

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2015-34

November 26, 2015

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number F6898

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to the Public Body for emails that referenced him during a certain time period. The Public Body responded to his request and withheld certain records under sections of the *Freedom of Information and Protection of Privacy Act*. The Applicant requested a review of the Public Body's decision to withhold records.

The Adjudicator found that the Public Body properly withheld all records except one. The Adjudicator ordered the Public Body to disclose one record.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss.1, 4, 6, 10, 17, 18, 20 24, 27, 71, 72.

Authorities Cited: AB: Orders 96-006, 97-020, F2003-010, F2004-029, F2007-021, F2012-10, F2013-13, F2013-51.

Cases Cited: *Edmonton Police Service v. Alberta (Office of the Information and Privacy Commissioner)*, 2009 ABQB 593; *Solosky v. The Queen* [1980] 1 S.C.R. 821.

Other Source Cited:

Access and Privacy Branch, Alberta Government Services. *Freedom of Information and Protection of Privacy Guidelines and Practices 2009*. Edmonton: Government of Alberta, 2009.

I. BACKGROUND

[para 1] The Applicant requested information from the Public Body. He asked for a copy of any emails that reference him within the email accounts of specified individuals and any other emails referencing him held within any Solicitor General and Public Security email inboxes, for the time period June 20, 2011 to August 23, 2012. After discussions with the Public Body, the Applicant confirmed that the request excluded emails sent by or to him, and records received by him further to previous FOIP requests.

[para 2] The Public Body provided some records, but severed and withheld information in reliance on sections 4, 17, 18, 20, 24 and 27 of the Act.

[para 3] The Applicant requested a review of the severing and expressed concern about the adequacy of the Public Body's search for records.

II. RECORDS AT ISSUE

[para 4] The records submitted to the Inquiry by the Public Body consisted of 326 pages, some withheld entirely, some partially withheld and some disclosed entirely. Those records disclosed entirely are not in issue. There are also 450 pages of records withheld as non-responsive.

III. ISSUES

Issue A: Are records that were located excluded from the application of the Act by section 4(1)(a) (information in a court file)?

Issue B: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act. In this case, the Commissioner will consider whether the Public Body conducted an adequate search for responsive records.

When the issues at inquiry include adequacy of search, it is helpful for the Public Body to include in its initial submission, direct evidence such as an affidavit regarding the search conducted for records responsive to the Applicant's access request. In preparing the evidence, the Public Body may wish to consider addressing the following:

- **The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request.**
- **The scope of the search conducted, such as physical sites, program areas, specific databases, off-site storage areas, etc.**
- **The steps taken to identify and locate all possible repositories where there may be records relevant to the access request: keyword searches, records retention and disposition schedules, etc.**

- **Who did the search? (Note: that person or persons is the best person to provide the direct evidence).**
- **Why the Public Body believes no more responsive records exist other than what has been found or produced.**
- **Any other relevant information.**

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

Issue D: Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information/record(s)?

Issue E: Did the Public Body properly apply section 18 of the Act (disclosure harmful to individual or public safety) to the information/record(s)?

Issue F: Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information/record(s)?

Issue G: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information/record(s)?

Issue H: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information/record(s)?

IV. DISCUSSION OF ISSUES

[para 5] The Applicant, in his request for Inquiry, indicates that he does not believe that his issues were resolved by the Senior Information and Privacy Manager who reviewed the Public Body's response to his request for access to information/records. He believes that the Manager may have erred in facts, law and a mix of facts and law. This inquiry is not a review of the decision of the Senior Information and Privacy Manager. The Applicant was made aware of this by letter from me dated May 2, 2015.

[para 6] The Applicant's submission in this inquiry is that the Public Body's response to his request for information should be reviewed for any errors in fact and law. The Applicant made further submissions in reply to the Public Body's response to further questions I asked regarding Issues E and F. The submissions of the Applicant and the Public Body will be discussed under those headings.

Issue A: Are records that were located excluded from the application of the Act by section 4(1)(a) (information in a court file)?

[para 7] The relevant provisions of the Act are as follows:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

- (a) *information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*

[para 8] I have reviewed the records to which section 4(1)(a) was applied. The records are 5 pages of an application for judicial review that is date stamped April 19, 2002 by the Clerk of the Court. There are 5 copies of the same documents (pp. 67-71, 204-208, 211-215, 218-222, 225-220). I accept that these records are copies of court documents filed in the Court of Queen's Bench of Alberta, Judicial Centre of Edmonton.

[para 9] I adopt the reasoning of the Adjudicator in Order F2007-021, where he said:

When a party files documents with a court, the party usually takes in several copies, all of which are stamped as "filed" and certain of which are retained by the party for its own use and for service on other parties. A "filed" stamp essentially means that the document was notionally once on the court file and then immediately "taken back" by the party that filed it. To put the point another way, the records are exact versions of the records in the court file. Either way, I find that copies of court-filed documents emanate from a court file and are excluded from the application of the Act under section 4(1)(a).

[para 10] I find that the Public Body properly withheld these records.

Issue B: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

[para 11] The Applicant initially requested the following:

I wish to please receive a copy of any email correspondence in relation to me and unknown to me WITHIN any given time frame existing in any capacity including but not limited to the sent/received inbox's of the following below emails: [The Applicant names 19 individual email addresses] and/or any other " gov.ab.ca" Solicitor General and Public Security email inbox's (excluding the departments email conversations between myself and foip personnel) pertaining to the *then named* "Alberta Solicitor General and Public Security.

The time frame for the request was June 20, 2011 to August 23, 2012.

[para 12] A fee estimate was provided to the Applicant. He requested a waiver of that fee. The Public Body denied a full fee waiver. After some discussion between the Applicant and the Public Body, the search was narrowed to exclude emails sent by the Applicant to the Public Body, emails sent to the Applicant by the Public Body and records the Applicant had received as a result of previous FOIP requests. The Public Body then waived the fee.

[para 13] The Public Body found 326 pages of records responsive to the Applicant's request. Some of the pages were withheld. The Applicant was given 298 pages and certain portions of some pages were severed.

[para 14] In *Edmonton Police Service v. Alberta (Office of the Information and Privacy Commissioner)*, 2009 ABQB 593, Justice Nielsen (at para.53) stated that "the public body must be in a position to establish that reasonable efforts were taken to search records in order to be able to respond openly, accurately and completely to the request. It follows that the person to whom the obligation is delegated must be in a position to provide evidence sufficient to establish what was done."

[para 15] The Public Body indicated that the search for responsive records involved the following:

- (i) All staff named in the Applicant's request were sent the following search request:
"I have received a FOIP request for all emails you have (please search all files and folders) that reference [Applicant's name], for the time period June 20, 2011 – August 23, 2012.
- (ii) Information Technology (IT) staff was give the same information as above to search the email account of those Solicitor and Public Security staff members not named by the Applicant as well as named individuals unavailable to search their own account. IT used the key words [Applicant's first name] and [Applicant's last name] to perform the search.
- (iii) All individuals contacted (including IT) responded to the search request with either records or indicated they had no records.

[para 16] The Public Body's position is that all responsive records were located as a result of this search.

[para 17] In this case, the Applicant limited the scope of his request by the nature of the records he sought (emails) and the time frame the emails were sent or received (June 20, 2011 to August 23, 2012). The Public Body directed a search of email accounts of the named individuals and other staff members of the Public Body. The search encompassed all files and folders in the email accounts of the named individuals and (with the assistance of IT staff) all other staff members of the Public Body. Key word searches that included the name of the Applicant were used. Records were produced from the search.

[para 18] The Applicant did not explain why he thought the search was inadequate or what records were not found that he thought should be found.

[para 19] Given the nature and scope of the request, I am satisfied that the Public Body carried out an adequate search for records.

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

[para 20] In its submissions, the Public Body indicated that it withheld records as non-responsive as they fell into one of the following categories:

- Emails and attachments sent by the Applicant to the Public Body
- Emails and attachments sent to the Applicant by the Public Body
- Records the Applicant already received as a result of previous FOIP requests

[para 21] Commissioner Clark noted in Order 97-020 that determining whether records are responsive is an important component to responding to an access request. He said:

In Ontario Order P-880, the Office of the Information and Privacy Commissioner of Ontario had the following to say about “responsiveness”:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, “relevancy” must mean “responsiveness”. That is, by asking whether information is “relevant” to a request, one is really asking whether it is “responsive” to a request. While it is admittedly difficult to provide a precise definition of “relevancy” or “responsiveness”, I believe that the term describes anything that is reasonably related to the request.

“Responsiveness” must mean anything that is reasonably related to an applicant’s request for access. In determining “responsiveness”, a public body is determining what information or records are relevant to the request. It follows that any information or records that do not reasonably relate to an applicant’s request for access will be “non-responsive” to the applicant’s request.

[para 22] Upon my request, the Public Body tabbed certain records as having been received as a result of previous FOIP requests. Upon my review of the over 450 pages of records that the Public Body withheld as non-responsive, I make the following observations:

- a) The vast majority of the records are email messages and their attachments that were either sent to the Applicant or sent by the Applicant.
- b) Many of the documents are copies of each other. Indeed there are 4 copies of a student handbook that numbers nearly 30 pages. There is much duplication of records, particularly email chains.
- c) There are copies of letters sent to the Applicant to an address in Calgary or hand delivered to the Applicant.
- d) There are forms that are filled out by the Applicant.
- e) There are a few emails not addressed to the Applicant, but they clearly are in the possession of the Applicant, as he has forwarded copies of those emails to others.

[para 23] The Public Body also severed portions of the records it provided to the Applicant, indicating that those portions were non-responsive to the Applicant’s request.

In its submissions regarding these severed portions of the records, the Public Body stated that the information fell within the following categories:

- Correspondence to/from the Applicant
- Information that has nothing to do with the Applicant.

[para 24] I have reviewed these severed portions of the records provided to the Applicant. I make the following observations of these severed portions:

- a) Many of the severed portions are duplicated, in that as they are part of an email chain that has itself been duplicated on numerous occasions. For example, severed portions of pages 9, 15 and 16 are duplicates of page 8.
- b) The majority of the severed portions are emails sent or received by the Applicant.
- c) The other severed portions are information contained in email chains that do not reference the Applicant, nor do they contain information about the Applicant.

[para 25] I find that that the information and records that the Public Body withheld as non-responsive do not reasonably relate to the Applicant's access request. I find that the Public Body properly withheld records and severed portions of records as non-responsive to the Applicant's request.

Issue D: Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information/record(s)?

[para 26] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, in part:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[...]

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

[...]

- (g) the personal information consists of the third party's name when*
- (i) it appears with other personal information about the third party,*
 - or*
 - (ii) the disclosure of the name itself would reveal personal information about the third party[...]*

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

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

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

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

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provided by the applicant.

[para 27] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 28] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered. If the decision is made that it would be an unreasonable invasion of personal privacy to disclose the personal information of a third party, the Public Body must then consider whether it is possible to sever the Personally identifying information from the record and to provide the remainder to the Applicant, as required by section 6(2) of the FOIP Act.

1. Is the information withheld personal information?

[para 29] The Public Body has withheld portions of nearly 40 records in reliance on section 17 of the Act. It states that it is evident on the face of the records that they contain “personal information” of a third party as defined in section 1(n).

[para 30] Section 1(n) of the FOIP Act defines “personal information”. It states:

I In this Act,

(n) “personal information” means recorded information about an identifiable individual, including

(i) the individual’s name, home or business address or home or business telephone number,

(ii) the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual’s age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual’s fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,

(vi) information about the individual’s health and health care history, including information about a physical or mental disability,

(vii) information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else’s opinions about the individual, and

(ix) the individual’s personal views or opinions, except if they are about someone else[...]

[para 31] I have reviewed the documents where the Public Body applied section 17. There is much duplication. I have determined that all of the information that the Public Body has refused to disclose under section 17 is personal information about identifiable individuals. All of the information, save records 278, 282, 286, 291, 295-296, 298, 299, 301 and 303, contain identifiable individuals’ names and, in some cases, email addresses (section 1(n)(i)). The saved records listed contain a cell phone number of a police officer (section 1(n)(i)). Records 14, 27, 30, and 114 contain names and information about an individual’s educational history (section 1(n)(vii)).

[para 32] There are records that contain the names and personal contact information of third parties along with their reports that contain opinions about the Applicant. In Order F2013-51 at para. 96, the Director of Adjudication said:

The names and personal contact information of witnesses is the personal information of these witnesses, except where they express opinions about the Applicant. However, the fact that the witnesses held or expressed the opinion is their personal information. In other words, some information may be considered to be the personal information of more than one person at the same time, such as when the information is both about the Applicant and a witness. Insofar as the records contain facts or opinions about the Applicant, the opinion itself is her personal information by operation of section 1(ix), and the fact that a witness holds the opinion, is the personal information of the witness.

I find that these records express opinions about the Applicant and are therefore the personal information of the third parties as well as of the Applicant.

2. Would disclosure of the personal information be an unreasonable invasion of a third party's personal privacy?

a) Presumption against disclosure of personal information

[para 33] The Public Body applied sections 17(4)(d), 17(4)(g)(i) and 17(4)(g)(ii) to the records at issue. These sections state:

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(d) the personal information relates to employment or educational history,

...

(g) the personal information consists of the third party's name when

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party,

...

[para 34] Records 14, 27, 30 and 114 contain names of third parties and their corresponding examination marks. I find that a presumption against disclosure arises with respect to these records under section 17(4)(d).

[para 35] Withheld information in records 278, 282, 286, 291, 295-296, 298, 299, 301 and 303 contain an Edmonton Police Service member's cell phone number. In Order F2013-13, at paragraph 117, the Adjudicator stated "given that the officers likely carry and use their cell phone outside work, and for purposes other than work purposes, I

am prepared to accept that the cell phone numbers have a personal dimension.” I agree and find that the cell phone numbers are subject to the presumption set out in section 17(4)(g)(i)(name plus personal information).

[para 36] The remaining records withheld under this section contain the names, personal email addresses and reports written by students and directed to educational staff. I have reviewed these records and find that when the names of the individuals appear with their personal email addresses, it can be considered to be personal information under section 17(4)(g)(i). I also find that the names of the individuals attached to reports written by them is also subject to the same provision as the reports contains personal information about that individual as well as about the Applicant.

b) Relevant circumstances under section 17(5)

[para 37] In its submissions, the Public Body indicated that the two relevant considerations under section 17(5) were subsections (e) (third party will be exposed unfairly to financial or other harm) and (h)(disclosure may unfairly damage reputation of any person referred to in the record). In its submissions, it stated that the reports written by the Applicant’s fellow students “were provided in confidence and even providing details of the reports would identify the individuals involved”. I take it from this submission that the Public Body also considered section 17(5)(f).

[para 38] The Public Body did not offer any explanation of how the circumstances outlined in sections 17(5)(e) and (h) were applied to the records. Some of the records, on their face, indicate that they were provided in confidence to educational staff members of the Public Body. I find that the Public Body correctly considered section 17(5)(f) as weighing in favour of its decision to withhold records.

[para 39] Since the Public Body did not tell me how it thought sections 17(5)(e) and (h) applied to the records, I cannot make any findings with respect to the applicability of those sections.

[para 40] I have found that the information withheld from the Applicant was personal information of third parties. I have also found that a presumption against disclosure arises under sections 17(4)(d) and 17(4)(g)(i), I have also found that the Public Body correctly considered section 17(5)(f) in its decision to withhold personal information.

[para 41] Section 71(2) of the Act states:

71(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party’s personal privacy.

[para 42] The Applicant has made no submissions fulfilling this onus. Weighing the factors I have considered above, I find that the Public Body correctly withheld records from the Applicant under the provisions of section 17.

[para 43] Section 6(2) states:

6(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

[para 44] The Public Body, in the majority of the records that were withheld from the Applicant as disclosing personal information of a third party, severed that information from the record and disclosed the remainder. I find the Public Body properly applied section 6(2) in withholding information to which section 17(1) applies and disclosing the rest. There is one record that was entirely withheld. Upon examination of that record, it is clear that it is a report written by the Applicant's fellow student. It is not possible to sever that record in a manner such that the personal information of the writer would not be disclosed.

Issue E: Did the Public Body properly apply section 18 of the Act (disclosure harmful to individual or public safety) to the information/record(s)?

[para 45] The Public Body applied section 18 to two records (321 and 322). The records consist of an email and its attachment.

[para 46] The relevant portion of section 18 states:

18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

(b) interfere with public safety.

[para 47] Prior decisions of this office regarding this section were reviewed by the Director of Adjudication in Order F2013-51. After reviewing those decisions, she stated (at para. 20 and 21):

These cases establish that section 18 of the FOIP Act applies to harm that would result from disclosure of information in the records at issue, but not to harm that would result from factors unrelated to disclosure of information in the records at issue. Further, a public body applying section 18 of the FOIP Act must provide evidence to support its position that harm may reasonably be expected to result from the disclosure of information...

Following the approach adopted by the former Commissioner in Order 96-004, and in subsequent cases considering either section 18 of the FOIP Act or section 11 of the HIA, the onus is on the Public Body to provide evidence regarding a threat or harm to the

mental or physical health or safety of individuals, to establish that disclosure of the information and the threat are connected, and to prove that there is a reasonable expectation that the threat or harm will take place if the information is disclosed.

[para 48] In initial submissions the Public Body cited Order F2003-010 and quoted the adjudicator's decision in paragraph 10:

...to determine whether there is a threat to a person's safety...a public body must apply the test for harm developed in Order 96-003:

1. There is a causal connection between the disclosure of the information and the anticipated harm;
2. The harm must constitute damage or detriment, not mere inconvenience; and
3. There is a reasonable expectation that harm will occur.

[para 49] The Public Body suggested that the record in question itself met the three part test.

[para 50] The Public Body further asserted that "the Applicant is a disgruntled former employee, who has pursued a plethora of actions against the Public Body and certain employees. It is therefore conceivable that if this information were to be disclosed to him that he may use it against the Public Body and its staff".

[para 51] The Public Body made *in camera* submissions on this issue. I required further submissions as to the existence of evidence that would satisfy the "harm test" as stated above. I requested that the Public Body also restate their submissions, in general terms that would not reveal the information withheld, that could be shared with the Applicant. This was done and the Applicant also made submissions on this issue.

[para 52] The Public Body, in exchanged submissions, cited Order F2004-029, para.13:

...in order to determine whether there is a threat to a person's safety or mental or physical health, the Public Body must show evidence for the criteria of the "harm test" referred to in Order 96-003:

[para 53] The Public Body further submitted:

The Public Body has evidence that the Applicant has exhibited behaviors toward its staff that would constitute harassment and intimidation. Details of that evidence are being provided in a separate submission *in-camera*. It is the Public Body's position that this behavior creates legitimate concerns on the part of its employees, not mere inconvenience. There can be no doubt that there has been harm to employee mental health and if the records were to be disclosed to the Applicant, it is likely further harm would occur.

[para 54] In his submissions on this issue, the Applicant states:

Further to the alleged evidence that the public body mentions made *in-camera* which was never made available to the Applicant so that he may properly respond and refute such false allegations, the Applicant respectfully submits that he has never exhibited any behaviours toward the public body's staff that would constitute harassment and intimidation. Rather, in all ways and in all manners, the Applicant sought legal advice and respectfully exercised his rights, as permitted by law, in petitioning for information under provincial privacy legislation which the Applicant was advised may have been improperly withheld.

[para 55] Record 321 is email correspondence. The Public Body applied sections 18 (1) (a) and (b) to Record 321. The Public Body supplied evidence *in camera* of the Applicant's behaviours in a number of incidents that can objectively be considered to be intimidating or harassing.

[para 56] I find that the Public Body properly withheld record 321 under section 18. The *in camera* evidence convinces me that there is a causal connection between disclosure of the withheld information and the anticipated harm. Further the Public Body has shown that the harm would constitute damage and not mere inconvenience and that there is a reasonable expectation that harm would occur.

[para 57] Record 322 is the attachment to the email. The Public Body applied sections 18(1)(a) and (b) to this record. The Public Body submitted the same *in camera* evidence in support of withholding this record under section 18.

[para 58] I find that the evidence and submissions provided to me by the Public Body *in camera* do not persuade me that the Public Body properly withheld Record 322 under section 18. My discussion of the issues respecting this record is to be delivered *in camera*. I have prepared an Addendum to this Order which will be provided to the Public Body only. The reasons for my decision discuss the *in camera* evidence and submissions of the Public Body.

[para 59] Should this Order be judicially reviewed, this office will provide, in the return for the Court, both a copy of this Order and the Addendum. There will be a 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.

Issue F: Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information/record(s)?

[para 60] The Public Body applied sections 20 (1)(a), (c) (k) and (m) to Records 321 and 322.

[para 61] The evidence and submissions provided by the Public Body *in camera* do not persuade me that the Public Body properly withheld Record 322 under section 20. I have prepared an Addendum to this order which will be provided to the Public Body only. The reasons for my decision discuss the *in camera* evidence and submissions of the Public Body.

[para 62] Should this Order be judicially reviewed, this office will provide, in the return for the Court, both a copy of this Order and the Addendum. There will be a 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.

Issue G: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information/record(s)?

[para 63] Section 24 creates an exception to the right of access in relation to “advice from officials”. It 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...*

[para 64] The *FOIP Guidelines and Practices 2009* (the FOIP Guidelines) offers the following definition of the terms included in section 24(1)(a):

The exception provides specific coverage for advice, proposals, recommendations, analyses, and policy options developed by or for a member of the Executive Council.

Advice includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts.

Recommendations include suggestions for a course of action as well as the rationale for a suggested course of action.

Proposals and *analyses or policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

[para 65] In Order F2012-10, the Adjudicator considered the interpretation of these terms and said (para. 34):

Under the above interpretation, advice, proposals, recommendations, analyses, and policy options are largely synonymous terms, and describe the information employees of a public body may provide to an individual or individuals empowered to make decisions on behalf of a public body, such as a member of the executive council, in order to assist that individual or individuals, to make decisions on behalf of a public body. The information in question will put forward a course of possible action or evaluate various courses of action, in relation to an area or issue where an individual or individuals responsible for making decisions on behalf of a public body, or a member of the executive council, is considering taking action, or could consider taking action. The interpretation put forward in the FOIP Guidelines is consistent with previous orders of this office, and recognizes the public interest that section 24(1)(a) is intended to protect.

[para 66] The Public Body withheld records 37, 39, 58, 59, 60, and 61 under section 24(1)(a). Records 37 and 39 are duplicates of each other. The record is a draft of a letter. It is attached in email correspondence asking for advice and recommendations on the draft. The draft letter is addressed to the Applicant. Similarly, records 58, 59, 60 and 61 are pages of a draft letter addressed to the Applicant. Again, the draft letter is attached in email correspondence asking for advice and recommendations on the draft. The first letter responds to the Applicant's query to a member of the executive council. The second letter responds to the Applicant's grievance of termination. I find that these records put forth a course of possible action for the Public Body. I also find that the records are advice to for a member of the Executive Council. I find that the Public Body correctly withheld these records under section 24(1)(a).

[para 67] In Order 96-006, former Commissioner Clark considered the meaning of "consultations and deliberations" within the terms of section 24(1)(b). He said:

When I look at section 23 as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank deliberations were to be made public. Again, this is consistent with Ontario and British Columbia. I therefore believe a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of the responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice.

[para 68] The Public Body withheld certain records under section 24(1)(b). There are duplications of records as they are contained in various email chains. Records 1, 3, 4, 5, 6, 7, 317 and 318 are duplicates of the same record. Records 18 and 19 are duplicated by records 20, 21, 23, 24, 99, 100, 134, and 239. Records 43 and 44 are identical to 49 and 50. These records are email chains requesting and giving advice to individuals charged with decision making for the Public Body. As such, I find that the Public Body correctly applied section 24(1)(b) to withhold these records.

Issue H: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information/record(s)?

[para 69] Section 27(1) reads as follows:

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

- (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
- (b) information prepared by or for*
 - (i) the Minister of Justice and Solicitor General,*
 - (ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
 - (iii) an agent or lawyer of a public body,*
in relation to a matter involving the provision of legal services, or
- (c) information in correspondence between*
 - (i) the Minister of Justice and Solicitor General,*
 - (ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
 - (iii) an agent or lawyer of a public body,*
and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer.

[para 70] 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 71] The Public Body initially withheld 12 records in reliance on this provision. Submissions regarding this section were sparse and the Public Body was invited to make fulsome submissions. At that time, the Public Body withdrew its application of section 27 to two records and disclosed those records to the Applicant. The Public Body also provided an affidavit of a barrister and solicitor who provided legal advice to the Public Body.

[para 72] In the affidavit, the affiant deposes (in part) the following:

1. I am a member of the Law Society of Alberta. I am employed as a Barrister and Solicitor by the Government of Alberta.

2. In my employment, I am responsible for providing legal advice to all departments of the Government of Alberta, including Alberta Justice and Solicitor General and its predecessor Alberta Solicitor General and Public Security (SGPS)
...
- 5 Within the disclosure package, each of the following records was created exclusively for the purpose of seeking legal advice or providing legal advice and was exchanged in confidence between me, as legal advisor, and my SGPS clients: pages 77-78, 88, 244-247, 314.

[para 73] The affiant sets out further details regarding each record in a chart. The chart shows that each record was email correspondence, the date of the correspondence, the names of correspondents and to whom the correspondence was copied or forwarded.

[para 74] I accept the statements of the affiant and am satisfied that the Public Body properly applied section 27 to the withheld documents.

V. ORDER

[para 75] I make this Order under section 72 of the Act.

[para 76] I confirm the Public Body's decisions to withhold records (except record 322) from the Applicant.

[para 77] I order the Public Body to disclose record 322 to the Applicant.

[para 78] I further order the Public to notify me, in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Neena Ahluwalia Q.C.
Adjudicator