ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2014-29

July 14, 2014

CITY OF CALGARY

Case File Number F6235

Office URL: www.oipc.ab.ca

Summary: On April 13, 2012, an individual made a request to the City of Calgary (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for "Midfield Mobile Home report, approx. 200 pages reviewed by city [council] Jan 23rd, 2012." The Public Body responded by letter dated April 23, 2012, disclosing some records to the Applicant and withholding other records in their entirety under sections 23 (local public body confidences), 24 (advice from officials), 25 (disclosure harmful to economic and other interests of a public body) and 27 (privileged information).

The Applicant requested a review of the Public Body's response to her access request. The Commissioner authorized a portfolio officer to investigate and attempt to settle the matter; however, this was not successful in resolving the issues, and the Applicant requested an inquiry.

The Adjudicator found that section 23(1) applied to limited information in the records, but ordered the Public Body to reconsider its exercise of discretion in light of the fact that the Public Body appears to have made its decision regarding the Midfield Mobile Home Park public.

The Adjudicator also found that sections 24(1)(a) and (b), and 25 applied to some information in the records. She upheld the Public Body's application of section 27.

The Adjudicator ordered the Public Body to make a new decision regarding the application of sections 23(1)(b), 24(1)(a) and 24(1)(b), using the guidance provided in the Order.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 22, 23, 24, 25, 27, 32, 72, *Freedom of Information and Protection of Privacy Regulation*, Alta Reg. 186/2008, ss. 18; *Municipal Government Act*, R.S.A. 2000, c. M-26, ss. 181, 197; **BC:** *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s.12.

Authorities Cited: AB: Orders 96-006, 96-011, 96-012, 97-007, 97-009, 2001-040, F2004-024, F2004-026, F2005-004, F2006-010, F2007-013, F2007-014, F2008-008, F2008-020, F2008-031, F2008-032, F2009-040, F2010-007, F2010-036, F2010-037, F2012-06, F2012-08, F2012-10, F2012-24, F2013-13, F2013-23; **BC:** Order No. 326-1999; **ONT:** Order MO-2697.

Cases Cited: *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 (CanLII), 2011 BCSC 112, *John Doe v. Ontario (Finance)*, 2014, S.C.C. 36, *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23, *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821.

I. BACKGROUND

[para 1] On April 13, 2012, an individual made a request to the City of Calgary (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for "Midfield Mobile Home report, approx. 200 pages reviewed by city [council] Jan 23rd, 2012." The Public Body responded by letter dated April 23, 2012, disclosing some records to the Applicant and withholding other records in their entirety under sections 23 (local public body confidences), 24 (advice from officials), 25 (disclosure harmful to economic and other interests of a public body) and 27 (privileged information).

[para 2] The Applicant requested a review of the Public Body's response to her access request. The Commissioner authorized a portfolio officer to investigate and attempt to settle the matter; however, this was not successful in resolving the issues, and the Applicant requested an inquiry.

[para 3] The Public Body provided both *in camera* and open submissions.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of pages 1-277, 321-335, and 340-373, which were withheld in their entirety. The Public Body's index of records does not indicate that page 277 was withheld in its entirety, but this page is included in the copy of the withheld records provided to me by the Public Body. It is also the first page of a document, the remainder of which was withheld in its entirety. Therefore I assume that this is a

typographical error in the index and that page 277 was withheld in its entirety, under the same exceptions applied to the remainder of the document.

III. ISSUES

[para 5] The Notice of Inquiry dated December 2, 2013, lists the issues for this inquiry as follows:

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

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

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

4. **Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?**

[para 6] I also discuss the application of section 32, which was raised by the Applicant in her initial submissions.

IV. DISCUSSION OF ISSUES

[para 7] Before discussing the application of the exceptions to access to the records at issue, I will discuss the outcome of this order.

[para 8] In Order F2012-24 the Director of Adjudication decided to direct the public body to reconsider its application of an exception to access (section 17 in that case) rather than to substitute her own decision regarding the application of the exception to the records at issue. She said (at paragraphs 35-36):

> In this case I have decided that rather than performing the weighing exercise myself taking into account these additional factors and points as to how they are to be applied, I will ask the Public Body to do so, and to make a new decision as to which portions of the personal information should be disclosed and which withheld. I have chosen this approach for the following reasons.
>
> By the terms of the Act, my task is to review the decisions of public bodies rather than to make decisions in the first instance, Though the Act gives me the ability to substitute my own decision for that of a public body, section 17(5) also places a positive duty on public bodies to make the decision initially, taking into account all relevant factors, including information from the Applicant and from third parties. My review is to be done with the benefit of the reasoning of the public body as to why particular items of information were withheld, and as well on the basis that the public body has gathered relevant factual information before

> making its decision. In this case I do not find it either practical or possible to conduct a "review" of the Public Body's decision at this time.

[para 9] For the following reasons, I have determined that it is appropriate for me to send the Public Body back to make new decisions respecting its application of sections 23(1)(b) and 24(1)(a) and (b) to the records at issue, rather than substituting my own decisions, line by line, regarding the application of those provisions.

[para 10] The Public Body has applied sections 23(1)(a), (b), 24(1)(a), (b), (g), 25(1)(c)(iii) and 27(1)(a) to the records at issue. In every case, the Public Body has withheld each page in its entirety under the claimed exception.

[para 11] In some instances, it seems clear from the records themselves that a particular exception applies to certain information; similarly, it seems likely that none of the exceptions cited by the Public Body apply to some of the information in the records. However, in many instances in the 373 pages of records, I lack the Public Body's particular knowledge and expertise regarding the substance of these records. As such, it is my view that the Public Body is in a better position to delineate what information in the records can be withheld under each of the exceptions, taking into account the guidance provided in this order.

[para 12] That said, should the Applicant want a review of the Public Body's new decisions regarding access, it seems inefficient to require the Applicant to apply to this Office anew for a review of the Public Body's decisions. Therefore, should the Applicant wish to request a review of the Public Body's new decisions resulting from this Order, her request will proceed directly to the inquiry stage, and follow an expedited process.

Late-raising of section 32 by the Applicant

[para 13] 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*
>
> *(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or*
>
> *(b) information the disclosure of which is, for any other reason, clearly in the public interest.*

Adding section 32 as an issue in the inquiry

[para 14] The Applicant raised the application of section 32 in her initial submissions to the inquiry. The Public Body responded in its rebuttal submission.

[para 15] In Order 96-011, former Commissioner Clark stated that an applicant seeking the disclosure of information under section 32 ought to go to the head of the public body first. Further, in Order F2008-020, the adjudicator said:

> The former Commissioner expressed concern that applications to review section 32 decisions could be used as a way of circumventing the usual review processes set out in the Act, and stated that any member of the public seeking an investigation of a section 32 decision ought to go to the head of the public body first (Order 96-011 at p. 18 or para. 54). These comments provide some guidance as to when and how issues under section 32 should be raised and dealt with. While public bodies must, in appropriate circumstances, consider the application of section 32 in any event, I believe that if an applicant making an access request specifically takes the position that a public body has a duty to release information in accordance with the section, the applicant should draw this to the public body's attention at the time of the access request, or otherwise as early as possible.
>
> Alerting a public body to the arguable application of section 32 at the earliest time would be in keeping with the objective of section 32, which is to bring about the disclosure of the information that it contemplates "without delay". In other words, raising the application of section 32 as an issue late in the process prevents what could have been an earlier resolution of that particular issue, and delays disclosure of information that is potentially clearly in the public interest. Having said this, it is important to add that section 32 may obviously be found by this Office to apply regardless of any previous steps taken by an applicant, such as where there is a clear risk to someone's health or safety. What is important to bear in mind is that each individual case should be dealt with in whatever manner the type of information involved suggests, and fairness to the interested parties requires (Order 96-011 at p. 14 or para. 40).

[para 16] I agree with the adjudicator's comments in Order F2008-020 that an applicant ought to raise the application of section 32 with the Public Body as soon as possible. Nevertheless, as I have arguments from both parties, I will address this issue.

[para 17] The Applicant bears the burden of establishing that section 32 applies in this inquiry, in that she 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 18] The Applicant argues that both section 32(1)(a) and (b) apply.

[para 19] With respect to section 32(1)(a), the Applicant must provide some evidence that there is an *actual* risk of harm, and that the harm is significant (Order 97-009).

[para 20] For section 32(1)(b) to apply, there must be circumstances *compelling* disclosure, or disclosure must be *clearly* in the public interest, as opposed to a matter that may merely be of interest to the public (Order F2004-024 at para. 57).

[para 21] The Applicant states (initial submission, page 2):

> A majority of the residents of the Midfield Mobile Home Park are senior citizens, many have lived on the property for more than 30 years… The relocation of the residents to a park located in the far eastern boundaries of the city (East Hill Estates) will seriously compromise access to pre-existing medical care and support services, I feel Section 32(a) of the Act applies in the case.
>
> Further, the City-owned property, also known as Midfield Mobile Home Park, is located off of a pivotal throughway, 16th Ave NE. In accordance to subsection (b), the sale and/or future development of this property is clearly in the interest of all Calgarians. The relocation of Midfield residents and costs associated with further land acquisitions is also relevant and in the clear interest of Calgary taxpayers.

[para 22] The Public Body responds (rebuttal submission, page 1):

> There is a public purpose in creating the exceptions set out in the FOIP Act and they should not be lightly overridden. The Public Body has carefully considered and weighed both the private and public interests with respect to disclosure of the information. The legislature has recognized the need of governing bodies and elected officials to conduct deliberations in camera when that information falls within specific and limited exceptions established under the FOIP Act.

[para 23] On May 28, 2014, the Applicant provided an additional submission to the inquiry, consisting of media articles covering the Public Body's recent decision to close the Midfield Mobile Home Park (based on the media reports, this decision appears to have been communicated to the Park residents on or around May 27, 2014). These reports also include statements from the Public Body indicating that the Park will not be relocated to East Hill Estates. This information appears to related to at least some of the concerns raised by the Applicant.

[para 24] Regarding the sale and/or development of a particular section of land in Calgary, this may be of interest to city taxpayers, but is not a matter of clear or compelling public interest. Further, the Applicant's arguments regarding the possible effect on the health of the Midfield residents are too remote to constitute an actual risk of harm. I find that section 32(1)(a) does not apply to the information in the records at issue.

[para 25] I conclude that section 32 of the FOIP Act does not require the Public Body to disclose further information in the records at issue.

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

[para 26] The Public Body applied section 23(1)(a) to pages 207 and 208, and section 23(1)(b) to pages 1-206, 209-277, 321-335, 340-363, and 370-373. These provisions state:

> *23(1) The head of a local public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*

(a) a draft of a resolution, bylaw or other legal instrument by which the local public body acts, or

(b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

(2) Subsection (1) does not apply if

(a) the draft of the resolution, bylaw or other legal instrument or the subject-matter of the deliberation has been considered in a meeting open to the public, or

(b) the information referred to in that subsection is in a record that has been in existence for 15 years or more.

Section 23(1)(a)

[para 27] Having reviewed the records at issue, I agree that pages 207 and 208 consist of a draft resolution, bylaw or other legal instrument of the Public Body, and that section 23(1)(a) applies.

Section 23(1)(b)

[para 28] In order to apply this section, 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)

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

[para 29] The Public Body is a "local public body" as defined in section 1(j) of the FOIP Act, and the records at issue arose from a meeting of the City Council, which consists of the elected officials of the Public Body. Therefore, the first question listed above is 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 30] The Public Body cites section 197 of the *Municipal Government Act* (MGA) as authority for the Council to hold meetings *in camera*. This provision states:

> *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 31] In Order F2013-23, the adjudicator considered the interaction of section 23(1)(b) of the FOIP Act and section 197 of the MGA. He said (at paragraphs 52-56):

> 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.*
>
> 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.*

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.

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.

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 32] The Public Body argues that the above analysis is in error and that section 18 of the FOIP Regulation does not apply, because section 197 of the MGA provides for *in camera* meetings of the Public Body. It further states that "section 23 of the Act applies to the Record in its entirety as disclosure of the Record may reasonably reveal in-camera deliberations of elected officials. While the Public Body has properly applied other exceptions to disclosure to this same information, section 23 is in and of itself a discrete exception to the right of access." (Exchanged initial submission, pages 5-6)

[para 33] Section 197 of the MGA states that a council may hold an *in camera* meeting if the subject-matter of the meeting falls within one of the exceptions to disclosure in the FOIP Act (sections 16-29). For example, if the subject-matter of the meeting includes advice to officials that would fall within the scope of section 24(1)(a), the council may

discuss that matter *in camera*. The Public Body's argument seems to be that section 23(1)(b) has the same function as section 24(1)(a) in my example. I disagree.

[para 34] For a council governed by the MGA (such as the Calgary City Council), the application of section 23(1)(b) to withhold information is conditional upon the application of section 197(2) of the MGA, which is itself conditional upon the application of an exception to access in the FOIP Act. Section 23(1)(b) cannot be that exception to access if section 197(2) of the MGA is the trigger for the application, because this would create an 'infinite loop' between section 23(1)(b) of the FOIP Act and section 197(2) of the MGA, wherein authority to conduct an *in camera* meeting, and authority to withhold information considered at that meeting, are conditional upon the application of the other provision, such that neither of the relevant conditions can be fulfilled.

[para 35] Rather, I agree with the reasoning in Order F2013-23, that in order for the Council to hold an *in camera* meeting under section 197(2) of the MGA (i.e. in order to fulfill the condition in that provision), the subject-matter of the meeting must consist of information that could, in response to an access request, be withheld under sections 16-29 of the FOIP Act. If, for example, the subject-matter of the meeting consists of advice to officials that could be withheld under section 24(1)(a) of the FOIP Act, then Council can hold the meeting (or that portion of the meeting) *in camera*.

[para 36] In this case, the Public Body has argued that sections 24(1)(a) and (b) apply to all of the information to which it has also applied section 23(1)(b). It has also applied sections 24(1)(g) and 25(1)(c)(iii) to several pages.

[para 37] In Order F2013-23 the adjudicator also discussed the overlap between sections 23(1)(b) and 24(1)(a) and (b) in circumstances similar to those in this inquiry:

> 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.
>
> 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).
>
> 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 38] In this case, where the Council was authorized to hold *in camera* meetings to discuss issues to which sections 24(1)(a), (b), (g) and/or 25(1)(c)(iii) apply, that information can be withheld under those exceptions, rather than (or in addition to) section 23(1)(b). I will therefore discuss the application of sections 24(1)(a), (b), (g) and section 25(1)(c)(iii) to the records at issue further in the relevant sections of this order.

[para 39] Although the Public Body argued that the adjudicator in Order F2013-23 erred in determining that section 18 of the FOIP Regulation applies where section 197(2) of the MGA allows for *in camera* meetings, it also argued, in the alternative, that sections 18(1)(a), (c), and (e) of the Regulation apply to the information in the records. Section 18 of the Regulation states in part:

> *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*
>
> *(a) the security of the property of the local public body,*
>
> *…*
> *(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,*

[para 40] The Public Body did not specify which subsection of section 18(1) applies to what information in the records. Having reviewed the records, I agree that some information in the records relates to proposed or pending acquisition or disposition of property, and some relates to a law enforcement matter, litigation or potential litigation. However, it is not clear what information relates to the *security* of the Public Body's property, such that section 23(1)(b) would apply to information that would reveal the substance of deliberations about the security of the property, and the Public Body did not provide any specific arguments on this point. I find that section 18(1)(a) of the Regulation does not apply to information in the records at issue.

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

[para 41] As stated above, where the Council held *in camera* meetings to discuss matters to which sections 24(1)(a), (b), (g) and 25(1)(c)(iii), I will consider the application of those provisions later in this order.

[para 42] In Order F2013-23, the adjudicator considered the meaning of "substance of deliberations"; he cites *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 (CanLII), in which the Court considered whether the mere indication of the topics and issues discussed form part of the substance of deliberations. The Court states:

> 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 43] The adjudicator in Order F2013-23 adopted this approach endorsed by the BC Supreme Court. He stated:

> 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.
>
> 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).
>
> 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.
>
> 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 44] Where the Public Body may hold a meeting in the absence of the public under section 18 of the FOIP Regulation, the Public Body may withhold only information that would reveal the substance of those discussions under section 23(1)(b), in response to an access request.

[para 45] The Public Body has withheld all records to which section 23(1)(b) has been applied, in their entirety. The Public Body states that "while the release of any single factual statement may not reveal the substance of the in-camera deliberations, when all of those statements are reviewed collectively the substance of the deliberations conducted by City Council are revealed" (Exchanged initial submission, pages 6-7). In my view, the Public Body is confusing "substance of deliberations", which has been interpreted narrowly, with the *topic* of deliberations, or issues being deliberated, which is much broader. Certainly the disclosure of factual statements or document headings would reveal the subject-matter of the deliberations; however, the test is whether the information would reveal views, advice, recommendations, pros and cons, reasons, rationales, etc. that were conveyed and considered by Council.

[para 46] Unlike in Order F2013-23, the records at issue in this case are not notes or minutes taken at the *in camera* meeting. Rather, the records consist of a report prepared for Council to consider at the meeting.

[para 47] In Order No. 326-1999, former BC Information and Privacy Commissioner Loukidelis considered the application of the equivalent provision in BC's *Freedom of Information and Protection of Privacy Act* (FIPPA). In that case, he considered whether section 12(3)(b) (equivalent to Alberta's section 23(1)(b)) applies to a report that had been commissioned by a city council and considered in an *in camera* meeting of that council. He stated:

> … Still, disclosure of the report would not reveal anything about those discussions. Council members may have debated the IAO Report vigorously, with many different views being expressed and various possible courses of actions being suggested. The IAO Report itself is silent about this. Its disclosure tells us nothing about what was said at the council table, much less what was decided. We simply do not know, and cannot tell from the IAO Report – which was prepared by outside consultants - what the deliberations of council were. The most that can be said is that disclosure of the report would disclose one subject of such meetings. We already know the IAO Report was one of the subjects addressed at the meeting or meetings discussed above, of course, from the Montain Affidavit and the City's submissions in this inquiry.
>
> …
>
> … As was said in Order No. 113-1996, at p. 4, one can – in cases such as this one – release the source documents without disclosing the substance of deliberations about them.

[para 48] A comparison of sections 22(1) and 23(1) in the FOIP Act supports the above approach to Alberta's Act. Section 22(1) applies to Cabinet and Treasury Board confidences; it states (in part, emphasis added):

> *22(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.*

[para 49] This provision specifically encompasses advice etc. that has been prepared for or submitted to Cabinet or Treasury Board. In contrast, section 23(1)(b) applies only to the substance of deliberations. Had the Legislature intended to include advice etc. prepared for or submitted to an *in camera* meeting of a local public body, it would have included language similar to that in section 22(1).

[para 50] I adopt the approach taken by the former BC Commissioner to section 23(1)(b). Although the Public Body may have deliberated on the contents of the records at issue, the records themselves are, for the most part, silent as to whether relevant deliberations occurred.

[para 51] That said, a few pages of the report includes references to past *in camera* meetings, such as questions posed by Council to the administration. In my view, these questions posed in past *in camera* meetings reveal the substance of deliberations of those meetings. The responses from administration to those particular questions would allow a viewer to infer the question with reasonable accuracy and would therefore reveal the substance of deliberation also.

[para 52] However, the subject-matter of the question (and response) must also fall within section 18(1) of the FOIP Regulation to be withheld under section 23(1)(b). Some information (for example, on page 3 of the records) refers to past deliberations of Council at an *in camera* meeting; however, the topics of the deliberation do not fall within the scope of section 18(1)(a), (c) or (e).

[para 53] I have stated that none of the information in the records appears to relate to the security of the Public Body's property (under section 18(1)(a)), and the Public Body has not explained its application of this section. Therefore, the applicable provisions are sections 18(1)(c) (proposed or pending acquisition or disposition of property) and (e) (law enforcement matters, litigation or potential litigation).

[para 54] In some instances the records refer to past meetings of Council but it is not clear whether these were held *in camera*. The Public Body has the onus of showing that those past meetings referred to in the records took place *in camera* (with authority to do so). The Public Body's submissions refer to two previous meetings of Council (paragraphs 3 and 5, Tab 2, of the *in camera* submission) for which I have sufficient evidence to determine were conducted *in camera*. However, I have no evidence regarding prior meetings referred to in Attachment 1 of the Report, or other meetings of Council referred to in the records. The Public Body's *in camera* submission refers to previous directions from Council, "many of which" were provided *in camera*. To say that many of the items of information originated from *in camera* meetings suggests that some were not. Therefore, I cannot find that section 23(1)(b) would apply to any information regarding Council's deliberations at those meetings.

[para 55] Regarding the subject-matter encompassed by section 18(1)(c), the scope of "acquisition or disposition of property" in section 18(1)(c) is not entirely clear. The Dictionary of Canadian Law (4th ed) lists several definitions of "disposition"; the most relevant is as follows:

> 3. The act of disposal or an instrument by which that act is affected or evidenced, and includes a Crown grant, order in council, transfer, assurance, lease, licence, permit, contract or agreement and every other instrument whereby lands or any right, interest or estate in land may be transferred, disposed of or affected by or which the Crown divests itself of or creates any right, interest or estate in land.

[para 56] This is a fairly broad definition. In my view, the term 'disposition' in section 18(1)(c) of the FOIP Regulation is coloured by the preceding term 'acquisition', which is defined in the Dictionary of Canadian Law (4th ed.) as follows:

> Includes purchasing, leasing or bringing into the province for consumption or use and all derivatives of this term.

[para 57] I conclude that in the context of section 18(1)(c), 'acquisition' means to acquire property (via purchase or otherwise), and 'disposition' means to divest oneself of property (via sale, lease or otherwise). The subject-matter of the records at issue is the fate of the Park; in some cases the records refer to possible acquisition or disposition of property. However, discussing whether the Park will remain on the land is not the same as disposing of the Park (or the land alone). I note that in Ontario Order MO-2697 (at paragraph 20), the adjudicator found that plans regarding the remediation of property did not fall within the scope of "acquisition or disposition" of property under Ontario's Act.

[para 58] In my view, a discussion about the fate of the Park as a park is not the same as a discussion about whether the Public Body intends to keep or sell the land on which the Park is located. I acknowledge that this is a narrow reading of the term 'disposition'; however, I believe that it is consistent with the purposes of the Act, both in terms of permitting access to information, as well as in terms of allowing *in camera* meetings of local public bodies only in narrow circumstances. Section 23(1)(b) would apply to information in the records that reveal (or could lead to an accurate inference about) deliberations from past *in camera* council meetings that concern any pending or proposed plans by the City to obtain property, or divest itself of property.

Application of section 23(1)(b) to the records

[para 59] In order to provide guidance to the Public Body regarding the proper application of section 23(1)(b) to information in the records at issue, I will determine to what information this provision can be applied on pages 1-19 of the records at issue.

[para 60] Question 2 on page 1 of the records, and the fifth paragraph on page 2 (except the first sentence) relate to the subject-matter encompassed by section 18(1)(e) of the Regulation. I agree that section 23(1)(b) applies to this information.

[para 61] The indented information following the second paragraph on page 3, as well as part of the first sentence in the following paragraph (to the end of the parentheses) relates to the subject-matter encompassed by section 18(1)(c) of the Regulation. I agree that section 23(1)(b) applies to this information.

[para 62] I note that all of the above information is also information to which I found section 24(1)(b) applies (discussed later in this Order).

Section 23(2)(b)

[para 63] Section 23(2)(b) of the Act states that section 23(1) does not apply to information in a record that has been in existence for 15 years or more. Some records have clearly been in existence for more than 15 years. The Public Body argues that the deliberations regarding these records are new. I agree that information revealing new deliberations about records more than 15 years old would not be encompassed by section

23(2)(b). However, regarding the records themselves, which are 15 or more years old, this provision is triggered by the age of those records, not the last date on which they were deliberated or considered. Therefore, this section applies to the records consisting of pages 361-363, such that they cannot be withheld under section 23(1). The Public Body has not applied any other exception to this information so I will order the Public Body to disclose it to the Applicant.

Exercise of discretion

[para 64] Section 23(1)(b) is a discretionary exception. In *Ontario (Public Safety and Security) v. Criminal Lawyers Association,* 2010 SCC 23, the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.

[para 65] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

[para 66] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act:

> While this case was decided under Ontario's legislation, in my view, it has equal application to Alberta's legislation. Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:
>
> > *72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*
> >
> > *(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access…*

[para 67] The adjudicator then considered how a public body's exercise of discretion had been treated in past orders of this office and concluded that

> In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not

subject to solicitor-client privilege in *Ontario (Public Safety and Security)*. (at 104)

[para 68] The Public Body's submissions indicate that the Public Body considered, as factors in exercising its discretion to withhold information under section 23(1)(b), the purpose of the Act as a whole, and the purpose of the provision; it also states that it "considered and weighed both the private and public interests with respect to disclosure" (Rebuttal submission, page 1). These are appropriate factors to consider in exercising discretion to withhold information.

[para 69] The Public Body also referred to the harm that might be caused by disclosing information about options the Public Body was considering regarding the closure of the Park. In light of the fact that the Public Body has made its decision regarding the Park public, I will order the Public Body to consider whether this ought to change its decision to withhold the information to which section 23(1)(b) applies.

[para 70] The Public Body did not explain how it exercised its discretion to withhold pages 207 and 208 under section 23(1)(a). The records at issue (for example, page 16) indicate that a bylaw has been passed that may be a later version of this draft document. I do not know whether the entire content of pages 207 and 208 match that of the passed bylaw. I note that both sections 181(1) and 197(3) of the MGA state that a resolution or bylaw cannot be passed at a meeting that is not held in public; therefore, if the information on pages 207 and 208 is the same as (or substantially similar to) a passed bylaw, it is not clear to me what harm would result from disclosing this information to the Applicant. I will order the Public Body to reconsider its exercise of discretion, taking into account the factors listed above and whether the substance of these pages has been discussed in a public meeting.

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

[para 71] The Public Body withheld information under sections 24(1)(a), (b), and (g). These provisions state:

> *24(1) The head of a public body may refuse to disclose information to an applicant of 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,*
> *…*
> *(g) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision,*
> *…*
> *(2) This section does not apply to information that*
>
> *…*

> *(f) is an instruction or guideline issued to the officers or employees of a public body,*
>
> *...*

Sections 24(1)(a) and (b)

[para 72] In previous orders, the Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a), and consultations or deliberations under section 24(1)(b) 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. (Order 96-006, at p.10)

[para 73] 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 74] 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 (Order 96-012, at paras. 31 and 37).

[para 75] 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 76] 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 77] 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 78] 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 79] Further, sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the individuals involved in the advice or consultations, dates, and information that reveals only the fact that advice is being sought or consultations held (and not the substance of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 89).

Public Body arguments and analysis of section 24(1)(a)

[para 80] The Public Body did not provide any specific arguments in its exchanged submission regarding the application of section 24(1)(a); its *in camera* submissions were similarly sparse. However, it is clear from the Public Body's submissions, and the records themselves, that they were created for the purpose of providing advice, recommendations, options, etc. to Council by an employee (or employees) of the Public Body with responsibility to do so.

[para 81] The Public Body seems to argue that the disclosure of any headings, background facts, or similar information would reveal information to which section 24(1)(a) applies. As with its application of section 23(1)(b), the Public Body's interpretation of section 24(1)(a) is overly broad; this provision applies only to information that would reveal the *substance* of the advice etc. listed in section 24(1)(a). Some of the information in the records appears to fall within the scope of this exception; however, much of the information does not.

[para 82] By letter dated May 14, 2014, the Public Body asked to be permitted to submit additional arguments to the inquiry, which it submitted on June 20, 2014 (presumably). The Public Body noted that on May 9, 2014, the Supreme Court of Canada issued the decision *John Doe v. Ontario (Finance)*, 2014, S.C.C. 36. This decision addressed the interpretation of section 13 of Ontario's *Freedom of Information and Protection of Privacy Act*, which is similar, but not identical to, section 24 of Alberta's Act. The Public Body argued that this decision is relevant to the interpretation of section 24. Specifically, the Public Body stated:

> The SCC has indicated that there is no requirement that "advice" be communicated in order for the information to fall within an exception to disclosure as well, the SCC has indicated that the words "advice" and "recommendations" are not synonymous as each have their own distinct meanings. The Public Body respectfully requests the opportunity to make further submissions with respect to the application of this case in the inquiry.

[para 83] Although the Supreme Court's decision in *John Doe* overturned the Ontario Information and Privacy Commissioner's interpretation of section 13 of the Ontario Act, it does not alter the approach of this Office to Alberta's section 24(1). Past orders of this Office have confirmed that advice need not be communicated to a decision-maker for section 24(1)(a) to apply; in Order F2013-13, the adjudicator said:

> So long as the information described in section 24(1)(a) is developed by a public body or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a) regardless of whether the individual or individuals ultimately responsible for making a decision receives it. The third arm of the test should therefore be restated as "created for the benefit of someone who can take or implement the action" to better accord with the language and purpose of section 24(1)(a), and I will review the information to which the Public Body has applied section 24(1)(a) with that in mind.

[para 84] With respect to the Supreme Court's decision regarding the scope of "advice" and "recommendation", the Court rejected an interpretation of advice that required that advice include a recommended course of action. It said (at paragraph 24):

> However, it appears to me that the approach taken in *MOT* and by the Adjudicator left no room for "advice" to have a distinct meaning from "recommendation". A recommendation, whether express or inferable, is still a recommendation. "Advice" must have a distinct meaning. I agree with Evans J.A. in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C. 421 ("*Telezone*"), that in exempting "advice and recommendations" from disclosure, the legislative intention must be that the term "advice" has a broader meaning than the term "recommendations" (para. 50 (emphasis deleted)). Otherwise, it would be redundant. By leaving no room for "advice" to have a distinct meaning from "recommendation", the Adjudicator's decision was unreasonable.

[para 85] The Supreme Court of Canada concluded that "advice" in section 13 of Ontario's Act includes policy options (see paragraph 47). Ontario's section 13 refers only to "advice or recommendations" of a public servant, while section 24(1)(a) of Alberta's FOIP Act specifically includes advice, proposals, recommendations, analyses or policy options within its scope. In my view then, the Court's decision with respect to the meaning of "advice" in section 13 of Ontario's Act, does not change the meaning of "advice" in Alberta's section 24(1)(a), as that section already includes policy options.

[para 86] The Public Body also points out that "the SCC found that it was unreasonable to require that advice be communicated in order for the information to fall within FIPPA's section 13(1) exception to disclosure." This finding is also consistent with the interpretation of section 24(1) of Alberta's Act (see Order F2013-13, at para. 123, cited above). In my view, this Supreme Court decision does not affect my conclusion with respect to the Public Body's application of section 24(1)(a).

[para 87] In order to provide guidance to the Public Body regarding the proper application of section 24(1)(a) to information in the records at issue, I will determine to what information this provision can be applied on pages 1-19 of the records at issue.

[para 88] Much of the information contained in these pages consists of background information and statistical information. None of the information in the header, footer, or main (bolded) headings reveals the substance of the advice etc. provided by the Public Body's administration; therefore, section 24(1)(a) does not apply to that information. The following information consists of advice etc. from the Public Body administration to Council:

- answers to the second and third questions on page 1, and the last sentence in the answer to the fifth question on that page;
- answers to the third and fourth question on page 2 (this information consists of analysis);
- the information following the underlined subheading on page 8 (but not the heading) and the first two paragraphs of page 9;
- the information following the first underlined subheading on page 9 (but not the heading) and the second and third sentences following the second underlined subheading (but not the subheading);
- the last sentence of the paragraph following the first italicized sentence on page 10;
- the paragraph under the first italicized sentence on page 12, and the indented paragraphs on pages 12, 13 and 14, as well as the last paragraph on page 14;
- the last sentence of the first paragraph and the third paragraph on page 15;
- the information under the first, second and fourth bolded headings on page 16 (but not the headings);
- the information described at paragraph 12, Tab 2 of the Public Body's *in camera* submission appears to be merely background information to which section 24(1)(a) does not apply; however, I accept the Public Body's explanation that the fact that this information is included in the Report reveals the substance of advice to Council, and that this exception applies to the information as described by the Public Body in its submission, wherever it occurs in the records (page 5 from the underlined heading to the bolded heading on page 6, the information after the dash in the second paragraph of page 18).

[para 89] The information on pages 18 and 19 appears to comprise previous *decisions* of Council. However, sections 24(1)(a) and (b) of the Act do not protect a decision itself, as they are only intended to protect the path leading to the decision (Order F2005-004 at

para. 22; Order F2007-013 at para. 109; Order F2008-031 at para. 87). Therefore section 24(1) does not apply to this information.

[para 90] It is possible that some further information falls within the scope of section 24(1)(a); however, the Public Body has the burden of providing sufficient information to show that this is the case. In many cases, it is not clear from the records themselves that information consists of advice, recommendations, analysis, etc. rather than background facts and so I cannot conclude that section 24(1)(a) applies (for example, the entire paragraph following the first italicized sentence on page 10, and the second-last paragraph on page 15).

[para 91] I note that the public meeting minutes provided by the Public Body show that Council voted to accept the administration's recommendations in the Report; therefore, these recommendations reflect a decision of Council, and cannot be withheld under section 24(1).

Public Body arguments and analysis of section 24(1)(b)

[para 92] With respect to the application of section 24(1)(b), the Public Body argues the following in its exchanged submissions:

> The Public Body submits that deliberations and consultations envisioned under Section 24(1)(b) of the Act refers to the deliberative or consultative process undertaken by the officers and employees of the Public Body. Consequently, information assembled for the specific purpose of forming the basis for a deliberation or consultation is excluded along with the information that forms part of the deliberation itself. Section 24(1)(b) protects the deliberative or consultative process.
>
> Since deliberations and consultations cannot occur in a vacuum, the Public Body submits that all information that "could reasonably be expected to reveal" the process of consultations and deliberations "involving officers or employees" of the Public Body may be exempted from disclosure. This includes all information that is created, and necessary, for a deliberation or consultation to occur.

[para 93] As with its application of section 23(1)(b) and 24(1)(a), the Public Body's interpretation of section 24(1)(b) is overly broad. This provision applies only to the *substance* of the deliberations or consultations, not any and all information "assembled for the specific purpose of forming the basis" for deliberations or consultations.

[para 94] That said, some of the information in the records at issue falls within the scope of this exception. Information that reveals the questions asked by Council of the City administration falls within the scope of consultation and deliberation, as does information that reveals the substance of the Council's deliberation (but not merely the topic of deliberation) in past *in camera* meetings. In addition to this, the administration's responses to the Council's questions in the report could reasonably reveal the substance of the questions, and therefore fall within the scope of consultation and deliberation. In order to provide guidance to the Public Body regarding the proper application of section

24(1)(b) to information in the records at issue, I will determine to what information this provision can be applied on pages 1-19 of the records at issue.

[para 95] The information in the following pages falls within the category of information described above:

- All information following (and including) the first italicized sentence on page 1;
- The first four paragraphs on page 2, as well as the italicized information in the fifth paragraph;
- The indented information (below the second paragraph) on page 3, and the first sentence in the following paragraph, and the bullet points at the bottom of the page;
- The bullet points on page 4;
- The underlined heading on page 6 and the information below;
- All information on pages 7-13 (except headers and footers);
- The top half of page 14, up to the first bolded heading;
- The information on page 17 (except headers and footers);

[para 96] It is not clear from the records that the information in the bottom half of page 14 to page 16 reveals deliberations of Council and so I cannot find that section 24(1)(b) applies. Pages 18-19 appear to reveal some consultation between Council and the administration, but also some decisions of Council; the latter cannot be withheld under section 24(1)(b), as noted above. The provision applies to the following information on page 18:

- The last three lines of the first paragraph;
- The seventh paragraph;
- Information after the first comma in the eighth paragraph;
- The second sentence of the ninth paragraph;

None of the information in the headers or footers of these pages can be withheld.

[para 97] The remaining information in these pages consists of background information, information that describes the process for answering Council's questions, and general descriptions of the subject-matter. Section 24(1)(b) does not apply to these types of information.

[para 98] I note that pages 21-47 are a similar type of record to the record consisting of pages 1-17. However, most of the information in pages 21-47 does not include questions asked or other consultations of Council. The records refer to Council as having 'directed' the administration to perform certain actions; in some instances, these directions appear to be requests for information, which fall within consultations and deliberations (for example, all but the first line of the sentence comprising paragraph 3 on page 21) but in other cases the directions appear to reflect decisions of Council, to which section 24(1) does not apply (for example, the first sentence of the last paragraph on page 26).

Section 24(1)(g)

[para 99] The Public Body's submissions indicate only that the Public Body feels it properly applied this exception to pages 27, 38, 43, 62-66, 201-204, 209-222, 225, 231, 245-265, 321-333. Again, these pages were withheld in their entirety.

[para 100] This provision applies to information that could reasonably be expected to result in the disclosure of a pending policy or budgetary decision. In Order F2008-008, the adjudicator considered the scope of this provision. He stated "[i]n referring to a decision that is *pending*, I believe that the intent of section 24(1)(g) of the Act is to protect a decision that has already been made – and not merely any number of possible decisions" (at para. 57).

[para 101] I agree with this statement. However, the evidence provided by the Applicant regarding the City's decision to close the Park indicates that the Public Body's decision is no longer pending. The Applicant provided me with copies of media reports that stated that residents have been told of the closure and the reasons for it, allocation of moving costs, and that the City would not be building a new park at East Hills Estates. The articles also quote the mayor as referring to this as the final decision.

[para 102] The Public Body had an opportunity to respond to the new evidence of the Public Body's decision submitted by the Applicant, and did so. However, its response was limited to the relevance of that evidence to public interest in disclosure of the records. The Public Body did not address how the public decision affects its application of exceptions to disclosure to the records.

[para 103] Some information in the records refers to pending plans, but those plans appear to have now been made public. Some other information in the records may relate to decisions that remain pending; however, I do not know – and the Public Body has not told me – what decisions in the Report remain pending in light of the recent announcement. Therefore I find that the Public Body has not met its burden to show that this exception applies to information in the records at issue.

Exercise of discretion

[para 104] The Public Body states that it considered the purposes of the Act, whether there was a compelling public interest in disclosure of the information, and the purpose of section 24(1). I accept that the Public Body properly exercised its discretion to withhold information to which section 24(1) applies.

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

[para 105] The Public Body applied section 25(1)(c)(iii), to the information in pages 16, 27, 45, 46, 57, 58, 61-63, 65, 66, 192, 193, 201, 202, 231, 244, 260-265. This provision states:

> *25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:*
>
> *...*
>
> *(c) information the disclosure of which could reasonably be expected to*
>
> *...*
>
> *(iii) interfere with contractual or other negotiations of,*
>
> *the Government of Alberta or a public body*

[para 106] In order to demonstrate that there is a reasonable expectation of harm, the following test must be satisfied:

a) there must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
b) the harm caused by the disclosure must constitute "damage" or "detriment" to the matter and not simply hindrance or minimal interference; and
c) the likelihood of harm must be genuine and conceivable.

(Order F2010-037, at para. 74)

[para 107] The Public Body's exchanged submission states merely that it believes this provision applies to the information in the above-cited pages. Its *in camera* submission provides some descriptions of information to which it has applied this provision. The Public Body's arguments primarily address the harm that could result from revealing decisions that have not yet been made, or not made public. As the decision regarding the closure of the Park, and the decision not to open a new Park, have been made public, it is unclear what harm could result from the disclosure of the information to which the Public Body has applied this provision.

[para 108] As noted above, the Public Body did not address how the fact that the decision is now public affects its application of exceptions to disclosure to the records. As many of the decisions or possible decisions in the Report have directly or indirectly been made public by the Public Body's announcement regarding the Park, this information seems to now reveal only that the Public Body considered other options.

[para 109] I find that the Public Body has failed to meet its burden to show that it properly applied section 25(1)(c)(iii) in most cases where it did so. However, there is a small amount of information that was not part of the Public Body's announcement to the Park residents and that could possibly affect the Public Body's negotiating position if known (for example, the last sentence of the second paragraph on page 27 and the

thirteenth bullet on page 46); however, while the nature of the information suggests a *possible* relationship between its disclosure and the harm alleged by the Public Body, the relationship is not clear cause and effect, and I do not have sufficient information to determine that the harm is genuine and conceivable. There is also other information (purchase price or value of particular land at a particular time on page 201, for example) that could conceivably affect the negotiation of the sale price if the Public Body were to later sell that land (although I do not know if it plans to); however, it seems to me to be at least possible that this information (purchase price) is publicly available, in which case the disclosure of this information would not harm the Public Body's negotiating position.

[para 110] The following information meets the test for section 25(1)(c)(iii) on the face of the records. I agree that the Public Body properly applied that exception to this information:

- the dollar amounts in the last two paragraphs on page 231 (except the first bullet in the second-last paragraph) – section 25(1)(c)(iii) applies to this information wherever it occurs in the records;
- the amount in the right-most box on the second-last level of the chart on page 265.

Exercise of discretion

[para 111] Section 25(1) is a discretionary provision. The Public Body states that it considered the purposes of the Act, whether there was a compelling public interest in disclosure of the information, and the purpose of section 25(1). The Public Body's *in camera* submissions provide further information regarding the harm that may result from disclosing the information in the records. I accept that the Public Body properly exercised its discretion to withhold information to which I have found section 25(1) applies.

4. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

[para 112] The Public Body withheld some information on pages 2 and 8, as well as pages 364-369 in their entirety under section 27(1)(a). The Public Body states that this information is subject to solicitor-client privilege.

[para 113] 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 114] The Public Body has not provided me with a copy of pages 364-369; rather it has relied on this Office's Solicitor-Client Privilege Adjudication Protocol. However, the Public Body has provided me with a copy of pages 2 and 8, including the information

to which section 27(1)(a) was applied. The copy of these records does not specify what information on each page the Public Body believes is subject to privilege; however, the Public Body's *in camera* submissions refer to specific sections of these pages. These specific sections of page 2 and 8 clearly relate to information in pages 364-369. This information in pages 2 (the fifth paragraph) and 8 (the top third of the page, above the secondary heading) reveals that this information, as well as the information in pages 364-369, consists of communications between a solicitor and client that entails the seeking and giving of advice. It is also clear from the context of the records that the advice was intended to be confidential. Therefore I find that the Public Body properly applied section 27(1)(a) to this information.

[para 115] 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)):

> … 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 116] As I have found that the information withheld on pages 2, 8 and 364-369 of the records at issue 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 117] I make this Order under section 72 of the Act.

[para 118] I find that section 23(1)(a) applies to information on pages 207 and 208. I order the Public Body to reconsider its exercise of discretion as described at paragraph 70.

[para 119] I find that the Public Body properly applied section 23(1)(b) to the information described at paragraphs 60-61. I order the Public Body to reconsider its exercise of discretion to withhold this information in light of the recent public decisions regarding the subject of the records.

[para 120] I find that section 23(2)(b) applies to the information on pages 361-363 and order the Public Body to disclose this information to the Applicant.

[para 121] I find that the Public Body properly applied section 24(1)(a) and (b) to some information in the records, as described at paragraphs 88, 95, and 96.

[para 122] I find that the Public Body did not properly apply section 24(1)(g) to the information in the records.

[para 123] I find that the Public Body properly applied section 25(1) to information described at paragraph 110.

[para 124] I uphold the Public Body's decision to withhold information on pages 2, 8, and 364-369 under section 27(1)(a).

[para 125] I order the Public Body to make new decisions regarding the application of sections 23(1)(b), 24(1)(a) and 24(1)(b), using the guidance provided in this Order, and disclose to the Applicant the information to which, by reference to my examples and the interpretation of the provisions which I have set out in the body of the Order, these exceptions do not apply. This part of the Order does not apply to information to which I have held other exceptions do apply.

[para 126] Should the Applicant wish to request a review of the Public Body's new decisions resulting from this Order, her request will proceed directly to the inquiry stage, and follow an expedited process.

[para 127] 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.

_____

Amanda Swanek
Adjudicator