

## **ALBERTA**

### **OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER**

#### **ORDER F2014-18**

April 29, 2014

#### **ALBERTA HEALTH**

Case File Numbers F6003 & F6004

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** A former employee of Alberta Health (the Public Body) made two access requests to her former employer under the *Freedom of Information and Protection of Privacy Act* (FOIP Act). One request was for records relating to her interview for a different position, including questions, answers and scoring. The second request was for information in the Applicant's Human Resources file, including formal and informal notes, emails, phone calls and logs regarding her work performance, YouTube videos, information related to her termination from the Public Body and Alberta Justice, the appeal of her termination, as well as the reasons for her termination.

Regarding the first request, the Public Body decided, in the course of the inquiry, to provide the Applicant with the 8 responsive pages of records in their entirety.

Regarding the second request, the Public Body provided partial access to 144 pages of the Applicant's employment-related records. It relied on section 17 (disclosure harmful to personal privacy), section 19 (confidential evaluations), section 20 (harm to law enforcement), section 24 (advice from officials) and section 27 (privileged information) to partially sever and withhold information in the records. In the course of the inquiry the Public Body located a further 190 pages of responsive records, which had been maintained by another public body (Service Alberta); information from two pages was partially severed and withheld under section 17.

The Applicant requested a review of the Public Body's decision, as well as a review of its response under section 10(1).

The Adjudicator determined that as the Public Body had failed to locate the records maintained by another public body until more than two years after the Applicant made her access request, the Public Body had failed to fulfill its duty under section 10(1). However, the Adjudicator also determined that the Public Body had ultimately performed an adequate search for records.

The Adjudicator found that the Public Body properly applied section 17 to information in the records in most instances; however, it withheld more information than was necessary in some cases. The Adjudicator also found that section 24(1) applied to some, but not all information withheld under that exception. She ordered the Public Body to reconsider whether to withhold the information to which section 24(1) applied by taking into account factors that weigh in favour of disclosure.

The Adjudicator determined that section 27(1)(a) applied to some information in the records and that the Public Body properly exercised its discretion to withhold that information.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 10, 17, 19, 20, 24, 27, 71, 72.

**Authorities Cited: AB:** Orders 96-006, 96-012, 96-020, 97-006, 97-007, 99-013, 2000-029, F2002-008, F2004-003, F2004-026, F2006-030, F2007-014, F2007-029, F2008-012, F2008-020, F2008-028, F2008-031, F2008-032, F2009-017, F2010-007, F2010-036, F2011-R-001, F2012-06, F2012-08, F2012-10, F2013-13.

**Cases Cited:** *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), 2010 SCC 23. *Solosky v. The Queen* [1980] 1. S.C.R. 821.

## I. BACKGROUND

[para 1] A former employee of Alberta Health (the Public Body) made two access requests to her former employer under the *Freedom of Information and Protection of Privacy Act* (FOIP Act). One request was for records relating to her interview for a different position, including questions, answers and scoring. The second request was for information in the Applicant's Human Resources file, including formal and informal notes, emails, phone calls and logs regarding her work performance, YouTube videos, information related to her termination from the Public Body and Alberta Justice, the appeal of her termination, as well as the reasons for her termination.

[para 2] Regarding the first request, the Public Body withheld records related to the Applicant's interview under section 19 (confidential evaluations) and section 26 (testing procedures, tests and audits) of the Act. However, in its initial submission the Public Body stated that it had decided to provide the Applicant with the 8 responsive pages of records in their entirety.

[para 3] Regarding the second request, the Public Body provided partial access to 144 pages of the Applicant's employment-related records. It relied on section 17 (disclosure harmful to personal privacy), section 19 (confidential evaluations), section 20 (harm to law enforcement),

section 24 (advice from officials) and section 27 (privileged information) to partially sever and withhold information in the records. In the course of the inquiry the Public Body located a further 190 pages of responsive records, which had been maintained by another public body (Service Alberta); information from two pages was partially severed and withheld under section 17.

## **II. RECORDS AT ISSUE**

[para 4] The records at issue consist of the withheld portions of the 144 pages initially provided in response to the Applicant's request, as well as information severed from 2 of the 190 pages provided in the course of the inquiry.

## **III. ISSUES**

[para 5] The issues as set out in the Notice of Inquiry are as follows:

- 1. Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?**
- 2. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?**
- 3. Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the information in the records?**
- 4. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?**
- 5. Did the Public Body properly apply section 26 of the Act (testing procedures, tests and audits) to the information in the records?**
- 6. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?**

[para 6] The Public Body states in its submissions that it provided the Applicant with all the information previously withheld under section 26; therefore that exception is no longer at issue. As the records indicated that the Public Body had also relied on section 20(1)(d) to withhold information in the records, by letter dated January 30, 2014, I added the following issue:

**Did the Public Body properly apply section 20(1)(d) of the Act (disclosure harmful to law enforcement) to the information in the records?**

[para 7] The issues to be discussed in this Order are therefore as follows:

- 1. Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?**

2. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?
3. Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the information in the records?
4. Did the Public Body properly apply section 20(1)(d) of the Act (disclosure harmful to law enforcement) to the information in the records?
5. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?
6. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

[para 8] I will also briefly address why the findings from the investigation conducted by this Office are not brought forward into the inquiry.

#### **IV. DISCUSSION OF ISSUES**

*An inquiry is a de novo process*

[para 9] In her submissions, the Applicant states that the Public Body knows of or located a further 4000 pages of records that it has not provided to the Applicant. The Applicant states that she was told about these records by the officer from this Office who conducted the investigation that preceded this inquiry. She indicates that this should be considered as evidence that the Public Body has not provided her with all responsive records.

[para 10] The Public Body correctly points out that the inquiry is a *de novo* process, and that the findings of the officer are not brought forward into the inquiry. An inquiry is not an appeal or review of the officer's findings, but rather is a new process, which is separate and distinct from an investigation that, by its very nature, is conducted without prejudice to the rights of the parties if the issues remain unresolved. Submissions and evidence made to the officer are not brought forward into the inquiry process. Further, the officer's findings are not considered in an inquiry. I do not know what was said by the officer to the Applicant regarding a further 4000 pages of records, and I have no evidence before me indicating that these records exist.

#### **1. Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?**

[para 11] Section 10(1) of the Act states:

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

[para 12] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the Applicant (see Order 97-006, at para. 7).

[para 13] There are two components of an adequate search:

- a) Every reasonable effort must be made to search for the actual record requested; and
- b) The applicant must be informed in a timely fashion about what has been done. (See Order F2009-017, at para. 53)

*Public Body's search for records*

[para 14] In Order F2007-029, the Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

In general, evidence as to the adequacy of a search should cover the following points:

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

[para 15] The Public Body states that the Applicant's request was sent to all divisions within the Public Body, as well as the Deputy Minister's office. The search included computer systems and servers, as well as the physical premises of the HR area, the Health Information Technology branch (HITS), the Assistant Deputy Minister's office and the Deputy Minister's office, which were most likely to have records of an HR nature regarding the Applicant. Electronic searches used the Applicant's name as the keyword. Responsive records were located in HITS, the HR area, and the Deputy Minister's office.

[para 16] The Applicant argues that more responsive records ought to exist. She states that she reported to a manager in the Project Management Office for two years and as such, the responsive records ought to have included emails from her account. She further states that a Public Body employee told the Applicant that this manager "deleted all information from her workstation with [the Applicant's] name on it at the time that FOIP request was sent to [the executive director]."

[para 17] The Public Body responded that the Applicant was supervised on a particular project by a manager in the Project Management area but continued to report to the director; therefore the manager did not have “managerial responsibility” of the Applicant. However, it also stated that this manager signed off on the Applicant’s 2009-2010 performance contract (which was located and provided to the Applicant with the records from Service Alberta). The Applicant argues that it is nonsensical to state that the Applicant did not report to this manager *and* that the manager was responsible for signing off on one of the Applicant’s performance contracts.

[para 18] I agree that it might be unusual for a performance contract to be signed by someone other than the person to whom an employee reports. Nevertheless, for the reasons that follow, I accept the reasons provided by the Public Body as to why no more records exist relating to the Applicant’s interactions with the Project Management manager.

[para 19] The Applicant argues, with respect to the manager, that emails between the Applicant and the manager ought to have been located; however, the Public Body points out that the Applicant’s request included only records of a human resources nature, and not records relating to the Applicant’s actual work. This point is also relevant to the Applicant’s argument that more records ought to exist because she was the “highest email user in the Ministry.” Records relating to the Applicant’s fulfilling her job duties are not responsive to her request, and as such, the Public Body had no duty to provide her with emails she sent or received in the course of performing her job (that were not related to her request).

[para 20] Regarding the alleged deletion of records by the Project Management manager, the Public Body had another search performed of the manager’s archived emails during the course of this inquiry. The IT area searched the archived (and current) emails of this manager, for “any e-mail and e-mail attachments that would refer to personal information related to [the Applicant].” This included emails and attachments that are “job related” to the Applicant, or that reference her position number and title, and her name. No further records were found. Furthermore, the deletion of records that were not responsive to a request would not be an issue in this inquiry in any event.

[para 21] I note that the email from the IT employee describing the search (provided to me by the Public Body) indicates that the IT employee spelled the Applicant’s last name incorrectly in its search. However, the IT employee searched using the Applicant’s first name, last name, and first and last name together. Since the IT employee spelled the Applicant’s first name correctly (which isn’t a common name), and also searched for the Applicant’s job title and position number, in my view, any relevant emails or attachments would have been found in response to the IT employee’s search. That said, misspelling the main search term when conducting a search may, in another set of circumstances, indicate an inadequate search was conducted.

[para 22] Regarding deleted records more generally, the Public Body states that it did not search for deleted records (other than the search detailed above). The Public Body states that there was no indication from the responsive records (such as references or links to other records) that other responsive records had existed but had been deleted. Further, emails that had been deleted fewer than 30 days prior to the search would have been located during the search. Emails

that were deleted more than 30 days prior would have been permanently deleted. Those permanently deleted emails must be located by accessing the backup system maintained by Service Alberta.

[para 23] The Public Body argues that it does not “own or control” the backup system maintained by Service Alberta. I am not entirely persuaded that the Public Body would not have control over its backup records even though the system is maintained by another public body. However, I accept the Public Body’s explanation that it did not have a duty to search the backup system because there is no indication that responsive records had been deleted. As the adjudicator in Order F2011-R-001 stated (at paragraph 44):

... in many cases, a public body will be able to conduct a reasonable search of electronic backup records without conducting an electronic search for them, by determining through inquiry whether responsive records were ever created, and if so, what has happened to them. In cases where a public body confirms that a record has been “double deleted” from a computer system, the public body may determine whether this record still exists by finding out whether it has a backup system, and, if so, how long records are preserved on that system.

[para 24] I agree with the Public Body that apart from speculation, the Applicant has not offered any reason to believe that responsive records have been deleted. Therefore, I confirm the Public Body’s decision not to search for deleted records (beyond the search conducted of the Project Management manager’s archived emails).

[para 25] The Applicant gives further examples of records she expected to see: emails or discussions regarding her appeal of her termination, and discussions regarding her application for another position in the Ministry. However, in a letter to this Office and the Public Body, dated December 7, 2013, the Applicant also states that she was given interview scores from a job competition held by the Public Body. It is unclear to me then, what further notes the Applicant expected to see. It might be the case that the Applicant expected these notes in the initial set of responsive records, but obtained them in the records that were provided to her in the course of this inquiry.

[para 26] Regarding the appeal of her termination, the Public Body provided approximately 14 pages of records relating to that appeal, including emails. It is not clear what further records the Applicant expected to see with respect to her appeal.

[para 27] The Applicant also argues that the HR area of the Public Body ought to have kept copies of the HR records it sends to Service Alberta (the Public Body stated that some records may be mailed to Service Alberta, while others may be scanned and emailed). As Service Alberta keeps the “official” HR records for the Public Body, I do not agree that the Public Body is obliged to keep its own copies. Further, as the HR records were eventually found by the Public Body and provided to the Applicant, I do not see how the Applicant would benefit from a duplicate copy from the Public Body’s HR area. It may be that the Applicant is arguing that the Public Body ought to have located and provided her with a copy of these HR records long before it did (during the inquiry).

[para 28] I agree with the Applicant that the Public Body's initial search for records was not adequate as it did not search for responsive records in its "official" HR database, maintained by Service Alberta. However, the Public Body ultimately located and provided these records, and I have insufficient evidence to conclude that the remainder of the Public Body's search was not adequate.

[para 29] I find that the Public Body ultimately performed an adequate search for responsive records.

*Public Body's response to the Applicant*

[para 30] I turn to the second part of the Public Body's duty to assist under section 10(1): responding to the Applicant openly, accurately and completely.

[para 31] As discussed, in the course of the inquiry the Public Body found a further 190 pages of records responsive to the Complainant's request. These records comprised the Complainant's "official" human resources file, which was stored by Service Alberta.

[para 32] An affidavit signed by a director of human resources of the Public Body states that "Human resources or employment records relating to an Alberta Health employee are entered into the electronic systems of Service Alberta which is considered by the Human Resources Branch of Alberta Health to be the definitive depository of an employee's human resources information or documents." The affiant further states that access to the records kept by Service Alberta must be approved by the Minister of the Public Body, and that Service Alberta retains the human resources records at the request of the Public Body. This indicates that while Service Alberta has possession of the records, the Public Body has control of the records, for the purposes of the FOIP Act. The Public Body does not argue that it does not have control of these records.

[para 33] The Public Body does not explain why these additional records were not searched for and located in October 2011, when it located the records initially provided to the Complainant. The Complainant points out that the affidavit of the Public Body HR director indicates that it is the normal practice for the Public Body's official human resources records to be located with Service Alberta. I agree with the Complainant that the records located in Service Alberta ought to have been part of the Public Body's initial search.

[para 34] The Public Body argues that as the records were eventually found, it has met its duty to assist under section 10(1). I disagree. By failing to search for the official human resources records in the appropriate location when it conducted its initial search, the Public Body clearly failed to make every reasonable effort to conduct a thorough search. While the records at issue in this inquiry were eventually located, they were provided to the Complainant more than two years after the initial set of responsive records was provided.

[para 35] I find that the Public Body did not fulfill its duty to assist the Complainant.



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

[para 36] The Public Body applied section 17 to information on pages 21, 22, 24, 25, 27, 29, 31, 34, 40, and 42.

*Is the information personal information?*

[para 37] 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;*

[para 38] The information withheld under section 17 in the initial set of responsive records consists primarily of names of third parties involved in an incident also involving the Applicant.

[para 39] Names, contact information and physical descriptions of third parties is personal information under the FOIP Act. However, previous orders from this office have found that section 17 does not apply to information that reveals only that an individual was acting in a formal, representative, professional, official, public or employment capacity, unless that information also has a personal dimension (Order F2008-028, para. 54). Such information may have a personal dimension if there is associated information suggesting that an individual performing work-related or business responsibilities was acting improperly, there are allegations that the work-related act of an individual was wrongful, or disclosure of information is likely to have an adverse effect on the individual (see Orders F2006-030 at paras. 12, 13, and 16; F2008-020 at para. 28).

[para 40] The Public Body disclosed names of most Public Body employees occurring in the records at issue, but withheld a few names and job titles of some Public Body employees, and statements they made. This information occurs in the context of disciplinary discussions, and therefore there is a personal dimension to the information of those particular employees (pages 21, 22, 27, 29, and 34). I will therefore consider whether the Public Body properly withheld this information under section 17.

[para 41] In one record, the Public Body severed the name of an individual who does not appear to be a Public Body employee and whose name is not related to a work function (page 40). Therefore, this is also personal information, and I will also consider whether the Public Body properly withheld this information under section 17.

[para 42] In some pages, the Public Body withheld information associated with individuals after removing their names, job titles, or statements they made; I do not see how the following information would identify an individual, given the name, job title or statements were removed. I find that the following information is not information about an identifiable individual and section 17 cannot be applied to withhold it:

- On page 27: only the job title on the first line; the handwritten comment; and the fourth and fifth line (to the end of the parentheses) of the fourth bullet point is information about an identifiable individual. The remaining information withheld under section 17 on page 27 is not information to which section 17 applies.
- On page 29: only the job title on the first line; the handwritten notes; and the fourth and fifth line (to the end of the parentheses) of the fourth bullet point is information about an identifiable individual. The remaining information withheld under section 17 on page 29 is not information to which section 17 applies.

[para 43] The Public Body withheld two lines on page 22, consisting of the requests for information from an executive director to the Applicant's supervisor; this information was withheld under section 24(1). As will be discussed further in the section of this Order addressing the application of section 24, it is not clear that this information can be withheld under that exception. The first line withheld under section 24(1) could be interpreted in different ways. On one interpretation, the executive director's question indicates some factors he was considering regarding what to do about the Applicant's conduct, in which case section 24 may apply. On another interpretation, the executive director was merely gathering facts from the supervisor regarding the conduct of other Public Body employees in relation to the incident involving the Applicant, in which case section 24 would not apply.

[para 44] Given the supervisor's response to the questions posed by the executive director, I find that the first line withheld on page 22 under section 24(1) contains personal information of a Public Body employee, to which section 17 may apply insofar as it has a disciplinary element, and thus a personal dimension. Therefore, even if the latter of the two interpretations above is correct, and section 24(1) does not apply to this information, section 17 is a mandatory exception

and so I must still consider whether disclosure of the information would be an unreasonable invasion of privacy under section 17.

[para 45] With respect to the second set of responsive records, consisting of the Applicant's official HR file that was maintained by Service Alberta, the Public Body has severed the name of an individual (not the Applicant) appearing in two of the records. These records appear to relate to a job application or interview that individual had with the Public Body and the name of the individual does not appear in the context of that individual's work duties. By letter dated March 5, 2014, the Public Body acknowledged that these two pages were "affixed to the wrong human resource file. We have advised our Human Resources branch that this information does not belong on the applicant's file and the correction will be completed." It seems that these two pages of records erroneously placed in the Applicant's HR file are not actually responsive to the Applicant's request. However, the Public Body presumably provided these pages to the Applicant because her request included her entire HR file and these pages (erroneously) formed part of that file at the time of her request. Therefore, I will consider whether section 17 was properly applied to this information.

*Would disclosure of the personal information in the records just discussed be an unreasonable invasion of a third party's personal privacy?*

[para 46] 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*

*(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*

...

*(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,*

...

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

...

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

...

*(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 provide by the applicant.*

[para 47] Section 17 is a mandatory exception; if the information falls within the scope of the exception, it must be withheld.

[para 48] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 49] Neither party has argued that section 17(2) or (3) apply to any of the withheld information, and from the face of the records, neither provision appears to apply.

#### *Section 17(4)*

[para 50] The Public Body argues that sections 17(4)(a), 17(4)(g)(i) and 17(4)(g)(ii) apply to the personal information, creating a presumption that disclosing the information would be an unreasonable invasion of personal privacy. I agree that section 17(4)(g) applies to the information withheld under section 17 (except the information identified above at paragraph 42, to which section 17 does not apply); section 17(4)(a) also applies to some information on pages 27, 29 and 34 as this information appears to refer to medical or health information of one of the third parties. These factors weigh against disclosure of the information.

#### *Section 17(5)*

[para 51] The factors giving rise to a presumption that disclosing the personal information is an unreasonable invasion of personal privacy must be weighed against any factors listed in section 17(5), or other relevant factors, that weigh in favour of disclosure.

#### *Section 17(5)(c)*

[para 52] Section 17(5)(c) weighs in favour of disclosing information that is relevant to a fair determination of an applicant's rights. The Applicant has stated in correspondence relating to this inquiry that she was seeking information for a legal proceeding against the Public Body, but that she required any additional information before January 10, 2014.

[para 53] Four criteria must be fulfilled for section 17(5)(c) to apply:

- (a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
- (b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
- (c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing . (Order F2008-012 at para. 55, Order F2008-031 at para. 112)

[para 54] It is possible that the personal information withheld under section 17 could be useful to the Applicant in a legal proceeding against the Public Body; However, the Applicant does not explain how the personal information of third parties is significant to the proceeding she states she has initiated against the Public Body; further, her correspondence indicates that any information disclosed to her as a result of this inquiry would be disclosed too late to be used in the proceeding. Therefore, I find that this factor is not relevant.

[para 55] Neither party has argued that other factors under section 17(5) are relevant, and I cannot see, based on the records and submissions in this inquiry, that any further factors are relevant.

#### *Weighing factors under section 17*

[para 56] I find that there are no factors weighing in favour of disclosing the third party personal information in the records, and therefore that it would be an unreasonable invasion of privacy of third parties to disclose this information.

### **3. Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the information in the records?**

[para 57] The Public Body applied section 19(1) to information on page 89 of the records at issue. This provision states:

*19(1) The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body when the information is provided, explicitly or implicitly, in confidence.*

[para 58] In order for section 19(1) to apply, the information:

- a. must be evaluative or opinion material;
- b. must be compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for:
  - i. employment; or
  - ii. for the awarding of contracts or other benefits by a public body; and

c. must be provided explicitly, or implicitly in confidence (Orders 2000-029, F2002-008).

[para 59] The Public Body states that page 89 “consists of a record of a discussion conducted by the [Public Body] and a third party – Alberta Justice, as to the Applicant’s suitability in a competition being conducted by Alberta Justice at a time when she was still employed with the [Public Body].” The Public Body describes the record as an email from the HR area in the Public Body to the HR area in Alberta Justice. It states that it applied section 19(1) to

- a. A reference check done by Alberta Justice on the Applicant in relation to a Alberta Justice competition in which the Applicant had been a candidate; and
- b. A conversation conducted as between Alberta Justice and the Human Resources group of the [Public Body].

[para 60] The first item of information the Public Body severed from the emails is information *about* a reference check conducted by Alberta Justice; it does not include the comments provided by the referee. Specifically, the information refers to the name of the referee and whether a topic was brought up as part of the reference. In my view, this is not opinion or evaluative information; rather, it is factual information about whether the referee discussed a particular topic (not what was said on the topic). For this reason, section 19(1) does not apply to the first severed item on page 89.

[para 61] The second severed item on page 89 also does not contain opinion or evaluative information. Rather, it refers to a past conversation between Human Resources areas regarding whether particular documentation existed on the Applicant’s human resources file. In my view, this is factual information and not information to which section 19(1) applies.

[para 62] I will therefore order the Public Body to disclose the information withheld from page 89.

#### **4. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to information in the records?**

[para 63] The Public Body applied section 20(1)(d) to some information in 11 pages of records. This provision states:

*20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*

...

*(d) reveal the identity of a confidential source of law enforcement information,*

...

[para 64] The Public Body applied this provision to the same information on pages 27, 29 and 34 that was also withheld under section 17. I found that section 17 applied to the information on page 34, and some of the information on pages 27 and 29. I therefore do not need to consider whether section 20(1)(d) applies to that information.

[para 65] With respect to the remaining information on pages 27 and 29, I found that it is not information about an identifiable individual (given that the names and other identifiers were withheld). As such, section 20(1)(d) also does not apply to the information, since it does not reveal the identity of any individual, whether or not that individual was a confidential source of law enforcement information. Therefore I find that section 20(1)(d) does not apply to the remaining information on pages 27 and 29 and I will order the Public Body to disclose that information.

## **5. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?**

[para 66] The Public Body applied sections 24(1)(a) and (b) to information on pages 21, 22, 27, 29, 34, 35, 37, 38 and 39. 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*

...

[para 67] In previous orders, the Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action. (See Order 96-006, at p.10)

[para 68] In Order F2013-13, the adjudicator stated that the third arm of the above test should be restated as "created for the benefit of someone who can take or implement the action" (at paragraph 123).

[para 69] In Order F2012-10, the adjudicator clarified the scope of section 24(1)(b):

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.

[para 70] The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (section 24(1)(a)), or consultations or deliberations between specified individuals (section 24(1)(b)). Neither section 24(1)(a) nor (b) apply to a decision itself (Orders 96-012, at paras. 31 and 37).

[para 71] Further, sections 24(1)(a) and (b) apply only to the parts of the records that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of the individuals involved in the advice or consultations, dates, and information that reveals only the fact that advice is being sought or consultations held (rather than the substance of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at paragraph 89).

[para 72] With respect to pages 28 and 29 (and presumably page 27, which is nearly identical to page 29 and has similar information withheld), the Public Body states that:

- a. The meeting participants are all persons who are officials or employees of the [Public Body] who either have direct supervisory roles over the Applicant and human resource professionals of the [Public Body] who by virtue of their positions or authority provide advice and make recommendations to officials within the public body concerning the discipline of employees of the public body;
- b. The advice, consultations and deliberations revealed within the above noted pages relate to a decision concerning what, if any, employee disciplinary action was to be taken against the Applicant; and
- c. The advice, consultations and deliberations were made in relation to advising [the executive director] the Applicant's supervisor at the time concerning what if any, disciplinary actions should be taken against the Applicant.

[para 73] Regarding pages 34-39, the Public Body states that "the notes constitute the basis for the contents of [pages] 000028 and 000029 and include references to the attendance of [the executive director] who as indicated had the authority to make disciplinary decisions concerning the Applicant or implement disciplinary decisions of other officials within the [Public Body]."

[para 74] By letter dated January 30, 2014, I asked the Public Body to clarify its application of section 24(1). As part of its response, the Public Body decided to disclose some information on pages 27 and 29, and to disclose pages 28 and 36 in their entirety.

[para 75] The Public Body also explained that pages 27-29 and 34-39 consist of notes created by an HR employee. It states:

Furthermore the records were used by [the HR employee] to create a recollection of the discussions held on the dates in question including meetings held with the Applicant. These recollections were used to assist in formulating options to be presented by [the HR



employee's] supervisor [...] to the [Public Body's] officials with the authority to discipline or terminate the Applicant.

The purpose of these meetings was to gather facts that would be used to create the options available to deal with the Applicant in these circumstances.

[para 76] In Order F2012-06, the adjudicator stated, citing former Commissioner Clark's interpretation of "consultations and deliberations", that

It is not enough that records record discussions or communications between employees of a public body; rather, a consultation takes place only when the individuals listed in section 24(1)(b) are asked for their views regarding a potential course of action, and a deliberation occurs when those individuals discuss a decision that they are responsible for, and are in the process of, making.

[para 77] In Order 97-007, former Commissioner Clark stated that

While there is some discretion exercised in choosing which facts are gathered, without more, a compilation of facts is not an analyses. Gathering pertinent factual information is only the first step that forms the basis of an analyses. It is also the common thread of "advice, proposals, recommendations, or policy options" because they all require, as a base, a compilation of pertinent facts.

[para 78] This was cited in F2008-032, in which the adjudicator concluded that

"Advice" then, is the course of action put forward, while "analyses" refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals, and policy options as to a course of action.

[para 79] The information withheld on page 22 under section 24(1) comprises two lines consisting of requests for information from the executive director to the Applicant's supervisor, regarding the incident involving the Applicant. I found that it would be an unreasonable invasion of privacy under section 17 to disclose the first line of the requests for information from the executive director.

[para 80] With respect to the second line, as stated by the adjudicator in Order F2012-10, "[s]ection 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." In my view, the second line on page 22 does not reveal any particular factors or considerations taken into account by the executive director; it merely seeks facts from the supervisor. Therefore, I find that section 24(1)(b) does not apply to that information.

[para 81] Information withheld on page 21 under section 24(1) consists of the opinion of the Applicant's supervisor regarding any disciplinary action to be taken against the Applicant. He presents options and factors for consideration, to the executive director who was responsible for making the decision. I find that this information falls within the scope of section 24(1)(a).

[para 82] The information withheld on pages 27 under section 24(1) is substantially similar to the information withheld on page 29 under that provision. As stated by the Public Body, this information appears to be notes taken by the HR employee at meetings regarding the incident involving the Applicant.

[para 83] The first two lines of the first bullet point withheld under section 24(1) (on both pages) state who was at a particular meeting; this is not information that can be withheld under section 24(1).

[para 84] The last three lines of the first bullet point withheld under section 24(1) reveal information that was discussed at the meeting; specifically, these lines indicate the considerations and factors discussed with respect to what disciplinary action would be taken regarding the Applicant's actions. The Public Body states that these discussions were used to develop options for the Public Body "officials" who were responsible for implementing any disciplinary action regarding the Applicant. I accept that these lines reveal the analyses that formed part of the advice given to the Public Body employees responsible for implementing any disciplinary action. Therefore, I find that section 24(1)(a) applies to this information.

[para 85] Regarding the second bullet point withheld under section 24(1), the information consists of fact-gathering by the HR employee from the IT area of the Public Body concerning the incident. There is no examination or evaluation of information that would constitute analysis, nor is there any indication that this information would reveal advice, proposals, recommendations or policy options presented to the person responsible for implementing disciplinary action. Further, there is no discussion or deliberation of facts in this information; therefore section 24(1) does not apply. I find that the Public Body cannot withhold this information under section 24(1).

[para 86] The Public Body has withheld pages 34, 35, 37, 38 and 39 in their entirety under section 24(1). Pages 34 and 35 appear to be notes taken by the HR employee during conversations with other employees (such as other HR employees) regarding the Applicant's actions and possible disciplinary options. It is difficult to discern from the records themselves what information in these notes is the HR employee's own thoughts and what information was part of the discussions. Further, while the notes include some analysis of different factors, they also contain information that appears to be a gathering of mere facts, as well as names and contact information for employees participating in the discussions.

[para 87] On page 34, there is a 9-line block of information under point 2; I find that the last three lines of this block of information, and the last line on the page, contain analyses of factors considered regarding the Applicant's actions. The last bullet point (of four bullet points) in the middle of the page consists of the opinion of one of the discussion participants. I accept that this information was part of the analysis forming the advice to the ultimate decision-maker regarding disciplinary action; therefore, section 24(1)(a) applies.

[para 88] The remaining information on this page consists of statements of facts, names and contact information of Public Body employees. I will order the Public Body to disclose this

information; however, the Public Body must consider, before disclosure, whether any of the names should be withheld under section 17.

[para 89] For the reasons given in the next section of this Order, some of the information on page 35 is properly withheld under section 27(1)(a). The information that appears below that information consists of the opinion of another HR employee, as well as some analysis of factors under consideration. I find that section 24(1)(a) applies to this information, except the name of the HR employee providing the opinion. The remaining information on this page indicates information the HR employee intends to gather, and does not reveal analysis, advice, or other information to which section 24(1) applies.

[para 90] Page 37 consists of handwritten notes that appear to have later been consolidated and typed by the HR employee (this is supported by the Public Body's submissions, which state that the notes on pages 27-29 are typed and consolidated notes of meetings with the HR employee). Much of the information on page 37 is the same as that on page 28 (although not repeated verbatim), which was disclosed by the Public Body in its entirety. As the substance of this information has already been disclosed to the Applicant, disclosing this information would not *reveal* advice, deliberations etc. to which section 24(1) applies. I therefore find that exception does not apply to most of the information on this page.

[para 91] Only the sixth bullet point, and the two indented bullets above the bottom three bullet points do not have corresponding points on page 28. None of this remaining information reveals advice, analysis or other information to which section 24(1) applies. I will therefore order the Public Body to disclose the information on page 37 in its entirety.

[para 92] Page 38 consists of a single policy option; possibly this is an early draft of options developed for the ultimate decision-maker. As stated in Order F2013-13, advice and other information to which section 24(1) applies does not necessarily have to have been provided to the decision-maker, it only must have been developed for the benefit or use of the decision-maker. I have accepted that the HR employee was developing advice for the use of the decision-maker (the executive director) and the single policy option presented on page 38 appears to have been a draft of options presented to him. In my view, as the intent of section 24(1)(a) is to ensure the development of information for a decision-maker without interference, this information fits within the scope of that section.

[para 93] Page 39 consists of notes taken from a meeting with the Applicant. It includes the date, the participants, and the information told to the Applicant. All of the information is factual, and reveals only the decision that was made. Further, as the Applicant was at the meeting, disclosing the information does not *reveal* the information contained in the record. Section 24(1) does not apply to any of the information in this page and I will order the Public Body to disclose this page in its entirety.

#### *Exercise of Discretion*

[para 94] In order to properly exercise discretion in determining whether to withhold information, a public body should consider the FOIP 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 95] The purpose of section 24(1) is to protect the ability of a public body to obtain and consider frank advice without interference.

[para 96] The Public Body states that in exercising its discretion to withhold information in the records, it considered the purpose of section 24(1), as well as relevant public and private interests. It also considered the contentious nature of the relationship between the Applicant and Public Body, the nature of the Applicant's conduct leading to the advice and deliberations, and the recent dates on the records.

[para 97] The Public Body notes that advice and deliberations regarding a breach of workplace conduct and HR matters generally are often sensitive and contentious, especially where, as in this case, there is a related legal proceeding. The Public Body states that disclosing the relevant information would reveal the Public Body's deliberative process and affect its ability to challenge the Applicant's claims in court. It is not clear to me how disclosing the small amount of information to which section 24 applies would reveal the Public Body's deliberative process such that it would prevent full and frank discussions in the future.

[para 98] The Public Body also noted that disclosing this type of information could lead to a situation in which Public Body officials might not be able to obtain similar advice in the future, which could affect its ability to make decisions. I agree that this is a factor relating to the application of section 24(1); however, the degree to which it applies will vary depending on the information. For example, this factor may weigh more greatly against disclosure where the opinion or advice is given by the Applicant's supervisor and has a degree of performance or personal evaluation. Conversely, the factor may not weigh greatly against disclosure where the opinion or advice consists of fact-based analyses from HR employees regarding appropriate disciplinary action in a particular situation. In my view, it is difficult to see how the disclosure of some of the information to which section 24(1) applies (for example, some of the information on pages 27, 29, 34 and 35) would lead to this result as argued by the Public Body.

[para 99] The Public Body states that the records relate to a private matter between the Applicant and the Public Body, and that the issues in the records do not relate to matters of proper functioning of government, public debates or other public interests. I agree that there does not appear to be a public aspect to the information withheld under section 24(1), and that this is a proper factor to consider in the Public Body's exercise of discretion.

[para 100] However, the fact that the records relate to a private matter between the Public Body and Applicant does not mean that there do not exist factors weighing in favour of disclosing the information. In other words, it is not only public interests that weigh in favour of disclosing information; private interests may also indicate that a public body ought to exercise its discretion to disclose information. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), 2010 SCC 23, the Supreme Court of Canada commented on

the exercise of discretion to withhold information under a law enforcement exception to access in Ontario's legislation. It said (my emphasis):

At the second stage, the head must weigh the public *and private* interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[para 101] In this case, the information withheld under section 24(1) relates to the Public Body's termination of the Applicant's employment, and the reasons for the termination. It may be the case that the withheld information would allow the Applicant to better understand how the Public Body came to its determination to end her employment. While the Applicant may be in an adversarial relationship with the Public Body (insofar as she has stated that she has initiated a legal proceeding against the Public Body), the Public Body must still consider whether the Applicant's private interest in the records outweighs any harm to full and frank advice and discussions that section 24(1) aims to protect. Further, the Public Body must make this determination for each discrete item of information withheld under section 24(1); the disclosure of some advice or deliberations may clearly interfere with obtaining full and frank advice, while the disclosure of other advice or deliberations may pose little or no risk of such harm.

[para 102] In my view, the Public Body has properly considered factors weighing against the disclosure of information to which section 24(1) applies but has not addressed relevant factors weighing in favour of disclosure, such as the Applicant's need for the information. Therefore, I will order the Public Body to reconsider its application of section 24(1) in light of the above.

#### **6. Did the Public Body properly apply section 27(1)(a) of the Act (information in correspondence between a lawyer and another person) to information in the records?**

[para 103] The Public Body applied section 27(1)(a) (solicitor-client privilege) to information on page 35. The Public Body also applied section 24(1) to information on this page. Although I asked the Public Body to clarify to what information it applied each exception (letter dated January 30, 2014), the Public Body did not do so.

[para 104] Section 27(1)(a) states the following:

*27(1) The head of a public body may refuse to disclose to an applicant*

*(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege*

...

[para 105] The Supreme Court of Canada stated in *Solosky v. The Queen* [1980] 1 S.C.R. 821 that in order to correctly apply solicitor-client privilege, the following criteria must be met:

- a. the document must be a communication between a solicitor and client;
- b. which entails the seeking or giving of legal advice; and
- c. which is intended to be confidential by the parties.

[para 106] The Public Body has also cited Order F2004-003, which states that solicitor-client privilege also applies to records that quote or discuss the legal advice (see also Orders 96-020 and 99-013).

[para 107] Page 35 consists of notes taken by a Public Body Human Resources employee. The notes include several statements attributed to different employees within the Public Body.

[para 108] The Public Body states that the notes include a reference to a legal adviser of the Public Body, as well as the comments of the legal adviser. It is clear from the record that the HR employee recorded in her page of notes the advice given to her by the legal adviser.

[para 109] I agree that the comments from the legal adviser constitute legal advice. As argued by the Public Body, confidentiality of advice from counsel can be implied (Order F2004-003 at para 30). There is nothing in the record to indicate that the advice was not given or kept in confidence (within the circle of Public Body employees tasked with giving advice on or making a decision about the Applicant's termination); I find that the expectation of confidentiality relative to the records at issue was implicit.

[para 110] This finding applies to the comments associated with the Public Body's legal adviser. It also applies to the note following the adviser's comments, which provides details such as the date of the advice sought, and to whom it was relayed. In Order F2010-007, the adjudicator stated that "learning the dates that advice was given, coupled with knowledge of key events in litigation, could enable an individual to determine the subject matter of legal advice" (at para. 23). I agree and add that information regarding who within the Public Body was privy to the advice could enable an individual to determine the content of the advice.

[para 111] However, the remainder of the record consists of the HR employee's notes of comments given by two other Public Body employees (not legal advisers). It appears that the page consists of notes from discrete conversations with Public Body employees and with the legal adviser. In other words, the comments (advice) from the legal adviser do not appear to be related in any way to the notes taken from other conversations. This conclusion is supported by the Public Body's arguments regarding the application of section 27(1), which refer only to the adviser's comments and not the remaining comments on page 35.

[para 112] With respect to the exercise of discretion under section 27(1)(a), withholding information that is subject to solicitor-client privilege is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036). The adjudicator in Order F2012-08 stated (citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), 2010 SCC 23):

the public interest in maintaining solicitor-client privilege is such that it is unnecessary to balance the public interests in withholding records subject to this privilege and those in relation to disclosing them, as the public interest in withholding such records will always outweigh the interests associated with disclosing them.

[para 113] As I have found that the information withheld on page 35 as described above is subject to solicitor-client privilege, I conclude that the Public Body properly exercised its discretion to withhold the information it withheld under section 27(1)(a).

## **V. ORDER**

[para 114] I make this Order under section 72 of the Act.

[para 115] I find that the Public Body did not respond to the Applicant openly, accurately and completely as required by section 10. However, as the Public Body found additional records in the course of this inquiry, I find that it ultimately conducted an adequate search under section 10. As such, I do not find it necessary to order the Public Body to provide an adequate response to the Applicant in regard to her access request.

[para 116] I find that the Public Body properly applied section 17 to the information in the records, with the exception of the information listed at paragraph 42. As to the latter information, I find that the Public Body also did not properly apply section 20(1)(d) to that information. I order the Public Body to disclose that information.

[para 117] I find that section 17 applies to information on page 22, as described in paragraph 43.

[para 118] I find that the Public Body did not properly apply section 19(1) to information on page 89. I order the Public Body to disclose that information to the Applicant.

[para 119] I find that the Public Body properly applied section 24(1) to some, but not all, information in the records. I order the Public Body to disclose the information as described in paragraphs 80, 83, 85, 88, 89, 90, 91, and 93. The Public Body must consider whether section 17 applies to any of this information prior to disclosure.

[para 120] I further order the Public Body to exercise its discretion to withhold the information to which section 24(1) applies, per paragraph 102.

[para 121] I find that the Public Body properly applied section 27(1)(a) the information on page 35, as described in paragraph 110.

[para 122] 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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Amanda Swanek  
Adjudicator