ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2016-58

November 25, 2016

CITY OF CALGARY

Case File Number F6617

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Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for her personal information to the City of Calgary (the Public Body). She requested all HR personal files, all private files held by managers, supervisors, team leaders and human resources personnel, whose names she provided, all electronic records, work reviews, performance reviews, minutes, job competitions for which she had applied, information regarding education and training, records regarding her classification from the area where she had worked, and any other recorded personal information about herself.

The Public Body responded to the Applicant's access request. The Public Body located 1551 pages of records and included them in its response to the Applicant. It severed information from these records on the basis of sections 16 (disclosure harmful to business interests), 17 (disclosure harmful to personal privacy), 24 (advice from officials), and 25 (disclosure harmful to economic and other interests of a public body) of the FOIP Act.

In Order F2015-25, the Adjudicator found that the Public Body had not established that its search for responsive records was adequate. The Adjudicator held that the Public Body had not properly applied section 16 to the records. She also found that it was difficult to tell from the records which provisions the Public Body had applied in relation to sections 24 and 25 and to what information. She required the Public Body to make new decisions in relation to these provisions and to communicate them to the Applicant.

The Public Body conducted an additional search for responsive records and located 628 additional records that it had not included in its original response. Some of these were duplicates of records it had already provided, but others were not. It determined that it had destroyed some human resources records that were responsive to the Applicant's access request. The Public Body reviewed its decisions under sections 24 and 25 as the Adjudicator had required. It decided that it would no longer rely on section 25 to sever information and released the records to which it had originally applied this provision. It provided explanations to the Applicant of its severing decisions under section 24 and its reasons for withholding information under this provision.

The Adjudicator found that the Public Body had demonstrated that its search for responsive records was reasonable. However, she found that it had not met the informational component of the duty to assist, as it had not explained whether it had provided specific records to the Applicant that were responsive to her access request. The Adjudicator also found that it had failed to meet its duty to assist the Applicant by destroying responsive records, despite being aware that they were the subject of an access request and an inquiry.

The Adjudicator confirmed the Public Body's decision to sever information under sections 24(1)(a) and (b) of the FOIP Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 10, 16, 17, 24, 25, 29, 30, 72, 92

Authorities Cited: AB: Orders 2001-016, F2007-029, F2009-01, F2009-05, F2009-10, F2010-19, F2015-09, F2015-25, F2015-29, F2015-36

Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner),* 2010 ABQB 89 (CANLII)

I. BACKGROUND

[para 1] The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for her personal information to the City of Calgary (the Public Body). She requested all HR personal files, all private files held by managers, supervisors, team leaders and human resources personnel whose names she provided, all electronic records, work reviews, performance reviews, minutes, job competitions for which she had applied, information regarding education and training, records regarding her classification from the area where she had worked, and any other recorded personal information about herself.

[para 2] The Public Body responded to the Applicant's access request. The Public Body located 1551 pages of records and included them in its response to the Applicant. It severed information from these records on the basis of sections 16 (disclosure harmful to business interests), 17 (disclosure harmful to personal privacy), 24 (advice from officials), and 25 (disclosure harmful to economic and other interests of a public body) of the FOIP Act. It also decided that some of the records were not actually responsive to the

access request, but included them in the response, severing such information as "nonresponsive". The Applicant requested review of the search conducted and the Public Body's decisions to apply exceptions to disclosure.

[para 3] In Order F2015-25, which addressed the foregoing issues, I found that the Public Body had not established that its search for responsive records was adequate. I also found that the Public Body had not properly applied section 16 and ordered the Public Body to disclose responsive information that it had severed under this provision. I found that the Public Body's decisions to apply section 17 were appropriate in most instances, although I ordered it to gather evidence in relation to one record. I noted that the Public Body had not included all its decisions to apply sections 24 and 25 in its responses to the Applicant and ordered it to do so. I also directed the Public Body to provide a set of records for the inquiry clearly documenting the Public Body's decisions in regard to these provisions, as its decisions were unclear on the records and submissions it had provided for the inquiry.

[para 4] The Public Body conducted an additional search for responsive records and located 628 additional records that it had not included in its original response. Some of these were duplicates of records it had already provided, but others were not. It also determined that it had destroyed some human resources records that were responsive to the Applicant's access request. The Public Body reviewed its decisions under sections 24 and 25 as I had asked. It decided that it would no longer rely on section 25 to sever information and released the records to which it had originally applied this provision. It provided explanations to the Applicant of its severing decisions under section 24 and its reasons for withholding information under this provision.

[para 5] The Applicant requested review of the Public Body's new search for responsive records and this issue was added to the inquiry.

II. INFORMATION AT ISSUE

[para 6] Information from records 98, 100, 105 to which the Public Body applied section 24(1)(a) and from records 39 – 40, 91, 93, 95, 98, 100, 102 – 104, 106 – 108, 111, 113 – 114, 126, 216, 218, and 242, to which the Public Body applied section 24(1)(b) is at issue.

III. ISSUES

Issue A: Has the Public Body met its duty to the Applicant under section 10(1) of the Act (duty to assist applicants)?

Issue B: Does section 16 of the Act (disclosure harmful to business interests of a third party) require the Public Body to sever the information to which it applied this provision?

Issue C: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information it has severed from the records under this provision?

Issue D: Did the Public Body properly apply section 25(1) of the Act (advice from officials) to the information it has severed from the records under this provision?

IV. DISCUSSION OF ISSUES

Issue A: Has the Public Body met its duty to the Applicant under section 10(1) of the Act (duty to assist applicants)?

[para 7] Section 10 of the FOIP Act states, in part:

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

[para 8] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records. In Order 2001-016, the Commissioner said:

> In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) [now 10(1)] of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) [now 10(1)].
>
> Previous orders ... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now 10(1)] of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

[para 9] As discussed in the foregoing excerpt, a public body bears the burden of proving that it conducted a reasonable or adequate search for responsive records.

[para 10] The Public Body submitted the affidavit of the administrative assistant who conducted the search to describe the search conducted and its results.

> To conduct the Second Search, I determined that the following divisions within HR may have responsive records and requested that each division search for responsive records:
>
> Health and Wellness,
> HR Advisors,
> Labour Relations[,]
> Employee Records Centre,
> Temporary Employment Services Agency ("TESA"); and,
> Human Rights & Respectful Workplace BP[.]

The administrative assistant also provided details in her affidavit as to results of her search in these areas. The administrative assistant explained that the Health and Wellness Division had been inadvertently omitted from the initial search for records that was the subject of Order F2015-25, but that she had located additional records in this area. The administrative assistant also located a box of responsive records in the labour relations area of the Public Body that had been overlooked during the search that was the subject of Order F2015-25. The administrative assistant attached emails documenting the searches conducted in the human resources areas by others. The administrative assistant also determined that responsive temporary employment services agency "TESA" records had been destroyed in accordance with the Public Body's record retention schedule.

[para 11] In Order F2007-029, former Commissioner Work explained the kinds of evidence that must be adduced in order to establish that a search was conducted in a reasonable way. He said:

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

[para 12] In my view, the Public Body's evidence addresses all the questions set out in Order F2007-029. The administrative assistant reviewed the parameters of the access request and determined that responsive records were likely to exist in the areas she listed in her affidavit. She requested records from the areas she determined were likely repositories of responsive records and then followed up with the area to find out how the searches were conducted, in what areas, and to find out whether any responsive records were found. The administrative assistant also described the computer systems that were searched and the methods of searching these systems.

[para 13] The Public Body also provided the affidavit of a senior policy analyst who directed employees to conduct keyword searches. The senior policy analyst provided the responses of employees who conducted searches. The senior policy analyst also located records through searches of archives.

[para 14] I infer from the evidence that the Public Body believes no more responsive records exist because it conducted searches in all areas where it anticipated responsive records were likely to exist. In its submissions, the Public Body states:

> Based on the searches conducted, keywords used and the evidence of the individuals who conducted the searches the Public Body submits that it has demonstrated that it has conducted a comprehensive search and explained why it believes there are no more responsive records. The Public Body submits that it has responded openly, accurately, and completely to the Applicant[.]

[para 15] Based on its account of the search it conducted, I am satisfied that the Public Body has now conducted an adequate search for responsive records. However, conducting an adequate search for responsive records is only one aspect of the duty to assist. Previous orders of this office (See Orders F2009-001, F2009-005, F2015-36) have held that the duty to respond openly, accurately, and completely, includes explaining the steps taken to locate responsive records and to explain to an applicant why a public body believes no further records exist. In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89 (CanLII) the Alberta Court of Queen's Bench confirmed the reasonableness of this interpretation of section 10, stating:

> The University argues that it provided a full, complete and accurate response, and that it was unreasonable to find that it failed in the information component of the duty to assist. In particular, the University says that the Adjudicator unreasonably required it to explain why it believes no further responsive records exist and failed to describe the steps it took to identify the location of responsive records.
>
> 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 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.
>
> The University argues that the Adjudicator's reasoning is circular because she unreasonably expanded the search by ignoring the proper scope of the Request and the University's reasonable steps to ascertain the likely location of records, and then asks the University to explain why it did not search further. That argument is itself circular, presupposing that the University's search parameters were reasonable.
>
> In my view, the Adjudicator's conclusion that the University either expand its search or explain why such a search would not produce responsive records was reasonable in the circumstances and based on the evidence.

From the foregoing, I conclude that the duty to assist includes the duty to explain why certain records have not been produced when it is reasonable to expect that a public body would have such records in its custody or control.

[para 16] In her submissions, the Applicant raises several concerns regarding the Public Body's response to her:

> Item 4: New search November 5, 2015 for records [is] inadequate.
>
> a) No additional performance reviews were provided, despite records showing they had been completed. These reviews would acknowledge the exemplary quality of my work. There are no destruction certificates. The City has violated FOIP policy if they have destroyed these records. Please provide all performance reviews.
>
> […]
>
> b) Redacted (blank) pages: New FOIP 380, 426, 460, 473, 507, 534, 560. New FOIP 42 appears to relate only to me and has been redacted (section 17). I request the information on these pages.
>
> c) New FOIP search: 41, 43, 46, 47, 48, 49, 50 indicates one to five attachments for each of these pages. Please provide these attachments.
>
> d) New FOIP 23, contains a summarization by [an employee] of [a human resources advisor's] February 9th email. On June 21, 2012, [the employee] quoted from a February 9th email written by [the human resources advisor]. I asked her for a copy and was denied. I asked if I would receive it through FOIP and she said yes. Please provide.
>
> e) Sparse records from all Assessment Management. Only two examples are listed:
>
> New FOIP 492 – 507, indicated the records from my North Region Manager, […], are dated 2006 to May 26, 2007. [He] was my manager from 2006 until April 2009. There are 2 years of missing records from May 27, 2007 to April 2009. I request a new search for all of [his] records, particularly those that occurred around July 24, 2007 when threats were made to the Jubilee Auditorium.
>
> New FOIP 371 – 491 are labelled as emails originating from […] my North Region Manager since April 2009. Of the 121 pages, only 16 pages (after removing duplicates and emails from before he became my manager) originated by him. Please provide a new search of all Assessment Management records.

The Applicant also notes that the Public Body destroyed her "TESA file", or Temporary Employment Services Agency file. She argues that destruction of this file, which is responsive to her access request, contravened the FOIP Act.

Performance Reviews

[para 17] The Public Body did not address the Applicant's arguments regarding the absence of performance reviews among the records it has located in response to her access request for this stage of the inquiry. However, I note that in its submissions and in the affidavit evidence of the FOIP Officer which the Public Body submitted during the first stage of the inquiry, the Public Body explained that limited term and union employees, such as the Applicant, did not have written performance reviews, but verbal

reviews only. The Public Body also explained that its retention schedule for records of reviews, performance development process forms, disciplinary performance, non-medical counseling notes, and related correspondence is two years. It also explained that "ten minute interviews" conducted by the Assessment Business Unit were considered transitory records and were not retained.

[para 18] The Public Body's evidence is that some of the performance reviews it conducted in relation to the Applicant would not have been written but would have been conducted orally. Moreover, while some may have been recorded, some of these would have been considered transitional, without any requirement to maintain them, while others would have been destroyed after two years in accordance with its retention schedule.

[para 19] In addition, the Public Body's new evidence regarding the search it conducted for responsive records supports finding that the new search would be likely to turn up any written performance reviews if such existed. As the new search did not locate performance reviews, it appears to be the case that there were no responsive records that could be located and produced. Moreover, as the Public Body's evidence is that records of performance reviews were likely not created, or in the alternative, destroyed if they were, it has provided a reasonable explanation as to why it has not produced copies of performance reviews.

Attachments

[para 20] In her submissions, the Applicant noted that records 41, 43, 46, 47, 48, 49, and 50, which contain emails, also contain icons indicating that these emails contain attachments. Given the titles of the attachments and the context in which the attachments appear, it is likely that they are responsive to the Applicant's access request. However, it is unclear whether the Public Body produced these attachments in its response to the Applicant. It is possible that some of the records are printouts of these attachments and that the attachments were in fact included in the response; however, there is insufficient evidence before me to make that determination, as the Public Body has not made submissions regarding the attachments or pointed to them among the records it has produced.

[para 21] As discussed above, the duty to assist includes an informational component. A public body may need to explain why it has not produced records in circumstances where it appears likely that it would have such records in its custody or control. Given the indications in the records that they contain attachments, it is natural to expect that attachments would be produced. (Indeed, it is possible that they were produced.) In this case, the informational component includes explaining whether the Public Body has produced the attachments, and if not, why not.

[para 22] As I am unable to say whether the Public Body included the attachments in its response I must require it to either produce the attachments to the Applicant (subject to any exceptions to disclosure that may apply), or, if it is the case that it has

provided the attachments, to indicate the record numbers it has assigned to the attachments in its response.

The Human Resources Advisor's email

[para 23] In Order F2015-25, I held the following regarding records created by the Human Resources Advisor:

> The Public Body has not explained the extent of its search of the Human Resources Advisor's records, or detailed its search for the email to which the Applicant refers. I note that records 217 and 218 indicate that the Human Resources Advisor maintained employee files, which he provided to another Human Resources Advisor. Record 217 indicates that the Human Resources Advisor assembled a file relating to the Applicant. It is possible that the records the Public Body has produced include the contents of this file. However, unless the Public Body states that this is so, and provides details of the extent of the search it conducted for the Human Resources Advisor's records and the results of its search, I am unable to find that it included this file in its search or that it conducted a reasonable search for responsive records created by this employee.

[para 24] The Applicant continues to seek the email referred to in the excerpt above. She believes that the content of the email is summarized in new record 23; however, she is concerned that the Human Resources Advisor's email has not yet been produced. She explains that the Public Body's return to work coordinator described the content of an email created by the Human Resources Advisor, and what she was told of the content of this email corresponds with some of the statements in record 23, which contains an email from the Return to Work Coordinator. The Return to Work Coordinator is the employee who told the Applicant about the existence of the Human Resources Advisor's email. The Return to Work Coordinator would not provide the email to her, but agreed that she could make an access request under the FOIP Act for the email. The Applicant is concerned that she has not been provided with this email.

[para 25] The Public Body provided the affidavit of the Human Resources Advisor regarding the search he conducted for responsive records. In his affidavit, he documented the search he conducted of his computer and the method by which he searched for responsive records. From the account he provided of the search he conducted, I find it likely that he produced all the records on his computer.

[para 26] It appears to me to be possible that the email the Applicant is seeking has been produced to her, but has not been identified as such by the Public Body and is not recognizable as the email in question due to severing. For example, record 297 is an email from the Human Resources Advisor dated January 26, 2012. This email contains an attachment that was severed in its entirety under section 24(1)(b). It may be the case that this email and its attachments are the records the Applicant is seeking. However, unless the Public Body explains that it has produced the record the Applicant is seeking, and provides an explanation as to which one it is, (or explains that the records does not exist or no longer exists) the Applicant will be uncertain as to whether she has received the record she is primarily concerned with receiving. While I can speculate as to which record it may be, I am unable, on the balance, to conclude which one it is likely to be, or that the record in question has been produced at all.

[para 27] As discussed above, the duty to assist may require a public body to explain why it has not produced a record that an applicant reasonably believes it has in its custody or control. In this case, the Applicant has explained why she believes the record she is seeking exists: she has been told about it by two different people who would be in a position to know about the record. The Public Body has not commented on this aspect of the Applicant's request or submissions in its own submissions or evidence. Moreover, no record clearly meeting the Applicant's description of the record has been produced to the Applicant. In my view, the Public Body has a duty to explain whether this record exists, and if so, whether it has produced the record.

Former Northern Region Manager's records

[para 28] The Public Body provided the evidence of a senior policy analyst in the Assessment Business Unit to document the search conducted for the former Northern Region Manager's records. From his affidavit, I conclude the senior policy analyst took steps to ensure that all responsive records, including archived records, were located. The senior policy analyst attached to his affidavit the reply of the former Northern Region Manager to the senior policy analyst's request for records. The reply states:

> I have checked for both written records and soft records related to [the Applicant].
>
> I have 4 books, operational records from the time, that are still in my possession that have some references to [the Applicant]. I have reviewed the books and tagged those pages. You are free to take them and copy those pages.
>
> I have no email records in my possession. All email records in my inbox dating 2012 and earlier have been deleted. I have no other emails that I can see related to [the Applicant] (6.5 years ago)[.]
>
> I expect I would have provided, as is the practice, any HR records related to [the Applicant] to her new supervisor when she transferred over in Feb 2009. I believe that supervisor was […].
>
> I have no other transitory records of any type referencing [the Applicant].

[para 29] From the accounts of the senior policy analyst and the former Northern Region Manager, I conclude that the search for records as it relates to the records of the former Northern Region Manager was reasonable.

[para 30] In Order F2015-25, I noted that the Applicant had not provided sufficient evidence to establish that there was any likelihood that the Public Body would have in its custody or control records documenting an incident which the Applicant alleges took place on July 24, 2007 and involved the former Northern Region Manager. I said:

> The Applicant also states that she is seeking records regarding an incident that happened at a workplace other than the Public Body. The Applicant has not provided sufficient evidence to establish the likelihood that the Public Body has records containing information about this incident that it has not produced.

The Applicant has provided no explanation as to why the Public Body would be likely to have records containing the information she seeks regarding the incident of July 24, 2007 and my finding in this regard remains the same.

The TESA file

[para 31] The Applicant's access request was received by the Public Body on June 14, 2012. This access request includes "all HR personal files". It appears from the Public Body's evidence that it located the TESA file, which is a human resources file, on July 12, 2012 and indicated to the Applicant that she could call and request her file to review it.

[para 32] However, the Public Body did not include the contents of the file in its response to the Applicant. In its rebuttal submissions, the Public Body states:

> The Applicant was advised she could review her TESA file by contacting the Human Resources (HR) division of the public body, as shown in the enclosed letter dated 2012 August 16. That letter explained that she had to go to HR to attain these records, "*as these items are publicly available, they cannot be accessed via a FOIP request (as per Section 29 of the Act)*" [emphasis in original]. By 2015, the records had appropriately been destroyed in accordance with the City's CRCRS (Corporate Records Classification and Retention Schedule).

[para 33] It appears that the Public Body considered the TESA file to be responsive to the access request, but did not include this file in its response because of its interpretation of section 29 of the FOIP Act. It permitted the Applicant to view the records, but subsequently destroyed them by 2015.

[para 34] Section 29 of the FOIP Act states:

> *29(1) The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is readily available to the public,*
>
> *(a.1) that is available for purchase by the public, or*
>
> *(b) that is to be published or released to the public within 60 days after the applicant's request is received.*
>
> *(2) The head of a public body must notify an applicant of the publication or release of information that the head has refused to disclose under subsection (1)(b).*

> *(3) If the information is not published or released within 60 days after the applicant's request is received, the head of the public body must reconsider the request as if it were a new request received on the last day of that period, and access to the information requested must not be refused under subsection (1)(b).*

[para 35] As noted above, the Public Body informed the Applicant that records subject to section 29 are "not accessible under the FOIP Act". This position is erroneous. Section 29, like sections 24 and 25 of the FOIP Act, is a discretionary exception to disclosure. As with sections 24 and 25, a public body must apply this provision to a record before it may rely on it. To apply section 29, a public body must locate the record at the request of the Applicant and then determine whether section 29 applies to it, and sever the information if it does (assuming the public body decides that relevant considerations weigh in favor of withholding the information from an applicant). Even though section 29 may apply to a record, an applicant may request the record under the FOIP Act, and receive it, if the public body exercises discretion in favor of disclosure.

[para 36] In any event, it does not appear possible that section 29 would apply to the content of a TESA file. "Publicly available" is a term that has been defined in previous orders of this office as referring to "a pre-existing system of *public access*". (See Orders F2009-10, F2010-19, and F2015-09) In Order F2015-09, "information that is available to the public" was further described as information that "any member of the public can gain access to information through a process other than the FOIP régime, for example, by accessing QuickLaw or CanLII".

[para 37] It does not seem likely that the personal information in the Public Body's employee files is available to any member of the public on request, as would be the case in a system of public access, as described above. This is because a public body is prohibited from disclosing the personal information of individuals, including its employees, unless it first determines under section 17 that it would not be an invasion of the employee's personal privacy to disclose the information. From the description the Public Body has provided of its process regarding TESA file access, I find it is more likely that the Public Body shows or provides the TESA file to the employee who is the subject of the file, if the employee requests it, but not to a member of the public. Instituting a practice of showing an employee's file to an employee in the absence of a FOIP request for the information is an alternative method of providing records to an employee. However, it does not follow from this that the information in the file is publicly available, given that the alternative system of accessing the information is only available to an employee, and not to members of the public generally.

[para 38] From the Public Body's submissions and evidence, I conclude that the Public Body did not include the contents of the TESA file in its response to the Applicant, but excluded the file from its response, despite the fact that the file was encompassed by her access request and the Public Body recognized that the file contents were responsive. Even though the Public Body was aware of the existence of the records at the time the Applicant made her access request and knew they were responsive to the

request, the Public Body then destroyed the records in reliance on its record retention schedule.

[para 39] Section 92(1)(g) of the FOIP Act makes it an offense to willfully destroy any records subject to the FOIP Act with the intent of evading a request for access. In this case, I do not believe the Public Body destroyed the records in order to evade a request for access. Rather, it destroyed records on the mistaken assumption that they were not subject to the FOIP Act. While its destruction of the records may not amount to an offence under the FOIP Act, it does result in a failure to respond to the Applicant openly, accurately, and completely within the terms of section 10 of the FOIP Act. Moreover, as the records have been destroyed, I cannot make an order that will enable the Public Body to bring itself into compliance. However, I will ask it to ensure that its employees are familiar with the requirements of the FOIP Act, and the way in which the exceptions to disclosure operate, in order to avoid destruction of records that are both the subject of an access request and an inquiry, in the future.

Issue B: Does section 16 of the Act (disclosure harmful to business interests of a third party) require the Public Body to sever the information to which it applied this provision?

[para 40] In Order F2015-25 I found that the Public Body had not properly applied section 16 to the information in the records. I said:

> I find that none of the information to which the Public Body applied section 16 falls within the scope of this provision and I intend to order it to produce this information to the Applicant, but for records 289 and 1199. With regard to records 289 and 1199, it is unclear whether these records are responsive. I must therefore ask the Public Body to determine whether portions of these records are responsive. If they are, I must ask it to provide the responsive information in the records to the Applicant with nonresponsive portions severed. If they are not, then it need not provide these records to the Applicant. In the event that the entire record is responsive, then the Public Body must obtain the views and evidence of the third party under section 30 prior to making a decision regarding the application of section 16.

[para 41] In the decision portion of Order F2015-25, I held:

> I have decided that the Public Body must review records 289 and 1199 to determine whether they are responsive to the Applicant's access request. If portions of these records are responsive and those portions can be provided to the Applicant without disclosing the information the Public Body considers should not be disclosed, then the Public Body should sever the nonresponsive information and provide it to the Applicant. If the Public Body determines the entire record is responsive, then it should provide notice to the third party regarding the access request and obtain the views of the third party regarding disclosure. Alternatively, if [the] entirety of the record is not responsive, then the Public Body need not provide it to the Applicant.

[para 42] The issue of the Public Body's application of section 16 was left undecided with regard to records 289 and 1199 only. (I ordered the Public Body to disclose all the information to which it had applied section 16 but for records 289 and 1199.) I ordered the Public Body to make a new decision as to whether these records

were responsive or not, and to comply with section 30 of the FOIP Act if it found that they were.

[para 43] The Public Body made a new decision that records 289 and 1199 were not responsive and no longer relies on section 16 to withhold any information from the Applicant.

[para 44] In her submissions, the Applicant complains that information in records 35, 390, 292, 294, 296, 299, 309, 325, 328, 338, 342, 350, 351, 600, 602, 604, 611, 616, 635, 636, 637, and 646 has not been provided to her despite my order in relation to section 16. However, the records the Applicant cites were records to which the Public Body applied section 17. I upheld the Public Body's decisions to sever personal information under section 17 from these records.

[para 45] I note too that the Applicant questions the severing that was done under section 17 in relation to the new records. The Public Body's FOIP Officer explained in his affidavit that he applied section 17 to redact other employees' personal information, including personal cell phones, work attendance / payroll, vacation time, employee IDs, training received, disciplinary records, and disability claims. From my review of the records, I agree with the FOIP Officer's description of the severing decisions and see no basis on which to alter them.

[para 46] As there are no outstanding issues in relation to section 16, I need not address this question further.

Issue C: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information it has severed from the records under this provision?

[para 47] Section 24(1) authorizes a public body to withhold information from an applicant when the information would reveal advice. 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 […]*

In the course of the first inquiry, it was unclear to me to which records the Public Body had applied provisions of section 24(1). This was in part due to the conflict between its responses to the Applicant, the severing decisions documented on the records, and the severing decisions documented on the index it provided for the inquiry.

[para 48] To address this situation, I stated in the decision portion of Order F2015-25:

> I have decided that the Public Body must, once it has provided a response to the Applicant that includes its severing decisions under section 24, provide for my review one set of those records to which it has applied the provisions of section 24 and 25 (and only those records). The single set of records it will provide must also indicate what has been severed from them and under what provision (or provisions) of the FOIP Act. The authority for this decision is section 56 of the FOIP Act.

The Public Body wrote the Applicant to explain that it had applied section 24(1)(a) to records 98, 100, and 105, and section 24(1)(b) to records 39 – 40, 91, 93, 95, 98, 100, 102 – 104, 106 – 108, 111, 113 – 114, 126, 216, 218, and 242. In its submissions for the inquiry, it stated that it was no longer relying on section 25 to withhold any information.

[para 49] As discussed above, the Public Body located additional responsive records. It has applied section 24(1)(a) to new records 177, 181, 184, 188, and 190, and section 24(1)(b) to records 52, 174, 177, 179, 182, 183, 185, 186, 191, 192, 195, 201, 298, 303, 304, 305, 306, 340, and 359.

[para 50] Although I directed the Public Body to provide a single set of records indicating what has been severed from them, and to provide only those records, the Public Body instead provided two sets of all the records it has located, one of which contains redactions, and the other of which does not. I made the direction for the reason that comparing two sets of records can be problematic, not only because it is time consuming, but because it may result in errors on my part if I fail to note all the information that the Public Body has severed from a record. It can also be difficult to determine whether a record has been severed in its entirety, or is missing, with the result that I could potentially direct a public body to disclose information it has already disclosed, if I find that the information should be severed rather than withheld in its entirety.

[para 51] In Order F2015-29, the Director of Adjudication explained the purpose of sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said:

> 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).
>
> 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 52] I agree with the analysis of the Director of Adjudication as to the purpose and interpretation of sections 24(1)(a) and 24(1)(b). I turn now to the question of whether the information the Public Body has severed under these two provisions falls within the terms of these provisions as set out in Order F2015-29.

Section 24(1)(a)
Records 98, 100, and 105, New Records 177, 181, 184, 188, 190

[para 53] The FOIP Officer explained his decision to apply section 24(1)(a) to the information in the foregoing records as follows:

> Additional Records 177n, 181n, 184n, 188n and 190n are duplicates of Initial Records FOIP 98, 102, and 105 and were severed under Section 24(1)(a).
>
> I considered the following criteria when I applied Section 24(1)(a) of the Act to information contained in the Additional Records:
>
> > (i) I considered that the advice was provided by [the Human Resources Advisor] who was a Human Resource (HR) advisor in the ABU. The advice was provided to a direct supervisor of the Applicant.
> >
> > (ii) Part of the responsibilities of an HR advisor is to provide advice or direction on employment or staffing issues.
> >
> > (iii) The HR advisor provided advice to the ABU supervisor who had sought advice regarding proper HR procedure in dealing with staff issues.
>
> The advice was provided to a supervisor of the Applicant who was in a position to action the advice.
>
> I determined that disclosure of the information contained in these records would hamper the ability of the Public Body in dealing with staff disputes effectively.

[para 54] From the foregoing, I understand that the FOIP Officer determined that section 24(1)(a) applies to information in these records because these records contain the advice of the Human Resources Advisor for the benefit of a supervisor. It was the role of the Human Resources Advisor to provide advice to the supervisor regarding human resources matters, so that she could make human resources decisions.

[para 55] I agree with the FOIP Officer that the severed information is advice and that section 24(1)(a) applies to it as the email proposes courses of action for the supervisor to consider taking.

[para 56] From my review of the content of the emails, I agree with the Public Body that disclosing this information could reasonably be expected to hamper its ability to make human resources decisions in the future regarding the same, or similar, subject matter. I therefore find that the Public Body appropriately applied its discretion when it decided to withhold information from the emails under section 24(1)(a). I will therefore confirm its decision to sever information under section 24(1)(a).

Section 24(1)(b)
Records 39 – 40, 91, 93, 95, 98, 100, 102 – 104, 106 – 108, 111, 113 – 114, 126, 216, 218, 242; New Records 52, 174, 177, 179, 182, 183, 185, 186, 191, 192, 195, 201, 298, 303, 304, 305, 306, 340, 359

[para 57] I have reviewed these records and find that they contain consultations and deliberations as those terms have been defined in past orders of this office. The records reveal that a supervisor who was responsible for making a decision consulted with advisors as to what she should decide, and considered courses of action to address a situation that had arisen.

[para 58] The Public Body has disclosed some details to the Applicant about the nature of the decision that was being made, but has withheld substantive information regarding the consultations and deliberations. It withheld the substantive information because it considered that disclosing this information could impede its ability to make decisions regarding the same or similar subject matter in the future. In my view, the Public Body exercised its discretion to sever this information reasonably and I will confirm its decision to sever information under section 24(1)(b).

Issue D: Did the Public Body properly apply section 25(1) of the Act (advice from officials) to the information it has severed from the records under this provision?

[para 59] As discussed above, the Public Body no longer relies on section 25 to withhold any information from the Applicant. As a result, I need not address this issue.

V. ORDER

[para 60] I make this Order under section 72 of the Act.

[para 61] I confirm the Public Body's decisions to sever information under sections 24(1)(a) and (b).

[para 62] I order the Public Body to fulfill its duty under section 10(1) by confirming whether it has provided the attachments indicated on records 41, 43, 46, 47, 48, 49, and 50 to the Applicant, and if it has, to indicate the record numbers. I also order the Public Body to fulfill its duty under section 10(1) by confirming whether it has located and produced the Human Resources Advisor's email that the Applicant has

specifically requested to her. If it has not produced these records, I order it to produce them, subject to any severing decisions it would be authorized by the FOIP Act to make.

[para 63] In order to ensure future compliance with its duty to assist an applicant under the FOIP Act, I ask the Public Body to ensure that its employees are familiar with the requirements of the FOIP Act and the way in which the exceptions to disclosure operate, in order to avoid destruction of records that are both the subject of an access request and an inquiry.

[para 64] I order the Public Body to notify me in writing within 50 days of being given a copy of this Order, that it has complied with it.

_____

Teresa Cunningham
Adjudicator