007-029, F2009-040, F2012-10 and F2012-17.

Cases Cited: BC: *Aquasource Ltd. v. British Columbia (Information and Privacy Commission)* (1998), 8 Admin. L.R. (3d) 236 (B.C. C.A.); *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112.

I. BACKGROUND

[para 1] The following excerpt from an information release, which was issued by the City of Lethbridge (the "Public Body" or the "City") on November 30, 2009, provides some necessary context for this inquiry:

> Prior to August 2007, the City invested a portion of it's [sic] portfolio in Asset Backed Commercial Paper (ABCP). These investments carried the highest short term rating of the Dominion Bond Rating Service – R1High. Investments with an R1 High rating are considered prime credit quality. In August 2007, the Canadian market for ABCP ceased functioning and the investments were frozen while the Pan Canadian Investors Committee attempted to restructure the investments. The City of Lethbridge held $30.2M or one tenth of 1% of the $32B in frozen ABCP investments nationwide.

> The ACBP restructuring led by Pan Canadian Investors Committee was successfully completed on January 21, 2009. As a result of the restructuring, the City of Lethbridge has received new replacement notes with the face value approximating the original ABCP investments in the amount of $30.2M.

[para 2] The Public Body's investments made in Asset Backed Commercial Paper were placed with the National Bank of Canada, although various other financial institutions had assisted other investors. After the investments became frozen by virtue of a "standstill agreement" under which investors agreed not to precipitate a default in any of the investments, the Pan-Canadian Investors Committee – also called the "Crawford Committee" – presented a plan of compromise and arrangement to investors in March 2008, as contemplated by the *Companies' Creditors Arrangement Act*, and in respect of which the investors voted in April 2008. The plan was approved by a majority of investors, and then sanctioned by the Ontario Superior Court of Justice in June 2008. There were then appeals by certain parties to the Ontario Court of Appeal and the Supreme Court of Canada, but they were not successful. Final completion of the creditors arrangement occurred in January 2009, as noted in the excerpt above.

[para 3] The Applicant explains that the arrangement included releases of liability of all financial institutions involved, including liability based on fraud. Having said this, there remained a "fraud carve-out" for investors who wished to pursue limited claims in fraud against investment dealers. The Public Body did not choose to rely on the fraud carve-out.

[para 4] In an undated Request to Access Information form (which was received by the Public Body on January 17, 2011, according to an Access Request Processing Summary), twenty-one individuals asked for records relating to the above matter under the *Freedom of Information and Protection of Privacy Act* (the "Act" or "FOIP Act"). They are represented in this review and inquiry by one particular individual (whom I shall call the "Applicant" in the singular, even though there is actually more than one applicant). The Request to Access Information form submitted by the Applicant in 2011 referred to and attached a similar form that had been submitted by his father in 2009, and the Applicant thereby repeated the access request that had been made by his father. The earlier access request had become the subject of an inquiry, but the inquiry was not concluded because the Applicant's father passed away partway through it.

[para 5] The repeated identical access request was as follows:

> *See attached letter for more complete descriptions of the 4 categories of records sought.*
>
> 1. *Documents respecting purchase of investments in what became known as the "frozen" asset investments – including original request for quotes, responses and slips reflecting investments.*
>
> 2. *Specific records "dealing" with notice of failure of maturity of notes as noted in attached letter*

3. *Sale of all investments between June 2007 and August 2008 with particulars*

4. *Minutes of City Council in camera dealing with notices and instructions.*

The attached letter referenced above was a letter that the Applicant's father had included at the time of his access request, which the Applicant re-included with his own access request. The letter clarified or narrowed what the Applicant's father, and now the Applicant, wanted to receive by way of the access request.

[para 6] By letter dated February 1, 2011, the Public Body gave the Applicant access to much of the requested information, but withheld the remaining information under section 17 (disclosure harmful to personal privacy), section 23 (local public body confidences) and section 24 (advice, etc.). It also indicated that there was no information responsive to item 3 of the access request reproduced above.

[para 7] In a form dated April 1, 2011, the Applicant requested a review of the Public Body's decision to withhold information, as well as a review of the adequacy of its search for responsive records. He also raised the possibility that disclosure was required under section 32 of the Act (disclosure in the public interest).

[para 8] The Commissioner authorized a portfolio officer to investigate and try to settle the matter. This was partly successful, in that the Public Body agreed to disclose the information that it had withheld under section 17 of the Act. As it continued to withhold information under sections 23 and 24, the Applicant requested an inquiry in a form dated June 29, 2011. A written inquiry was set down.

II. RECORDS AT ISSUE

[para 9] The records at issue consist of redacted portions of 20 pages of minutes of meetings of the Public Body's City Council and an Audit Committee of that Council. While these minutes were numbered pages 24 to 43 in the package of records released to the Applicant, I will refer to them as pages 1 to 20, as set out in the Index of Records prepared by the Public Body.

III. ISSUES

[para 10] The Notice of Inquiry, dated January 23, 2012, set out the following issues, although I have placed them in a slightly different sequence for the purpose of this Order:

> Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act?
>
> Did the Public Body properly apply section 24(1) of the Act (advice, etc.) to the information/records?
>
> Did the Public Body properly apply section 23(1) of the Act (local public body confidences) to the records/information?

Does section 32 of the Act require the Public Body to disclose the records/information in the public interest?

IV. DISCUSSION OF ISSUES

A. Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act?

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

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

[para 12] The Notice of Inquiry stated that the issue under section 10(1) of the Act was in relation to whether the Public Body conducted an adequate search for responsive records. A public body's duty to assist an applicant under section 10(1) includes the obligation to conduct an adequate search (Order 2001-016 at para. 13; Order F2007-029 at para. 50). The Public Body has the burden of proving that it conducted an adequate search, as it is in the best position to provide evidence of the adequacy of its search and to explain the steps that it has taken to assist the applicant within the meaning of section 10(1) (Order F2005-019 at para. 7; Order F2007-029 at para. 46).

[para 13] In his initial submission, the Applicant raised particular concerns. One of them was that the Public Body may have misunderstood the request for information set out in item 3 of the Applicant's access request. However, following the Public Body's explanation, the Applicant withdrew this concern. I will therefore deal with only the remaining ones.

[para 14] The letter included with the Applicant's access request indicated that he sought, in the context of item 2 on the Request to Access Information form, the "Record of the first notice that the investments purchased at discount would not be able to be fully redeemed at the maturity date (a letter or notation or other communication)". The Applicant believes that the Public Body overlooked the responsive record because the earliest record provided to him consists of minutes of the Audit Committee, dated September 6, 2007, yet the investments in question became frozen by virtue of the standstill agreement earlier in the summer, and the Crawford Committee issued a communiqué on August 16, 2007. He presumes that the communiqué reached the Public Body shortly afterwards, and that its receipt would have precipitated the creation of written records dealing with the matter.

[para 15] The Public Body responds that the communiqué issued by the Crawford Committee was in the form of a public release, not a communication to each investment holder. The Public Body says that its FOIP coordinator interviewed the City Treasurer, who indicated that he was directly and specifically notified about the frozen investments by telephone in August 2007, but that he created no written records at that time. As for

the Public Body's search, more generally, for records created prior to the meeting of the Audit Committee on September 6, 2007, the Public Body states that its FOIP Coordinator asked other City officials whether they had any responsive records, but they did not. The Public Body further explains that the first meeting of the Audit Committee, following the freezing of the investments in mid-August, was on September 6, 2007, at which time the City Treasurer reported on the matter and the first written record pertaining to it was created by the Public Body.

[para 16] I accept the Public Body's explanation regarding its search for the record of the first notice that the investments in Asset Backed Commercial Paper would not be able to be fully redeemed at the maturity date. Because the direct and specific notice to the Public Body was made verbally to the City Treasurer, and he did not record anything about that verbal notice, there is no responsive letter, notation or other communication in this regard.

[para 17] The Applicant questions why he did not at least receive a copy of the communiqué of August 16, 2007 in response to his access request, if that is also what alerted the Public Body to the frozen investments. The Public Body has a copy, as it provided one in the course of this inquiry. The Public Body responds that it considered it sufficient to provide the Applicant with a copy of its own news release of November 30, 2009, which I partly excerpted at the outset of this Order. That document included "frequently asked questions", one of which indicates that the Public Body became aware that its investments were at risk in August 2007. While it would have been more appropriate for the Public Body to disclose the actual communiqué of August 16, 2007 to the Applicant, I find that it made a reasonable effort to respond to the Applicant's request for information about the "first notice" openly, accurately and completely, as required by section 10(1). It provided a record indicating that the first notice was in August 2007.

[para 18] In short, the fact that the Public Body neglected to provide a copy of the communiqué in response to item 2 of the Applicant's access request does not mean that it failed to adequately search for records. Section 10(1) requires that a public body make every reasonable effort to locate responsive records, which does not require perfection (Order F2003-001 at para. 40).

[para 19] Another of the Applicant's concerns regarding the Public Body's search for records arises from the fact that he received more meeting minutes in response to his access request in 2011 than his father received in response to his identical access request in 2009. The Applicant submits that, if records were overlooked in 2009, the Public Body's system for locating responsive records must be flawed.

[para 20] The Public Body responds that the number of meeting minutes responsive to the 2009 and 2011 access requests differed because the Applicant neglected to include the third page of the letter that had been attached to his father's access request. The Public Body says that only the first two pages of that letter, which provided more complete descriptions of the four categories of records set out on the Request to Access Information form, were included with the Applicant's own access request. On the form,

item 4 referred broadly to the "Minutes of City Council *in camera* dealing with notices and instructions", whereas page 3 of the letter written by the Applicant's father described the records sought, as follows:

> *4. Minutes of the in camera meetings that originally discussed the freezing of the investment(s), and minutes of the in camera meeting that determined the approval of the Crawford and/or Pan Canadian Committee proposals to be presented to Ontario Courts. I am only interested in the first recorded minutes relating to the freezing of the investments – and in the second part, to minutes that reflect the necessary approval and vote of the City that was made in March or April of 2008. The original detailing of the investment maturity limitations would have been discussed in August, September or October.*

[para 21] I find that the foregoing narrowed the meeting minutes that were responsive to the access request of the Applicant's father, but not the Applicant's own access request. The Applicant suggests that he must have included page 3 of his father's letter with his own access request, given that the Public Body's response to him included a response to item 4, which is what appeared on page 3, as reproduced above. However, the Request to Access Information form also referred to item 4, meaning that there was nonetheless an item 4 in respect of which the Public Body could respond in the context of the Applicant's access request. Apart from noting the response to item 4 in the package released to him, the Applicant does not insist that he included page 3 of his father's letter with his own access request. I prefer to rely on what the Public Body states that it received (given that it is in possession of what it received) as opposed to what the Applicant may believe that he sent (which he no longer possesses, given that it was sent).

[para 22] Finally, the Applicant notes that some of the records provided to his father in 2009 differ in presentation from those provided to him. Specifically, the font and style of the headers of certain minutes are not the same, and some information disclosed to his father was redacted in the minutes provided to the Applicant. He acknowledges that the differences may not be meaningful, in that they may be the result of the way in which the records were copied, and the way in which they were redacted in order to withhold information unrelated to the access request.

[para 23] I find that the differences are indeed not meaningful. The substantive content of the meeting minutes disclosed to the Applicant's father (which the Applicant submitted for the purpose of this inquiry) is the same as that in the corresponding records at issue in this inquiry. The Public Body explains that there are differences in the font and style of certain headers because different staff responded to the two access requests. Some staff members print the minutes off with a City logo and stylized header, while others do not. As for the different redactions, the information disclosed to the Applicant's father, but not disclosed to him, is information that is really not responsive to either of the two access requests. For instance the words "Call to Order", which the Public Body was free to disclose to the Applicant's father even though not responsive, were not disclosed to the Applicant.

[para 24] I conclude that the Public Body met its duty to assist the Applicant under section 10(1) of the Act, and in particular, made every reasonable effort to search for records responsive to the Applicant's access request.

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

[para 25] Section 24 of the Act reads, in part, as follows:

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

[para 26] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 24.

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

[para 27] Section 24(2) of the Act states that section 24 does not apply to certain information, meaning that the Public Body cannot withhold that information in reliance on that section. The Applicant raises the possibility that sections 24(2)(b) and/or 24(2)(f) are engaged in this inquiry, but I find that they are not. On my review of the redacted portions of the meeting minutes, I find that there are no statements of the reasons for a decision that was made in the exercise of a discretionary power or an adjudicative function on the part of the Public Body. There is also no instruction or guideline that appears in the minutes and that was issued to the officers or employees of the Public Body. As discussed below, the minutes primarily summarize information provided by

City officials and questions raised by City Council or the Audit Committee. The Public Body notes that an instruction or guideline, which arose out of this matter and was eventually issued to its officers and employees, was a new Investment Policy. The Public Body included a copy with its submissions, but neither the policy nor a summary of it appears in the minutes themselves.

[para 28] The Public Body withheld all of the information at issue under both sections 24(1)(a) and 24(1)(b) of the Act. The respective tests for withholding information under these two sections have been summarized as follows:

> 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).
>
> (Order F2012-17 at para. 168)
>
> and
>
> 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.
>
> (Order F2012-10 at para. 37)

[para 29] The Public Body submits that the information that it withheld in the meeting minutes falls within the terms of section 24(1) on the basis that "Council was gathering,

analyzing, consulting, obtaining advice, discussing and deliberating in-camera to formulate an agreement with National Bank and to draft a new investment policy". The Applicant argues that it is unlikely that all of the withheld information is advice, etc., as much of it is presumably "mere" information.

[para 30] Indeed, section 24(1)(a) generally does not apply to the bare recitation of facts or summaries of information; these may only be withheld if they are sufficiently interwoven with information that constitutes advice, etc. so that they cannot reasonably be considered separate or distinct (Order 99-001 at paras. 17-18; Order F2007-013 at para. 108). These same principles apply in the context of consultations and deliberations under section 24(1)(b) (Order 96-006 at p. 10 or para. 50; Order F2004-026 at para. 78). Further, section 24(1) generally does not permit a public body to withhold the fact that advice was sought or given on a particular topic, or that consultations or deliberations on a particular topic took place; topics may only be withheld if their indication would, in and of itself, reveal the content of the advice or the content of the consultations or deliberations (Order F2004-026 at para. 71).

[para 31] I find that some of the information that the Public Body withheld in the meeting minutes consists of background facts, or mere indications of topics, which do not fall within the scope of section 24(1). The minutes themselves say that much of the information in them is being conveyed by various City officials by way of an "update", as "background", "for information only", as an "overview of the current status", or to "report" on events that have already occurred. At other times, the minutes note that a City official "advised" City Council of something, but the verb is often used in the sense of "informed". In all of the foregoing instances, no course of action is being suggested, but rather background facts and summaries of information are simply being conveyed. As noted by the Public Body itself, a compilation of facts is also not an "analysis", within the meaning of section 24(1)(a), but merely a first step that may subsequently form the basis of an analysis (Order 97-007 at para. 42).

[para 32] There is an instance on page 2 of the minutes where it is noted that certain "options" are being considered by the Public Body's Finance Department, but the options are not actually set out. I also find that the topic alone does not reveal what those options might be. On page 5 of the minutes, there is an indication that City Council discussed the "pros and cons" of two things, but those pros and cons are not listed (with one exception soon noted below). On page 6, there is a reference to the "reasons" for something, but again, those reasons are not actually provided. I accordingly find that the foregoing information generally does not fall within the terms of section 24(1). The exception on page 5 is that the last sentence withheld by the Public Body sets out a consideration of City Council in relation to one of the two topics being discussed, and it therefore reveals consultations or deliberations within the terms of section 24(1)(b).

[para 33] As noted in one of the excerpts above, neither section 24(1)(a) nor section 24(1)(b) applies so as to protect a final decision, but instead only the process by which a decision is made. In some portions of the minutes – as on page 3 (where "next steps" are listed), on page 9 (where a past action on the part of the City and a future action on the

part of the Mayor is noted) and on page 19 (where a consensus of the Audit Committee is indicated) – a decision or decided course of action is revealed, but no reasons for them or the manner in which they were reached is included in those particular portions of the minutes. Section 24(1) does not apply to the statements of the decisions or actions themselves. Having said this, one of the "next steps" set out on page 3 of the minutes (which step is repeated on page 18) is to evaluate two different options, and I find that the information about the two options falls within the scope of section 24(1)(a).

[para 34] There are instances on pages 3, 13 and 15 of the meeting minutes where questions are noted to have been raised by members of City Council or members of the Audit Committee, following the presentation by the particular City official. I find that the questions could reasonably be expected to reveal consultations or deliberations involving officers or employees of the Public Body, within the terms of section 24(1)(b)(i). The members of City Council or the Audit Committee, as the case may be, are consulting with the City officials and deliberating on what action to next take in relation to the particular topic under discussion.

[para 35] I similarly find that, in the second paragraph on page 19, the information reveals consultations or deliberations involving the Audit Committee and the City Treasurer, within the terms of section 24(1)(b)(i), with the exception of the first sentence in that paragraph. The first sentence merely reveals the topic under discussion, to which section 24(1) does not apply for reasons set out above.

[para 36] I also find that some of the information in the meeting minutes amounts to advice, proposals or recommendations within the terms of section 24(1)(a). Specifically, the information in the chart on page 2 sets out a proposal regarding the restructuring of the Public Body's investments, and the information in the first two bullets below the chart (but not in the third) reveals reasons for or against accepting the proposed restructuring. The foregoing also characterizes the information in the last paragraph on page 2, with the exception of the first sentence, which merely reveals a fact or topic. The information in several bullets on page 16, on the lower half of page 17 (with the exception of a sentence setting out mere facts) and in the second bullet on page 19 likewise falls within the scope of section 24(1)(a), for the reasons just set out.

[para 37] In the latter half of the paragraph redacted on page 11 of the minutes, there is an indication that the City Treasurer recommended a course of action to City Council in relation to the Public Body's investment policy, and the reasons for that recommendation follow. The information accordingly falls within the terms of section 24(1)(a).

[para 38] Finally, in the last paragraph on page 20, the meeting minutes reveal that the City Treasurer presented a particular proposal to the Audit Committee and the reasons for that proposal. The information in the paragraph falls within the terms of section 24(1)(a), with the exception of the first sentence, which merely reveals a background fact and topic, to which section 24(1) does not apply.

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

[para 39] I have found that some of the information in the records at issue falls within the terms of section 24(1) of the Act. The Public Body therefore had the discretion to withhold it in reliance on that section. In order to properly exercise discretion relative to a particular provision of the Act, a public body should consider the Act's general purposes, the purpose of the particular provision on which it is relying, the interests that the provision attempts to balance, and whether withholding the records would meet the purpose of the Act and the provision in the circumstances of the particular case (Order F2004-026 at para. 46).

[para 40] The Public Body says that, in deciding to withhold portions of the meeting minutes, it considered that disclosure would make future advice from City officials less candid and comprehensive, make future deliberations of City Council and its committees less frank, hamper the policy-making process, have a negative effect on the ability to develop and maintain strategies and tactics in the course of negotiations relating to the present and future similar matters, and undermine the ability to undertake administrative planning.

[para 41] The Applicant submits that the Public Body fails to provide any explanation or evidence to support its view that disclosure of the information at issue will have the foregoing consequences. He further argues that, once a decision is made and communicated, there is no longer any justification to withhold the advice, etc. that was in support of it.

[para 42] I find that the Public Body properly exercised its discretion when it refused to disclose the information that I have found to fall within the terms of section 24(1)(a) and 24(1)(b). One of the points of the exceptions to disclosure set out in those sections is to allow public bodies to make decisions without the public second-guessing those decisions or meticulously scrutinizing the process leading up to them. In this particular case, the matters being decided by the Public Body – such as how to reach an agreement with the National Bank, restructure its investments and formulate a new investment policy – were not trivial matters. On my review of the Public Body's submissions referenced above, I understand its preference to withhold the content of what City Council and the Audit Committee considered in making those decisions. This is not to say that there is anything troublesome about the information in the records; a public body also has the discretion to withhold information supporting and defending a decision. Moreover, once a public body makes a decision, it is entitled to communicate that decision and the reasons for it in a manner that it deems appropriate, without having to reveal every consideration that contributed to the decision.

[para 43] I conclude that the Public Body properly applied section 24(1) of the Act to the information that I have found to fall within the scope of that section.

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

[para 44] Section 23 of the Act reads, in part, as follows:

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

[para 45] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 23.

1. Does the information at issue fall within the terms of section 23(1)?

[para 46] Section 23(2)(a) of the Act states that section 23(1) does not apply if the subject-matter of the deliberation has been considered in a meeting open to the public. The Applicant argues that such was the case here, as the matter regarding the investments in Asset Backed Commercial Paper was considered at a public meeting sometime prior to July 28, 2008. He also submitted a copy of an audio recording of a question and answer session that occurred on January 15, 2009, at which the Mayor of the City answered questions from the public regarding the frozen investments.

[para 47] In my view, section 23(2)(a) does not operate so as to preclude the application of section 23(1) merely by virtue of the fact that the same topic or matter that was considered *in camera* was also considered in public. Section 23(2) exists so as to preclude a Public Body's reliance on section 23(1) when the substantive content of the deliberations in relation to the topic or matter has been considered in a meeting open to the public. To conclude otherwise would generally defeat the purpose of section 23(1). Many topics and matters discussed by city councils and their committees *in camera* are also discussed at city council meetings or other meetings open to the public. If section 23(2)(a) precluded the application of section 23(1) in such instances, section 23(1) would very rarely be available to a local public body. Its objective is to permit city councils and their committees to deliberate in private and confidentially, and to permit a local public

body to withhold the substance of those private and confidential deliberations. This is so, even if the general topic or matter was previously or is subsequently discussed openly.

[para 48] To put the point differently, the fact that the general subject-matter of something was discussed publicly does not preclude the application of section 23(1) to the more specific subject-matter of the deliberations in relation to that something, which deliberations include a consideration of the reasons for making a decision, the pros and cons of a course of action, or other details in relation to the particular subject-matter (see Order F2009-040 at para. 37).

[para 49] Given the forgoing, the fact that the topic of the Public Body's investments in Asset Backed Commercial Paper was addressed at a public meeting as early as July 28, 2009 does not mean that section 23(2)(a) is triggered. Similarly, my review of the audio recording of the public meeting on January 15, 2009 does not persuade me that the Public Body cannot rely on section 23(1) by virtue of section 23(2)(a). Merely discussing a topic, providing information about it or responding to questions about it is not the same as conveying the deliberations in relation to the topic, such as those revealing the reasons for or against a decision or action, how the pros and cons were weighed, and the like. In this particular case, the audio recording indicates that the Mayor deliberately refused to respond to questions that would reveal the deliberations of City Council, such as those regarding the ongoing negotiations with the National Bank.

[para 50] Turning to the application of section 23(1), the Public Body specifically relied on section 23(1)(b), and applied it to all of the information that it withheld in the meeting minutes. For information to fall within the scope of section 23(1)(b), each of the following questions must be answered in the affirmative:

> (i) Was there a meeting of elected officials, a governing body or a committee of a governing body of a local public body?
>
> (ii) Does an Act, or a regulation under the FOIP Act, authorize the holding of that meeting in the absence of the public?
>
> (iii) Could disclosure of the information reasonably be expected to reveal the substance of deliberations of that meeting?
>
> (Order F2009-040 at para. 38, citing Order 2001-040 at para. 9)

I will answer each of the above questions in turn.

> *Was there a meeting of elected officials, a governing body or a committee of a governing body of a local public body?*

[para 51] The Public Body is a "local public body" under the Act, and the records at issue arose out of meetings of its elected officials or governing body (i.e., City Council) and meetings of a committee of its governing body (i.e., the Audit Committee). The above question is accordingly answered in the affirmative.

Does an Act, or a regulation under the FOIP Act, authorize the holding of that meeting in the absence of the public?

[para 52] Section 18 of the *Freedom of Information and Protection of Privacy Regulation* (the "FOIP Regulation") reads, in part, as follows:

> *18(1) A meeting of a local public body's elected officials, governing body or committee of its governing body may be held in the absence of the public only if the subject-matter being considered in the absence of the public concerns*
>
> *…*
>
> *(c) a proposed or pending acquisition or disposition of property by or for a public body,*
>
> *…*
>
> *(e) a law enforcement matter, litigation or potential litigation, including matters before administrative tribunals affecting the local public body, or*
>
> *…*
>
> *and no other subject-matter is considered in the absence of the public.*
>
> *(2) Subsection (1) does not apply to a local public body if another Act*
>
> *(a) expressly authorizes the local public body to hold meetings in the absence of the public, and*
>
> *(b) specifies the matters that may be discussed at those meetings.*

[para 53] Consistent with section 23(1)(b) of the Act, and part (ii) of the test for withholding information under that section, section 18(2) of the FOIP Regulation allows another Act to set out the authority for a local public body to hold meetings in the absence of the public. In this inquiry, the Public Body cites section 197 of the *Municipal Government Act* (the "MGA"), which reads as follows:

> *197(1) Councils and council committees must conduct their meetings in public unless subsection (2) or (2.1) applies.*
>
> *(2) Councils and council committees may close all or part of their meetings to the public if a matter to be discussed is within one of the exceptions to disclosure in Division 2 of Part 1 of the Freedom of Information and Protection of Privacy Act.*
>
> *(2.1) A municipal planning commission, subdivision authority, development authority or subdivision and development appeal board established under Part 17 may deliberate and make its decisions in meetings closed to the public.*

(3) When a meeting is closed to the public, no resolution or bylaw may be passed at the meeting, except a resolution to revert to a meeting held in public.

[para 54] Section 197(2) of the MGA refers to the division of the FOIP Act containing section 23 of the FOIP Act, which in turn refers to the FOIP Regulation. In so doing, section 197(2) of the MGA incorporates the requirements for holding an *in camera* meeting already set out in section 18(1) of the FOIP Regulation. In addition to this, section 197(2) of the MGA permits an *in camera* meeting if the information relating to the matter to be discussed falls within any of the other exceptions to disclosure in Division 2 of Part 1 of the FOIP Act, being those set out in sections 16 through 29. In this particular case, the only other relevant exception to disclosure, as raised by the Public Body, is that set out in section 24.

[para 55] In the previous section of this Order, I concluded that some of the information at issue did not fall within the exception to disclosure set out in section 24 of the FOIP Act, meaning that the Public Body cannot, in turn, withhold that same information in reliance on section 23 of the FOIP Act in conjunction with section 197 of the MGA, in so far as section 24 of the FOIP Act is concerned. Conversely, I concluded that some information at issue fell within the exception to disclosure set out in section 24 of the FOIP Act, meaning that the Public Body can also withhold that same information in reliance on section 23 of the FOIP Act in conjunction with section 197 of the MGA. In other words, I have already addressed the extent to which section 24 of the FOIP Act permits the Public Body to also withhold the information at issue under section 23. The question at this point is whether there is additional information that the Public Body may withhold in reliance on section 23.

[para 56] Any ability for the Public Body to withhold additional information, on the basis of authority to hold a meeting in the absence of the public, would come from section 18(2) of the FOIP Regulation, as reproduced above.

[para 57] I find that City Council and the Audit Committee were discussing subject-matters set out in sections 18(1)(c) and 18(1)(e) of the Regulation. They were discussing a proposed or pending acquisition or disposition of property (i.e., disposition of the investments made in Asset Backed Commercial Paper and acquisition of investments to replace them), as well as litigation or potential litigation (i.e., in the context of the creditors' arrangement before the courts). I accordingly find that City Council and the Audit Committee had the authority to discuss the foregoing matters *in camera*, in addition to discussing matters involving information to which section 24(1) applies.

[para 58] The Applicant argues that City Council and the Audit Committee did not properly exercise their discretion when they decided to hold their respective meetings *in camera*. While I have jurisdiction to review the Public Body's exercise of discretion to withhold information, I have no jurisdiction to review the exercise of discretion to hold meetings *in camera*. With respect to the meetings, I only have the ability to decide whether there was authority to hold them in the absence of the public. I find that there was such authority.

Could disclosure of the information reasonably be expected to reveal the substance of deliberations of that meeting?

[para 59] Part (iii) of the test for withholding information under section 23(1)(b) of the Act is that disclosure of the information must reasonably be expected to reveal the substance of deliberations of the particular meeting. As for the meaning of "substance of deliberations", the Public Body cites the British Columbia Court of Appeal decision in *Aquasource Ltd. v. British Columbia (Information and Privacy Commission)* (1998), 8 Admin. L.R. (3d) 236 (B.C. C.A.). That case dealt with section 12(1) of British Columbia's *Freedom of Information and Protection of Privacy Act*, which is analogous to section 22(1) of Alberta's FOIP Act (Cabinet and Treasury Board confidences), as opposed to section 23(1). However, all three of the aforementioned sections use the same phrase "substance of deliberations", so I consider the comments in the *Aquasource* decision to be relevant for the purpose of interpreting section 23(1) of Alberta's FOIP Act. The Court stated the following (at paras. 38-39):

> The interpretation of s. 12(1) for which Aquasource contends is well expressed in Mr. Grant's speaking notes, pertinent excerpts of which are reproduced verbatim below:
>
> > It is submitted that the phrase "substance of deliberations" on its ordinary and natural interpretation must mean the essence or core content of the deliberations which would be the actual views, opinions, thoughts, ideas and concerns of the members of the cabinet.
> >
> > It is submitted that if the legislature had intended some other meaning, and had wished to capture information which would reveal simply the matters presented to cabinet, the legislature would have used very different language than "substance of deliberations". It could for instance have used the expressions "would reveal the topics, issues, matters or subjects presented to the executive council for its deliberation".
> > …
> >
> > The fact that the legislature specifically restricted the obligation not to disclose to "information that would reveal the substance of deliberations of the executive council" suggests that the legislature intended the restriction under section 12(1) to be a narrow one limited to documents that would actually reveal the views of cabinet.
> > …
>
> I do not accept such a narrow reading of s. 12(1). Standing alone, "substance of deliberations" is capable of a range of meanings. However, the phrase becomes clearer when read together with "including any advice, recommendations, policy considerations or draft legislation or regulations submitted ....". That list makes it plain that "substance of deliberations" refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision. An exception to this is found in s. 12(2)(c) relating to background explanations or analysis which I will discuss later.

[para 60] The foregoing stands for the proposition that mere indications of topics and issues discussed can form part of the substance of deliberations. However, the conclusion reached in the *Aquasource* decision was subsequently questioned by the British Columbia Supreme Court in *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner),* 2011 BCSC 112 (see paras. 53-61). In the latter case, the Court wrote as follows (at paras. 94-97):

> The OP [Office of the Premier of British Columbia] submits that the records at issue that identify the topics of discussion of the committees would allow someone to draw an accurate inference about the "substance of deliberations" of Cabinet or a Cabinet committee.
>
> The IPC [Information and Privacy Commissioner] Delegate concluded that the severed words do not consist of "descriptions" of the issues or topics of discussion, but are "a barebones series of subjects or agenda items". She concluded that there is no "substance" to them and that they reveal no "deliberations".
>
> The OP submits that the headings describe the specific issues to be discussed and therefore reveal the substance of deliberations. Having reviewed the records in dispute, I cannot agree with that submission. In my view, the IPC Delegate's characterization that "there is no 'substance' to them and they reveal no 'deliberations'" is reasonable.
>
> In my view, the conclusion of the IPC Delegate, that headings that merely identify the subject of discussion without revealing the "substance of deliberations" do not fall within the s. 12(1) exception, was a reasonable decision. I can find no reviewable error with regard to Order F08-17.

[para 61] The *British Columbia (Attorney General)* decision approves an approach by which mere indications of topics and issues discussed may not be withheld as part of deliberations unless their disclosure would permit a reader to draw an accurate inference about the substance of the deliberations. For the purpose of Alberta's legislation, I prefer this approach. In my view, the "substance" of deliberations refers to more than merely a topic or issue being discussed, in that it refers to the views, advice, recommendations, pros and cons, reasons, rationales, etc. that were conveyed and considered in relation to the topic or issue.

[para 62] The foregoing also accords with this Office's interpretation of section 24(1)(b), which uses the same term "deliberations". As noted earlier in this Order, section 24(1)(b) does not permit a public body to withhold the fact that consultations or deliberations on a particular topic took place; topics may only be withheld if their indication would, in and of itself, reveal the content of the consultations or deliberations (Order F2004-026 at para. 71).

[para 63] Also consistent with this Office's interpretation of "deliberations" within the terms of section 24(1)(b), I find that section 23(1)(b) does not apply to merely factual information unless it reveals the substance of the deliberations. A similar conclusion was

reached in the *Aquasource* decision (at para. 50). The Court noted that background information cannot be withheld as part of the substance of deliberations unless interwoven with that substance.

[para 64] Finally, the substance of a deliberations, within the terms of section 23(1)(b) of the Act, does not include information revealing a decision that has been made. Deliberations are what lead up to a decision and are not the decision itself.

[para 65] Given my interpretation of the scope of section 23(1)(b), I find that there is no additional information to which the section applies in the meeting minutes at issue in this inquiry. In other words, section 23(1) applies, and applies only, to all of the same information to which I found that section 24(1) applied in the preceding section of this Order. In short, the exceptions to disclosure set out in section 23(1)(b) on one hand, and sections 24(1)(a) and 24(1)(b) on the other, are very similar. While section 24(1) allows a public body to withhold information in order to protect a decision-making process involving information developed by or for it, or one involving its officers and employees, section 23(1) allows a local public body to withhold information to protect a decision-making process involving its elected officials, governing body or committee of its governing body.

[para 66] The sets of information to which sections 23(1) and 24(1) apply in this particular inquiry are co-extensive for a few reasons. First, section 197(2) of the *Municipal Government Act* permits information that may be withheld under section 24 to also be withheld under section 23. Second, in this particular case, the subject-matters of the advice, etc. that was provided within the terms of section 24(1)(a), and the subject-matters of the consultations and deliberations that occurred within the terms of section 24(1)(b), are those set out in sections 18(1)(c) and 18(1)(e) of the FOIP Regulation, allowing the Public Body to also withhold the substance of those deliberations under section 23(1)(b). In a different case, there might be information that can be withheld under section 24(1)(a) or 24(1)(b), but not under section 23(1)(b), because the topic under discussion does not fall within the terms of section 18(1) of the FOIP Regulation, or within the terms of another Act setting out the topics that may be discussed *in camera* for the purposes of section 23(1)(b). Third, in this particular case, the consultations and deliberations that occurred within the terms of section 24(1)(b) involved officers and employees of the Public Body who were present at the meetings in question. In a different case, where a local public body's elected officials, governing body or committee of its governing body deliberates without the involvement of any officers or employees, section 23(1)(b) might be available in order to withhold the substance of those deliberations, but not section 24(1)(b)(i).

[para 67] As for information that may be withheld under section 24(1)(a) in a given case, I would say that it can virtually always also be withheld under section 23(1), provided that the other requirements of section 23(1) are met (i.e., an *in camera* meeting of one of the listed groups in order to discuss an authorized subject-matter). This is because section 24(1)(a) requires only that the advice, etc. be "developed by or for a public body", which includes a local public body, and there is no requirement in section

24(1)(a) that officers or employees be involved. As may be taken from my comments above, I also consider advice, etc. provided to a local public body's elected officials, governing body or committee of its governing body to fall within the scope of "substance of deliberations" within the terms of section 23(1)(b), as the advice, etc. sets out reasons for or against an action or decision, which the elected officials, governing body or committee would be considering as part of its deliberations.

[para 68] The Applicant argues that any substantive action taken by City Council or the Audit Committee in the course of their *in camera* meetings cannot properly be withheld in reliance on section 23(1) of the Act because sections 180 and 181 of the *Municipal Government Act* state that a city council may only act by resolution or bylaw, and that all resolutions and bylaws must be passed in meetings held in public. This observation does not affect any of my conclusions. First, the "Actions" taken by City Council, as noted in the portions of the meeting minutes that follow that heading, were disclosed to the Applicant (and the Actions were not substantive, in that they were to set agenda items, proceed to a public meeting, and refer a matter to the Audit Committee). As for other information in the minutes of the meetings of both City Council and the Audit Committee, which conveys substantive action of an administrative nature (i.e., information not appearing in the part of the minutes indicating "Action" to be taken by City Council), I have found that this information cannot be withheld under section 23(1) in any event. The information indicates a decision made, not the substance of any deliberations leading up to it.

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

[para 69] As with section 24(1), section 23(1) of the Act sets out a discretionary exception to disclosure. The Applicant argues that the Public Body improperly exercised its discretion to withhold information under section 23(1) because it did so simply on the basis that meetings were held *in camera*, without regard to the information itself. He says that transparency should trump secrecy.

[para 70] Given the similarity of the exceptions to disclosure set out in section 23(1) and 24(1), the Public Body's submissions regarding its exercise of discretion to withhold information under section 24(1) may be extended to its exercise of discretion to withhold information under section 23(1). For the same reasons that I set out in the context of section 24(1), I conclude that the Public Body properly applied section 23(1) to the information in the meeting minutes that I have found to fall within the scope of that section.

D. Does section 32 of the Act require the Public Body to disclose the records/information in the public interest?

[para 71] Section 32 reads, in part, as follows:

32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant

…

(b) information the disclosure of which is, for any other reason, clearly in the public interest.

[para 72] The Applicant bears the burden of establishing that section 32 applies in this inquiry, in that he must show that the public interest in disclosure of the requested information overrides the public interest that the Act has recognized by way of the applicable exceptions to disclosure (Order F2006-010 at para. 31).

[para 73] The Applicant argues that the records that he has requested should be disclosed in the public interest on the basis that they relate to the expenditure of public funds, the investments formed a significant part of the Public Body's total assets and represented almost half of its total annual tax base, the investments were arguably unlawful in that they were not properly issued or guaranteed in accordance with section 250(2) of the *Municipal Government Act*, and there was arguably a serious misapplication of public funds in this case. He submits that disclosure of the records at issue will shed light on whether the Public Body might have resolved or settled the matter differently (e.g., by taking advantage of the "fraud carve-out") as well as assist in preventing similar financial disasters in the future.

[para 74] The Public Body responds that the Applicant merely suggests that the investments were unlawful and that there was a serious misapplication of public funds. It argues that he has presented no evidence to establish that there was actual illegality or any other circumstance warranting disclosure in the public interest. The Applicant counters with a reference to the Yukon Territory, in which similar investments were found not to comply with legislative requirements.

[para 75] For section 32(1)(b) to apply, there must be circumstances *compelling* disclosure, or disclosure *clearly* in the public interest, as opposed to a matter that may be of interest to the public (Order F2004-024 at para. 57). My review of the remaining information at issue in the meeting minutes does not lead me to conclude that any of it should be released on the basis that there is a clear or compelling public interest in disclosure.

[para 76] Insofar as the investments in question may have been unlawful or amount to a misapplication of public funds, the information in the meeting minutes reveals how the Public Body dealt with the investments after they were frozen, not how it first decided to make them. In other words, the records at issue will not shed light on the origin of any possible illegality. As for revealing whether the Public Body might have dealt with the frozen investments differently, I find that there is already sufficient information in the public domain so as to satisfy the public interest in disclosure. This information includes that set out in the Public Body's news release of November 30, 2009, the answers

provided by the City's Mayor in the audio recording of the public meeting on January 15, 2009, the contents of the Settlement Agreement with the National Bank, which the Public Body released, and general information about the creditor's arrangement and the nature of the fraud carve-out, which the Applicant already knows. Moreover, in the course of this inquiry, I have decided that additional information in the various meeting minutes should be released to the Applicant, which will further satisfy the public interest.

[para 77] I conclude that section 32 of the Act does not require the Public Body to disclose any additional information in the records at issue.

V. ORDER

[para 78] I make this Order under section 72 of the Act.

[para 79] I find that the Public Body met its duty to assist the Applicant under section 10(1) of the Act, and in particular, made every reasonable effort to search for records responsive to the access request.

[para 80] I find that the Public Body properly applied section 24(1) of the Act to some, but not all, of the information at issue, as disclosure could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for the Public Body, or consultations or deliberations involving its officers or employees.

[para 81] I also find that the Public Body properly applied section 23(1) of the Act to some, but not all, of the information at issue – being the same information to which it properly applied section 24(1) – as disclosure could reasonably be expected to reveal the substance of deliberations of meetings of the Public Body's elected officials or governing body or committee of its governing body, the *Municipal Government Act* and FOIP Regulation authorize the holding of those meetings in the absence of the public, and the subject-matters of the deliberations were not considered in meetings open to the public.

[para 82] Under section 72(2)(b) of the Act , I confirm the decision of the Public Body to refuse the Applicant access to the following information in the records at issue:

- the information in the chart on page 2, along with the information in the first two bullets below the chart;
- the last paragraph on page 2, with the exception of the first sentence;
- the information in the first bullet under the heading "Evaluate Options" on page 3;
- the information in the bullets under the heading "Questions" on page 3;
- the last sentence withheld on page 5;
- the information in the latter half of the paragraph withheld on page 11 (the information begins with the words "He advised…");
- the information in the bullets under the words "Some question arose concerning" on page 13;
- the information in the bullets under the words "Some question arose concerning" on page 15;

- the information in the 8th to 13th and in 15th to 17th bullets on page 16;
- the information in the last four paragraphs on page 17 (the information begins with "Under the…"), with the exception of the first sentence of the third-to-last paragraph (the sentence begins with "City representatives…");
- the information in the first bullet on page 18;
- the information in the second bullet on page 19;
- the information in the second paragraph on page 19, with the exception of the first sentence (the information that may be withheld begins with the words "If the…"); and
- the information withheld in the last two sentences on page 20 (the information begins with the words "It is proposed…").

[para 83] Under section 72(2)(a) of the Act , I require the Public Body to give the Applicant access to the remaining information that it withheld in the records at issue.

[para 84] I find that section 32 of the Act does not require the Public Body to disclose additional information in the records at issue, as it is not clearly in the public interest.

[para 85] I order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Wade Raaflaub
Adjudicator