

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2015-29

September 30, 2015

### ALBERTA JOBS, SKILLS, TRAINING AND LABOUR

Case File Number F6250

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

**Summary:** The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act or the Act) for records from the Public Body that documented the Public Body's dealings with him over a specified time period. The Public Body supplied some records, but withheld others, citing sections 4(1)(a), 17, 24 and 27, and saying that some records it had located, or parts of them, were unresponsive. The Applicant objected to the withholding and severing of some of the information. He also argued that records should exist which were not located or were not provided to him, and provided reasons for this belief.

The Adjudicator found it necessary to ask the Public Body further questions about its decision-making with respect to records regarding which the Public Body had cited section 17, as well as with respect to some part of the records regarding which the Public Body had described as unresponsive, or had cited section 24. She issued a Confidential Addendum to this decision, which she provided only to the Public Body, because it contains a discussion of her reasons for decision which must be kept confidential by reference to the Commissioner's duty under section 59(3) of the Act. This Addendum held that the Public Body had not properly applied certain of the provisions of the Act, and required the Public Body to make new decisions about these matters and to provide a new response to the Applicant. The Adjudicator said that if the Applicant is not satisfied with these new decisions, she would hear the related issues on an expedited basis. She also requested further *in camera* submissions from the Public Body on a particular question, and reserved jurisdiction to decide the matter related to these submissions.

The Adjudicator required the Public Body to explain to the Applicant, and to her, why particular records do not exist that the Applicant has explained he believes exist, and reserved jurisdiction to order a new search if this explanation was not satisfactory.

The Adjudicator upheld the Public Body's application of section 4(1)(a). With respect to records for which the Public Body had relied on section 24 that the Adjudicator had not dealt with in the Addendum, she upheld reliance on section 24 to some of these records, but not to others. For some of those that were upheld, she directed the Public Body to re-exercise its discretion, taking into account particular factors which she set out.

The Adjudicator upheld the Public Body's reliance on section 27 for some parts of the records. However, she found that the Public Body's descriptions of its reliance on section 27 were confusing and inconsistent in terms of which provisions were being applied and why. She directed the Public Body to review these records again, to make any new decisions where no clear decision has been made as to which provision applies, and to more clearly indicate which provisions were being applied to the records or parts of records, and why.

With respect to records which the Public Body had described as unresponsive, but which the Adjudicator had not dealt with in her Addendum, she agreed that the records were unresponsive in fact.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 10, 17, 24, 27, 59, 72.

**Authorities Cited: AB:** Orders 96-006; F2004-026, F2007-029.

**Cases Cited:** *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89.

## **I. BACKGROUND**

[para 1] The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* to Alberta Human Services (now Alberta Jobs, Skills, Training and Labour) (the Public Body) for access to the following information:

1. All documented casual conversations and statements etc that your office or other E.S. departments has kept a record of regarding their communications (whether in person or telephone) with me during the last four years since January 1, 2007. These records should include what was discussed including my concerns / questions and their response. They would also include opinions about me, etc. that any E.S. employee who I had contact or communications with felt compelled to record. I am specifically requesting any such records that were distributed amongst or between E.S. employees or other public bodies including but not limited to the various Directors, Compliance Managers, Policy and Technical advisors, Deputy Minister's office, Alberta Justice,

Service Alberta, Ombudsman's office or the Information and Privacy Commissioner's Office. Such personal records about me contained within your files, your office staff's internal files, the E.S. Director's office internal files, the Workplace Policy and Standard's office's internal files and or the Edmonton and Red Deer E.S. Storefront office internal files are being requested. Pages 4 – 6 of your September 4, 2009 section 55 exemption letter to the Commissioner strongly suggests that you and your office have had extensive communications with other E.S. departments about me. These are the type of personal records concerning me being requested.

2. All written and/or electronic records (faxes, emails, etc) documenting communications and meetings between E.S. Head Office and/or their various departments/offices about me since January 1, 2007. This would include your office. All information including personal opinions contained within the Public Body employee's notes or files concerning my letters/attempts to obtain answers to my concerns/questions about labour legislation, policy and enforcement other than from or through official FOIP requests. This request includes all documented conversations, meetings and file records between your department and other E.S. departments about my attempts to gather information and scrutinize E.S. policies and practices outside of filing an official FOIP request.

3. Recordings and/or written records of my phone conversations with the Employment Standards information advice telephone line: (780) 427-3731. I made a call to that number on December 9, 2010 at 10:30 am. I was informed that these conversations are recorded and kept for one year. I only made the one above-mentioned call in the previous year to the best of my knowledge. I am requesting the recording of that conversation. However your department appears to have knowledge of past communications between the E.S. information line and myself. Therefore, please also provide any other recordings or documentation about my enquiries that Employment Standards has chosen to retain and/or provide to your office, other departments or other public bodies since January 1, 2007.

4. Records verifying which other government departments your office and Employment Standards have forwarded personal information about me to since January 1, 2007. Please verify and provide any personal information about me that was provided to the Deputy Minister, other government officials, Alberta Justice, Service Alberta or the Ombudsman's Office. I am requesting any such personal information/opinions about me forwarded to other departments as I view the distribution of records unrelated [to] my access requests to your office to be a violation of your legislated responsibility under FOIPPA and Employment Standards legislated responsibility under the *Code*.

[emphasis in original]

[para 2] The Public Body provided records in a series of responses to the Applicant, providing some records but ultimately withholding some, indicating to him that it was relying on the following exceptions to disclosure: sections 4(1)(a), 17, 24(1)(a), 24(1)(b), 24(1)(c) and 27. It also told him it was withholding some records, and parts of records, because they were not responsive to his request.

[para 3] Mediation of the issues in this matter was not successful, and it proceeded to inquiry. I received initial and rebuttal submissions from both parties

[para 4] On reviewing the initial submission I had received from the Public Body, I sent a letter to it asking it to answer further questions with respect to the reasons for its decisions respecting some of the records which it had withheld in reliance on sections 17 and 24, as well as respecting its decision about the records it withheld as non-responsive. (These records totaled 7 pages, many of them with duplicative content). I could not share this letter with the Applicant because doing so had the potential to reveal information that the Public Body was entitled to withhold, and accordingly I also permitted the Public Body to provide its response *in camera*. The response of the Public Body necessitated some further questions sent to the Public Body, as well as the presentation of evidence by witnesses, which, again, I could not share with the Applicant for the reasons just mentioned. I indicated to the Applicant that I would give him as much information as possible about this process at the conclusion of the inquiry (the inquiry has not yet concluded). I received one additional submission from the Applicant.

## **II. RECORDS AT ISSUE**

[para 5] The records at issue are those that were totally withheld, or severed and partially withheld, from the Applicant.

## **III. ISSUES**

[para 6] The issues stated in the Notice of Inquiry were as follow:

- Issue 1: Are the records excluded from the application of the Act by section 4(1)(a) (court records)?
- Issue 2: Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)? In this case, the Commissioner will consider whether the Public Body conducted an adequate search for responsive records.
- Issue 3: Does section 17 of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information in the records?
- Issue 4: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?
- Issue 5: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?
- Issue 6: Did the Public Body properly withhold information as non-responsive to the Applicant's request?

#### IV. DISCUSSION OF ISSUES

[para 7] Section 59(3) of the Act prevents me from disclosing information which the Public Body may be entitled to withhold (and even if my view is that it is not entitled to withhold it, it must be given an opportunity to challenge my decision on judicial review). For this reason, the questions which I asked the Public Body to answer (which would themselves reveal information the Public Body was potentially entitled to withhold) were not disclosed to the Applicant, and I permitted the Public Body to answer them *in camera*.

[para 8] The prohibition in section 59(3) also applies to the writing of this decision. In dealing with *in camera* submissions in my decision, I should generally not disclose the information such submissions contain. As well, I cannot openly state the entirety of my reasons for decision without potentially offending section 59(3).

[para 9] At the same time, however, providing my conclusion about the merits of the Public Body's decision without providing reasons might be inadequate to satisfy the Public Body that I had thoroughly considered its submissions. As well, in the event of a judicial review, it would leave the reviewing court without a complete explanation of my reasons.

[para 10] I will, therefore, include a discussion of my additional questions and the *in camera* submissions which the Public Body provided to answer them, and my conclusions about these matters, in an Addendum to this decision, which I will provide to the Public Body alone. That decision involves Issue 3, and Issue 6 (except that for Issue 6, pages (or parts of pages) 6, 8, 9, 21 and 22, 76 (a duplicate of 9) and 88 can be dealt with openly). My decision requires the Public Body to reconsider and clarify its decision-making concerning these records, and to provide to the Applicant the results of this new decision-making. I have also raised a new issue in the Addendum, and asked the Public Body to provide *in camera* submissions on this issue, so that I may decide it before it provides its new decisions to the Applicant.

[para 11] The Public Body may decide instead to apply for judicial review of my decision. In the event it does so, I will provide in my return to the court both the Order containing the open part of my reasons for decision, and the Addendum, and will request that the Addendum be sealed. The court may then make any orders it regards as necessary with respect to further dissemination of these reasons for the purpose of the court's review. I will not provide the Addendum to the Applicant, or publish it, whether or not the decision is taken to judicial review.

[para 12] I will deal with the remaining issues below.

**Issue 1: Are the records excluded from the application of the Act by section 4(1)(a) (court records)?**

[para 13] I have reviewed the records the Public Body did not provide to the Applicant on the basis they are court records, and are therefore not subject to the Act (pages 34-36, 45-47, 50-52 and 58-60 – the latter three sets of records are all duplicates of one 3-page

document). As all these records have stamps showing they were filed in court, I agree they are not subject to the Act. I note, though, that although the Public Body is not required to provide these records to the Applicant under the Act, it is not prohibited from providing them.

[para 14] I also note these records do not, as the Applicant thinks they may, consist of information provided, *in camera* or otherwise, to the court by opposing parties in litigation.

**Issue 2: Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)? In this case, the Commissioner will consider whether the Public Body conducted an adequate search for responsive records.**

[para 15] The Public Body provided a summary of the search it conducted.

[para 16] In its letter to the Applicant of October 12, 2012, the Public Body explained its search in the following terms:

Based on the wording of your request the specific areas that were considered to possibly have records responsive to your request were:

- Deputy Minister's Office
- Assistant Deputy Minister, Corporate Services Division
- The Information and Privacy Office
- Employment Standards Program Delivery, Executive Director's Office
- Workplace Standards Division
- Employment Standards Program Delivery South
- Employment Standards Program Delivery North
- Career and Employer Services, Centrally Delivered Services
- Employment Standards Registrar

Subsequent to the initial release of responsive records and after additional clarification provided by you on May 8, 2012 we conducted a further search and located additional records in Workplace Policy, Legislation and Program Development offices.

We acknowledge that you feel your efforts to obtain access to your personal information has been frustrated. I would like to assure you that every effort to assist you to obtain access to your personal information has been expended. Based on the search criteria, the efforts of staff identified above and the provision of access to additional records that you subsequently identified through additional clarification, we believe we exhausted the possibility of finding any additional responsive records and that we have met and exceeded our duty to assist you as an Applicant.

[para 17] In its submissions, the Public Body argues that it conducted a reasonable search for responsive records, as follows:

The Public Body submits that it met the requirements of section 10(1) of *the Act*. The Public Body agrees that section 10 of *the Act* places a general duty on a public body to assist applicants. As outlined in the OIPC Order F2004-008 para 40:

*".. a public body must make every reasonable effort to search for the actual records that have been requested ..... The standard for the search is not perfection but rather what is 'reasonable' in the circumstances.*

Order F2004-008 (TAB 6)

The Public Body submits that it conducted a reasonable search for the records requested and informed the Applicant of what was done in its search.

The Public Body conducted the initial search for records by requesting all staff in their respective areas to search for responsive records as identified by the Applicant. The request was sent to the attention of senior staff in charge of each of the following specific areas:

Deputy Minister's office; Assistant Deputy Minister, Corporate Services Division; the Information and Privacy Office; Employment Standards Program Delivery; Executive Director's Office; Workplace Standards Division; Employment Standards Program Delivery South; Employment Standards Program Delivery North; Career and Employer Services, Centrally Delivered Services; and Employment Standards Registrar.

Each staff member was asked to confirm that they had searched:

*"Your search should include electronic data on all drives including e-mail and personal electronic drives. Further, your search for the records identified below should also include a search for hard copy paper records, including daytimers located in any and all receptacles including filing cabinets in filing rooms, employee's individual offices, desk drawers or any other place that records may exist."*

The Applicant in his letter of May 7, 2012, identified that he believed records were missing. The Public Body in response to the letter outlined the Public Body's understanding of the records being requested from a division not previously identified.

[para 18] Earlier orders of this office provide that a public body's description of its search should include a statement of the reasons why no more records exist than those that have been located. (See, for example, Order F2007-029, in which the former Commissioner included "why the Public Body believes no more responsive records exist than what has been found or produced" in the list of points that evidence as to the adequacy of a search should cover.<sup>1</sup> This requirement is especially important where an applicant provides a credible reason for its belief that additional records exist.

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<sup>1</sup> The remaining items set out in the Order that are important for assisting the adjudicator to assess the quality of the search a public body has conducted are:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request

[para 19] In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89, the Alberta Court of Queen's Bench confirmed that the duty to assist has an informational component. Manderscheid J. stated:

The University's submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, *Lethbridge Regional Police Commission*, F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):

In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps taken to identify and locate all records and possible repositories of them, and *why the Public Body believes that no more responsive records exist than what has been found or produced.* [Emphasis added in original]

Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University's rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords would not lead to responsive records, *its reasons for concluding that no more responsive records existed.* [Emphasis added]

[para 20] The Applicant has explained, in both his initial and rebuttal submissions, as well as in earlier communications to the Public Body (which he provided in his submissions), and in his requests for review and for inquiry, why he believes more records exist or should exist that were not provided to him. . He has explained that his belief is based on the fact that the Director, Information and Privacy Office referred to such information for the purposes of making a section 55 application to this office, when he wrote a chronology of events involving the Applicant's interactions with the Public Body.

[para 21] For example, in the concluding portion of his request for inquiry the Applicant said:

... Nor have I received an explanation why internal communications that [the director] had direct knowledge of were not located and produced.

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- 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.



[para 22] In his initial submission the Applicant describes in detail the kinds of information about him that the Director recounts in his chronology, and contends that for the Director to have been aware of the events he described in the chronology, there must have been records that documented them, which have not been provided to the Applicant.

[para 23] In his rebuttal submission the Applicant repeats these details and says:

It is still my position that certain documents exist, but were not provided. I base my position on [the Director, Information and Privacy]'s September 4, 2009 chronology about me.

My initial and clarification letters clearly specified “**all departments**” and clearly targeted [the Director, Information and Privacy]'s records.

[para 24] The Public Body has not addressed these points, which the Applicant repeatedly made, either in its letters to the Applicant, or in its submissions to this Office.

[para 25] Furthermore, the chronology, which the Applicant provided in his submissions, refers to at least one record (an email) that was a communication, to the Information and Privacy Office Director, of events involving the Applicant, within the specified time frame.

[para 26] Even if the Public Body's steps in conducting the search were adequate, it is also important for it to address the absence of records that, based on the Applicant's submissions, it seems possible should exist.

[para 27] I will therefore ask the Public Body to provide a new description of its search to me, and to the Applicant, that is adequate to explain why the records the Applicant believes exist, as described above and in his communications and submissions, do not exist. I reserve jurisdiction to order a further search if I conclude this is called for (after hearing from the Applicant), in the event the Public Body does not provide an explanation that satisfactorily addresses the Applicant's point that the chronology written by the Director could only have been written with supporting documentation.

**Issue 4: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?**

[para 28] The Index of Records the Public Body provided in its initial submission states that it severed information under provisions of section 24(1) from records 1, 2, 3, 4, 5, 6, 7, 11, 12, 13, 23, 24, 33, 38, 39, 40 – 42, 43, 44, 49, 55, 56, 57, 61 – 63, 64, 65, 66, 67, 69, 70 – 71, 72, 74, 75, 77, 81 – 82, 83 – 87, 88, 90, and 91.

[para 29] The Index also indicates that it applied section 27 to records 2, 11, 13, 33, 40 – 42, 61 – 63, 81 – 82, 83 – 87, and 91 and has not provided these records for my review. The Affidavit respecting the application of section 27 makes no reference to record 87, but adds record 1, 6 and 7, 12, 54 and 55, 77, and 90 as records to which section 27

applies. I will deal with records or parts of records for which section 27 (as well as section 24) was claimed (which were not supplied for my review) under the heading of section 27, below.

[para 30] Under the present heading, I will deal with records for which the Public Body has made a decision to sever information under section 24, and has provided the record for my review.

[para 31] Section 24 states, in part:

*24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*

*(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*

*(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...*

*(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations [...]*

*(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...*

[para 32] In Order 96-006, former Commissioner Clark established a test to determine whether information is advice, recommendations, analyses or policy options within the scope of section 24(1)(a). He said:

Accordingly, in determining whether section 23(1)(a) [now section 24(1)(a)] will be applicable to information, the advice, proposals, recommendations, analyses or policy options (“advice”) must meet the following criteria.

The [advice, proposals, recommendations, analyses and policy options] should:

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.

The three part test adopted by former Commissioner Clark in Order 96-006 is intended to assist in determining when advice, proposals, recommendations, analyses or policy options are *developed by or for a public body* within the terms of section 24(1)(a).

[para 33] The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. 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).

[para 34] 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 35] Section 24(1)(c) applies to positions, plans, procedures, criteria or instructions developed by or for a public body for its negotiations.

[para 36] The Public Body's arguments under section 24 consist of the following:

The Public Body submits the records contain advice and recommendations that meet the intent under section 24(1)(a) of the Act as defined by the OIPC [Order] 96-006.

[...]

Criteria

*(a) sought or expected*

The information in the records "was obtained and created to assist in the analysis by staff and used in preparation of recommendations to the Minister in respect of actions to be taken."

*(b) directed toward taking an action or making a decision*

Staff are expected and required to analyze information and provide the Minister with advice, proposals, analyses and policy options in order that the Minister makes informed decisions.

Information related to this Applicant was analyzed and proposals and recommendations made to the Minister for a course of action to be taken. The information was provided through briefing notes to the Deputy Minister.

*(c) made to someone who can take or implement the action*

The Minister of the Public Body is a member of the Executive Council charged by the Lieutenant Governor in Council and designated under section 8 of the *Government Organization Act*. Pursuant to the Designation and Transfer of Responsibility Regulation, AR 38/2008, responsibility for this request now lies with the Ministry of Human Services.

The Public Body is of the opinion that the objective of section 24(1) of *the Act* as adopted by the Alberta Commissioner in its Order 96-006 para 4 applies in this instance:

*"The objective of Ontario's section, which speaks of "advice and recommendations", is "to protect the free flow of advice and recommendations within the deliberative process of government decision - or policy-making" . ...*

Order 96-006 [TAB 13]

In the same paragraph, the Commissioner also adopted the reasoning of British Columbia's Order P-597 in Alberta Order 96-006:

*... advice and recommendations must contain more than mere information, and "must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process" ...*

Similarly, in Alberta Order F2004-026 para 64 the Commissioner accepted the Public Body's position that discretion was exercised

*"to safeguard the process by which governments enact legislation and permit it to obtain the necessary advice, through free and open discussions, such as allows for making well-reasoned decisions".*

In Alberta Order 96-012 para 31 and 37, the Commissioner concluded that the intention of section 24(1)(b) of *the Act* [previously 23(1)(b)] is ...

*"to protect consultations or deliberations occurring during the decision-making process" and "to protect information generated during the process of making a decision, but not to protect the decision itself"*

Order 96-012 [TAB 15]

In Alberta Order 97-007 para 42, the Commissioner states that:

*" ... if the Minister acts on advice or recommendation, disclosure would divulge the basis for the action. "*

Order 97-007 [TAB 16)

In Ontario's Order PO-2553 (pg 10, Analysis/Findings 2"d bullet), one way that advice or recommendations may be revealed is,

*"the information, if disclosed, would permit one to accurately infer the advice or recommendations given. "*

Order PO-2553 [TAB 17)

[para 37] The Public Body did not make arguments addressing the specific contents of the records or provide its rationale for its severing decisions under section 24 relative to specific records. It stated generally that staff are expected and required to analyze information and provide the Minister with advice, proposals, analyses and policy options in order that the Minister makes informed decisions. The Public Body also states: "Information related to this Applicant was analyzed and proposals and recommendations made to the Minister for a course of action to be taken. The information was provided through briefing notes to the Deputy Minister."

[para 38] As will be discussed below, these statements are inaccurate with respect to the majority of records to which the Public Body applied provisions of section 24(1), as for most of them, the information in question is not addressed to the Minister or the Deputy Minister, and the content of the information does not support finding that the information was to be provided to the Minister or was intended to advise the Minister.

[para 39] In addition, the Public Body's arguments address only sections 24(1)(a) and (b). No explanation has been provided regarding the Public Body's application of section 24(1)(c) to the information the Public Body severed under this provision.

[para 40] Finally, despite its argument that preparing advice is a general function of staff, the Public Body did not for the most part provide information regarding the actual functions and responsibilities of the employees to support its statements (it did provide some such information in its *in camera* submission with respect to a handful of specific records). Where the severed information does not obviously contain advice, it might have been possible to draw inferences that the information reveals advice, had the Public Body provided sufficient context and an explanation of the role of the employee who generated the information in its processes. However, the Public Body has not done so, and, therefore, where the records do not on their face contain advice, and I am unable to determine the function of the employee from the content of the records or their intent in generating information, I have been unable to draw inferences that the information would reveal advice or other kinds of information to which section 24(1) applies, if disclosed.

[para 41] I turn now to the records to which the Public Body applied provisions of section 24(1).

### *Record 3*

[para 42] The Public Body severed an email from record 3. The email is from one employee of the Public Body to a director. The email is also copied to an assistant deputy minister. The purpose of the email appears to be to ask whether a conversation had taken place, and the reasons for seeking this information.

[para 43] I note that there is a reference in the email to a proposed course of action that is also referred to in record 6. The reference to the proposed course of action in record 6 is clearly set out as something that was being deliberated and the subject of advice. Had the Public Body not included the information in record 6 for my review, I may not have been able to find that the content of record 3 could be categorized as advice. However, the context created by record 6 supports finding that the information in record 3 reveals proposals developed for the Public Body, and I find that section 24(1)(a) applies to the information severed from record 3.

#### *Record 4*

[para 44] The Public Body applied sections 24(1)(a), (b), and (c) to sever the content of an email from a director to another employee. The portions of record 4 that were disclosed to the Applicant indicate that the purpose of the email was to update the Deputy Minister regarding the Applicant's case prior to a meeting with the Ombudsman. The information in the email can be categorized as advice, as it provides analysis and a proposed course of action.

[para 45] I find that section 24(1)(a) applies to the information severed by the Public Body.

#### *Record 5*

[para 46] Record 5 contains the same email that the Public Body severed from record 3. My reasons for finding that section 24(1)(a) applies to this email are the same.

#### *Record 6*

[para 47] Record 6 contains an email, which the Public Body severed under sections 24(1)(a), (b), and (c). As I noted in my analysis of record 3, record 6 contains reference to a proposed course of action. Record 6 also contains a recommendation in relation to the proposed course of action. As the information severed from record 6 under section 24 contains information consistent with both a proposal and a recommendation, I find that section 24(1)(a) applies to the content of the email severed from record 6.

[para 48] In Order F2004-026, former Commissioner Work stated:

In my view, section 24(1) does not generally apply to records or parts of records that in themselves reveal *only* any of the following: that advice was sought or given, or that consultations or deliberations took place; that particular persons were involved in the seeking or giving of advice, or in consultations or deliberations; that advice was sought or given on a particular topic, or consultations or deliberations on a particular topic took place; that advice was sought or given or consultations or deliberations took place at a particular time. There may be cases where some of the foregoing items reveal the content of the advice. However, that must be demonstrated for every case for which it is claimed.

In that case, the Commissioner rejected the argument that the names of senders and recipients of advice, and the topic of advice could be severed under section 24(1). He held that a public body could apply section 24(1) only to information that would reveal the substantive content of advice or of consultations and deliberations.

[para 49] Here, the Public Body has severed the name and title of the sender, the date the email was sent, the recipients and the subject line from the email, in addition to the content. While the content does reveal information subject to the provisions of section 24(1), the information regarding the topic, the date, the sender, and the recipients does not, and the Public Body has not argued that it does.

[para 50] I find that the substantive portion of the email is subject to section 24(1)(a), but the remaining information severed by the Public Body is not.

#### *Record 23 and 24*

[para 51] Records 21 – 24 consist of a briefing note. The Public Body severed information appearing under the heading ‘Analysis’ from records 23 and 24. The Public Body also severed a ‘Recommendation’. The disclosed portions of the briefing note indicate that the briefing note was intended to advise the Director of Employment Standards about the Applicant’s request for clarification regarding the Public Body’s policies regarding the calculation of general holiday pay.

[para 52] The severed information contains proposed responses to the Applicant’s questions and how they will be answered.

[para 53] This information may be viewed as containing advice to the Director as to how to respond to the Applicant’s questions. I therefore find that this information severed by the Public Body is subject to section 24(1)(a). However, as the Director of Employment Standards subsequently responded to the Applicant and provided the same or very similar information to the Applicant in answer to his questions, it is unclear why the Public Body has elected to exercise its discretion to withhold the information it severed from records 23 and 24.<sup>2</sup> I will address this issue further when I review the Public Body’s exercise of discretion.

#### *Records 38 and 39*

[para 54] Records 38 and 39 contain a briefing note regarding Order F2010-029, an order of an Adjudicator of this office.

[para 55] The Public Body severed the ‘Background’ and the ‘Analysis’ portion of the briefing note.

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<sup>2</sup> The portion of the information dealing with the employment status of an employee is withholdable, in my view, as an unjustifiable invasion of that person’s privacy.

[para 56] I do not see that any of the information in the 'Background' or the 'Analysis' portion that was severed from records 38 and 39 is subject to section 24(1). The information severed from the 'Background' portion appears to be reproduced from the order, or alternatively, from the Public Body's open submissions in the inquiry that gave rise to Order F2010-029. The 'Analysis' consists of the Adjudicator's findings. Possibly, the presentation of the Adjudicator's findings was implicitly proposing an acceptance, or a rejection, of those findings, but if that is the case, the Public Body has not indicated this to me, and it is not self-evidently so. Rather, it may equally have been reproduced to inform the deputy minister of a particular state of affairs.

[para 57] Even if the information were advice, given the presence of the information in its open submissions at an inquiry in which the Applicant was a participant, and in the Adjudicator's order (which was provided to the Applicant), the Public Body would have been hard put to exercise its discretion against disclosure. However, as discussed above, I believe that the better view is that the severed portions of the briefing note provide information about a state of affairs, but are not intended to advise a course of action.

[para 58] The Public Body also severed the 'Recommendation(s)' portion from the briefing note, where it appears on record 39. I agree with the Public Body that this recommendation falls within the terms of section 24(1)(a). However, the substance of this recommendation may be inferred by the Public Body's subsequent actions. As a result, the Public Body's reasons for exercising its discretion so as to withhold the recommendation from the Applicant are unclear. I will address this issue further when I address the Public Body's exercise of discretion.

#### *Records 40 and 53*

[para 59] The Public Body severed the 'Remarks' portion of an Action Request Approval Sheet from record 40 under sections 24(1)(a) and (b). (The same content was severed from record 53, which is a duplicate of record 40, but for a signature.)

[para 60] The 'Remarks' that were severed from these records are essentially an instruction or direction to the Public Body's Information and Privacy Branch to complete a task.

[para 61] I do not agree the information severed by the Public Body on these pages falls within the terms of section 24(1)(a) or (b). The severed information does not appear to contain or reveal advice, or consultations or deliberations intended to guide or assist in making a decision. Instead, the information appears to fall within the scope of section 24(2)(f), as the information is an instruction issued to the employees of the Public Body to undertake a task. If a provision of section 24(2) applies to information, section 24(1) cannot apply.

[para 62] I find that sections 24(1)(a) and (b) do not apply to records 40 and 53.



*Records 43 and 44*

[para 63] Record 43 is a duplicate of record 4, which I have found to contain information subject to section 24(1)(a). My reasons apply equally to record 43. An email appearing at the bottom of record 43 and continuing into record 44 is a duplicate of the email appearing on record 3. I have already found that the email on record 3 reveals a proposal within the terms of section 24(1)(a). My reasoning applies equally to the email where it appears on records 43 and 44.

*Record 49*

[para 64] Record 49 consists of a briefing note. The disclosed portion of the briefing note indicates that its subject matter is the Applicant's judicial review application regarding the decision of this office to grant the Public Body's application under section 55 of the FOIP Act.

[para 65] The Public Body has severed information from the 'Background' portion of this record under sections 24(1)(a) and (b), in addition to the analysis portion and a recommendation.

[para 66] In Order 96-006, on which the Public Body relies in its submissions, former Commissioner Clark noted:

In passing, I want to note that the equivalent section of the British Columbia Act (section 13) specifically states that "factual material" (among other things) cannot be withheld as "advice and recommendations". As I stated, I fully appreciate that our section differs significantly from that of our neighbours. However, I cannot accept that the bare recitation of facts, without anything further, constitutes either "advice etc" under [section 24(1)(a)] or "consultations or deliberations" under [section 24(1)(b)].

[para 67] The information severed from the 'Background' portion is presented in such a way that *potentially*, what is recounted may have been used to develop advice that was then acted upon by the Public Body. However, the Public Body did not make any specific submissions as to how the redacted portion could be said to constitute advice, and this theory, though perhaps somewhat plausible if the information had in fact been incorporated into advice that was given to make the decision, would require more factual support than I have to make such a finding presently.

[para 68] There is also no basis for concluding that this portion of the record could in some way influence future decisions to be made.

[para 69] Given this, I can treat it as no more than 'background' information that is intended to provide facts, but not intended to advise or to obtain advice – i.e., as a "recitation of facts," in the sense described by former Commissioner Clark in the foregoing excerpt. The Public Body has not established that section 24(1)(a) or (b) applies to the information severed from the 'Background'.

[para 70] The ‘Analysis’ portion of the briefing note also appears to contain factual information intended as background. The statement appearing under the heading ‘Analysis’ seems to describe the Public Body’s position and actions that have been taken. Possibly, it is in fact merely a proposal, waiting either to be accepted, or rejected. However, I cannot conclude this without being told this was the case.

[para 71] Similarly, the ‘Recommendation’ severed from the briefing note announces a course of action that on its face has already been decided and will be acted upon. Again, it *may* be merely a proposal put in strong terms, but I cannot conclude this without a positive assertion to that effect. As the Public Body notes in its submissions, sections 24(1)(a) and (b) protect the decision making process, but not the final decision.

[para 72] I find that none of the information the Public Body severed from record 49 under sections 24(1)(a) and (b) falls within the scope of these provisions.

*Records 56 and 57, 65 and 66*

[para 73] Records 56 and 57, and 65 and 66, contain the same emails as those appearing on records 4 and 5. I have already found that the emails appearing on records 4 and 5 fall within the scope of section 24(1)(a). It follows that the same holds true for the emails on record 56 and 57, and 65 and 66.

*Records 74 and 87*

[para 74] Record 74 contains an email from the director who created record 4. The email on record 74 contains the same content as record 4, except that the last two lines of record 4 do not appear in the email on record 74. Like record 4, the content of record 74 is consistent with advice or a proposal within the terms of section 24(1)(a). I find that the information severed from record 74 falls within the terms of section 24(1)(a).

[para 75] Record 87 contains a copy of the same email in record 74. It also contains a copy of a response to the email from one of the recipients. Despite the fact that the second email on record 87 is the same as that appearing on record 74, the Public Body withheld the email in its entirety from record 87, but severed only the portions it considered to contain advice from record 74.

[para 76] In my view, the severing on record 74 is appropriate, as it is confined to the information that reveals advice or proposals, but provides the Applicant with information that does not. The severing on record 87 is inappropriate, as it severs information that reveals advice and proposals, in addition to information that is not subject to an exception to disclosure.

[para 77] The response email that appears at the top of record 87 proposes a course of action and explanation as to why the Public Body should adopt the course of action. I find that the content of this email is subject to section 24(1)(a). However, I find that the

name of the sender, the recipients, the date, and the subject lines are not subject to any of the provisions of section 24 and must be disclosed to the Applicant.

[para 78] I find that the substance of the emails on record 87 is subject to section 24(1)(a); however, I find that the remaining information in these emails is not.

#### *Record 88*

[para 79] The Public Body applied sections 24(1)(a), (b), and (c) to withhold an email appearing on the top of record 88 in its entirety. This email is a duplicate of the email appearing on record 6, which I have discussed above. My decision regarding the Public Body's application of section 24(1) to this part of record 88 is the same in relation to the Public Body's severing of the information on record 6; that is, section 24(1)(a) applies to the content of the email, but not to any other information.

#### *Exercise of discretion*

[para 80] As I have found that section 24(1)(a) applies to some of the information in the records, I must now consider whether the Public Body has demonstrated that it appropriately exercised its discretion when it elected to withhold this information.

[para 81] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that are involved. The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[para 82] While the foregoing case was decided in relation to the law enforcement provisions in Ontario's legislation, it is clear from paragraphs 45 and 46 of this decision that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in freedom of information legislation in particular. The provisions of section 24(1) of Alberta's FOIP Act are discretionary.

[para 83] Applying the principles in *Ontario (Public Safety and Security)*, a finding that section 24(1)(a) applies means that the public interest in ensuring that public bodies

obtain candid advice may trump public or private interests in disclosing the information in question. After determining that section 24(1)(a) applies, the head of a public body must then consider and weigh the public and private interests in disclosure and non-disclosure in making the decision to withhold or disclose the information.

[para 84] The Public Body provided the following explanation for its decision to exercise its discretion

The Public Body is of the opinion that the records at issue contain information that meets the criteria established under sections 24(1)(a), (b) and (c) of *the Act*, and that in protecting the free flow of advice and recommendations in the decision making process, it exercised its discretion appropriately in denying access to the records.

The Public Body considered the general principles of the legislation to demonstrate openness, accountability and transparency including an applicant's right to information and submits that it considered these factors in the exercise of discretion. The Public Body decided that the discretion to apply sections 24(1)(a), (b) and (c) of *the Act* was applied appropriately and outweighed the right of the Applicant to access the information. The Public Body provided the Applicant with the remaining information in the records which was not subject to section 24(1) of *the Act*.

In the OIPC review process, the Public Body was asked to reconsider its decision on some records where information was severed. The Public Body reconsidered its decision and disclosed the additional information to the Applicant. The Public Body submits that the remaining records were properly severed and information appropriately withheld under section 24(1) of *the Act*.

[para 85] Presumably, the Public Body made a decision that withholding some of the information in the records would in some way protect the free flow of advice and recommendations in the decision making process, and that this consideration outweighs the principles of openness, accountability and transparency in addition to the Applicant's right to information.

[para 86] While I acknowledge that for some of the records described above, this explanation is sufficient in view of a record's content, it is not satisfactory in relation to other records the Public Body decided to sever under section 24(1)(a) in this case. In particular, there are factors I have mentioned relative to the information severed in records 23, 24 and the 'Recommendation(s)' in record 39, that favour disclosure, which I do not believe the Public Body took into account. That is, some of the information severed from briefing notes is inferable from actions taken by the Public Body, and other information was exchanged with the Applicant in other circumstances. It is unclear how disclosure of such information could harm the Public Body's current decision making processes (although I acknowledge that the Public Body may have reasons that it has not yet provided for believing its decision making process could be subject to harm if this information is disclosed).

[para 87] As the Public Body's reasons for exercising its discretion to withhold the information to which it applied section 24(1)(a) are, as discussed at para 53 and 58 above,

not clear for records 23, 24 and 39, I will order the Public Body to reconsider its decision to apply section 24(1) to this information, taking into account the factors I have mentioned.

**Issue 5: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?**

[para 88] The Public Body has relied on section 27 of the Act to withhold a number of pages of records. In this regard, I have reviewed all of the following: the Public Body’s submissions; its Index in which it sets out the records it has partially and completely withheld, and the sections it relied on for each; the OIPC copy of the records (which does not include records or portions of records for which section 27 was relied on); the “Applicant’s Copy” of the records (“For OIPC”) as redacted; and the Public Body’s Affidavit which explains its reliance on section 27.

[para 89] Although the Public Body declined to provide for my review the records for which it relied on section 27, I can, from the context, together with the Affidavit, conclude that certain of them are subject to solicitor-client privilege, and hold that section 27 was properly applied. This includes: the bottom portions of records 6<sup>3</sup> and the withheld portions of record 7, which appear on their face to be legal advice (the top portion of record 6 consisting of a conveyance of the advice, including some discussion about it); and records 61, 62 and 63, which the Public Body explains constitute a draft briefing note that was sent to the Public Body’s lawyer seeking legal advice (and was intended to be confidential). I accept these communications were, as the Public Body attests, intended to be confidential.

[para 90] With respect to records which the Public Body states in its Affidavit “are Briefing Notes of which the Recommendations contain the legal advice obtained from the Public Body’s lawyer” (records 11 and 33), or “are Briefing Notes of which the Analysis and Recommendations contain the legal advice obtained from the Public Body’s lawyer” (records 12 and 13, 41 and 42, and 54 and 55 – which are three sets of duplicates of the same two records), it is possible the entirety of the Recommendations or of the Analysis and Recommendations are discussion of the legal advice, or even if they are not discussions of the legal advice, would in their entirety reveal what that advice was. However, the Public Body has so far told me only that they contain such legal advice. Furthermore, the Public Body has also relied on section 24 (advice to officials) to withhold these same records, which raises the possibility that parts of these records consist of advice formulated by the officials themselves (which may or may not at the same time reflect the legal advice that was received). Therefore I am unable to determine at these time whether the entirety of the withheld portions of the records discuss legal advice, or would reveal the advice that was given.

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<sup>3</sup> Record 88 is a duplicate of record 6. The Public Body has relied on different provisions for this record. It indicates in its Index and in the Applicant’s copy that the bottom portion of record 6 and 88 is unresponsive, but the records I received for my review suggest otherwise. I will assume for the purposes of this discussion that this is an error and that this portion of the record was (properly) withhold under section 27. If that is wrong, I ask the Public Body to advise me and I will give directions accordingly.

[para 91] With respect to the remaining records for which the Public Body relied on section 27, I begin with records 1<sup>4</sup> and 2. The Public Body tells me in its Affidavit that these pages “are communications between the Public Body’s lawyer and the Public Body [which entail] the giving or seeking of legal advice”. In the OIPC copy of these pages, the redaction stamp on the corner of the page suggests only section 27 was relied on for withholding these pages. However, in the Index in the Public Body’s initial submission, (and, for page 2, as well as by reference to the stamp on the Applicant’s Copy) the Public Body also relied on section 24(1)(b) to withhold records 1 and 2, which relates to consultations or deliberations by Public Body officials (officers or employees).

[para 92] Similar points apply to records 81 to 86. The Affidavit states they were communications between the Public Body and its lawyer entailing the seeking and giving of legal advice, but the Index indicates that sections 24(1)(b) was also relied on for records 81 and 82, and both sections 24(1)(a) and (b) were relied on for records 83 to 87, in addition to section 27. As well, the *Solicitor-Client Privilege Adjudication Protocol* forms which the Public Body filled out and provided with its Affidavit might also be taken to indicate that some of the correspondence (emails) flowed from the “Lawyer’s Client” (the Public Body) to the “Lawyer’s Client”, in other words, from one non-lawyer employee to another.

[para 93] In the usual practice of public bodies, a single record is not characterized *at the same time* as legal advice flowing between a public body as a client and its lawyer, and as consultations or deliberations amongst public body officials, or advice to officials. Conceivably a lawyer can be an employer or officer of a Public Body, and in some circumstances his or her legal advice could be seen as ‘advice to officials’ within the terms of section 24, but where the lawyer is providing legal advice, typically only section 27 is relied on.

[para 94] The idea that this is a unique case in which the Public Body was being abundantly cautious, and relied on section 24 because that provision also covers, by virtue of its breadth, a lawyer receiving requests for and providing legal advice, is also controverted by the fact that the Public Body asserted in its Affidavit that records 90 and 91 were communications between the Public Body and its lawyers entailing the giving or seeking of legal advice, even though these records were discussions among Public Body employees who do not appear to be lawyers.

[para 95] I am therefore uncertain as to whether section 24 was also relied on because it entailed communications amongst Public Body employees who were not lawyers.

[para 96] Similar points to those made in the preceding paragraph also apply to record 77. The Affidavit says the record is a communication between the Public Body’s lawyer

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<sup>4</sup> By reference to the OIPC Copy of the records, I believe the first page of the Applicant’s Copy is in error, and that this record was withheld in reliance on section 27, and possibly also on section 24 (in other words, that there was no portion of this page that the Public Body designated as “unresponsive”. If that is wrong, I ask the Public Body to advise me and I will give directions accordingly.

and the Public Body which entails the giving or seeking of legal advice. The Index relies on section 24 only, and the Applicant's Copy of the records provided to this office relies (by way of the stamp) on both provisions.

[para 97] In light of the foregoing, I cannot conclude that records 1 and 2, 77, and 81 to 86 were, as the Public Body says they were in its Affidavit, communications entailing the seeking or giving of legal advice, between the Public Body and its lawyer. (It is possible these records or parts of them entailed a *discussion of* legal advice, but if that is so, it contradicts the statement in the Affidavit.)

[para 98] Record 40 is among those listed in the Index as withheld in full under section 27. However, I believe this to be an error, since it was provided for my review, and the greatest part of this record seems to have been disclosed to the Applicant, with only a small portion withheld on the basis of section 24. This record is a duplicate of record 53.

[para 99] Record 87 is listed in the Index as relying on section 27, as well as section 24; however, it is not mentioned in the Affidavit, and was provided for my review. I believe the Public Body intended to rely only on section 24 with respect to this record.

[para 100] Record 89 is listed in the Index as unresponsive; however in the OIPC Copy of the records it is listed as withheld under section 27. Since it is not mentioned in the Affidavit, I presume it was withheld as unresponsive. If that is correct, it must be provided to me for my review.

[para 101] I turn finally to records 90 and 91. The Index relies only on section 24 to withhold record 90, and both sections 24 and 27 for record 91, but the Affidavit says both records 90 and 91 are communications between the Public Body and its lawyer entailing the seeking and giving of legal advice. As noted earlier, it also appears from the parts of the records that were disclosed that some of the correspondence in these records did not involve a lawyer as a sender or receiver. Again, because of these internal contradictions, I cannot conclude that the records were, as the Public Body says in its Affidavit, communications entailing the seeking or giving of legal advice, between the Public Body and its lawyer.

[para 102] In view of the foregoing, I can conclude that section 27 was properly applied only to the following records: the bottom portions of records 6, and the withheld portions of record 7, all of which appear from the face of these records to be legal advice<sup>5</sup>; and records 61, 62 and 63, which the Public Body explains constitute a draft briefing note that was sent to the Public Body's lawyer seeking legal advice (and was intended to be confidential). (With regard to exercise of discretion against disclosure, this is, in accordance with earlier decisions of this office, generally acceptable for solicitor-client privileged records without explanation beyond the fact the records are privileged and intended to be confidential.)

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<sup>5</sup> The top portion of record 6 consists of a conveyance of the advice, including some discussion about it, and was properly withheld under section 24.

[para 103] With respect to the remaining records under the present heading, I will direct the Public Body to review these records again, to make any new decisions where no clear decision has been made as to which provision applies, and to more clearly indicate, both to the Applicant, and to me, which provisions are being applied to the records or parts of records, and why. In this regard, I remind the Public Body it is not enough to fill out the *Protocol* form; as the *Notes* to the *Protocol* point out, it is also necessary to demonstrate that all the elements of solicitor-client privilege have been met, in accordance with numerous earlier decisions of this office. As these decisions indicate, communications that discuss legal advice may be withheld under the privilege; however, where this is the case, it must be made clear, and in such cases the communications cannot at the same time be described as being between a lawyer and a client. Any parts of the records to which only section 24, but not section 27, are being claimed must also be provided for my review. I reserve jurisdiction to make new decisions about these records after hearing from the Applicant.

**Issue 6: Did the Public Body properly withhold information as non-responsive to the Applicant's request?**

[para 104] The Public Body withheld or partially withheld records 6, 8, 9, 21 and 22, 76 (which is a duplicate of 9) and 88 on the basis they are not responsive. I have reviewed these records.

[para 105] Records 6 and 88 (which are duplicates) appear to have been withheld on this basis in error, and have already been dealt with above (under the section 27 heading).

[para 106] The parts of records 8 and 9 which were withheld as non-responsive do not appear to be information relating to the Applicant, and were properly withheld on this basis; while they relate to another matter in which the Applicant may also have had some involvement, no such involvement is revealed from the face of the records. Records 75 and 76 are duplicates of records 8 and 9, and the same reasoning applies.

[para 107] Similarly, the parts of pages 21 and 22 and 23 which were withheld as non-responsive do not appear to relate to the Applicant's issues, and were properly withheld on this basis.

**V. ORDER**

[para 108] I make this Order under section 72 of the Act.

[para 109] I order the Public Body to provide a new description of its search to me and to the Applicant, in accordance with para 27, by November 24, 2015. I reserve jurisdiction as to whether to require a new search.

[para 110] I uphold the Public Body's application of section 4(1)(a) to records to which it applied this provision.



[para 111] I deal in the Confidential Addendum with the Public Body's application of section 17, with its application of section 24 to some records, and with its description of some of the records as unresponsive. I require the Public Body to make new decisions about these records and to provide a new response to the Applicant, by November 24, 2015. I reserve jurisdiction to make a decision with respect to an issue raised in that Addendum. Any submissions which the Public Body wishes to make regarding that issue are to be provided by November 13, 2015.

[para 112] I agree with the Public Body that it properly applied section 24 to the records or parts of records that it withheld under this provision with respect to the following records: 3, 4, 5, the substantive part of the email in record 6, records 42, 44, 56, 57, 65, 66, 74, the substantive portions of the emails on record 87, the substantive part of the email in record 88. I uphold its decision to withhold these records or parts of records.

[para 113] I agree that section 24 applies to records or parts of records 23 and 24, and the 'Recommendation(s)' on record 39, but direct the Public Body to re-exercise its discretion to withhold these records, taking into account the factors I mention at paras 53, 58 and 86, and footnote 5.

[para 114] I do not agree that section 24 applies to records or parts of the following records: the topic, date, sender and recipient of the email in the part of record 6 withheld under section 24; records 38, 40, 49, 53; the senders, recipients, dates and subject lines on record 8; the topic, date, sender and recipient of the email in the part of record 88 that was withheld under section 24. I direct the Public Body to disclose these records.

[para 115] I uphold the Public Body's application of section 27 to the bottom portions of records 6 and 88, to the withheld portions of record 7, and to records 61, 62 and 63.

[para 116] For the remaining records withheld by reference to section 27, I direct the Public Body to make new decisions as described in para 103 above, by November 24, 2015. I reserve jurisdiction to review the new decisions about these records after the Public Body has complied with this direction.

[para 117] I agree with the Public Body that records 8, 9, 21 and 22, and 76 are unresponsive, and need not be provided.

[para 118] I 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 portions of this Order that direct it to disclose information.

Christina Gauk, Ph.D.  
Adjudicator and Director of Adjudication