

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2018-14

April 4, 2018

### CITY OF CALGARY

Case File Number 001676

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

**Summary:** The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the City of Calgary (the Public Body) for copies of two reports created for the Public Body by an outside consultant in 2014.

The Public Body responded to the Applicant, refusing to disclose the requested information citing sections 17(1) (invasion of third party privacy), 20(1)(d) (confidential source of law enforcement information), and 27 (privileged information). The records at issue consist of a document described by the Public Body as a legal opinion (pages 1-22) and a Whistleblower Investigative Report (pages 23-32, the Report).

The Applicant requested an inquiry into the Public Body's response. Prior to the start of the inquiry, the Public Body informed the Applicant of its decision to apply additional exceptions to information in the Report. Specifically, the Public Body also applies sections 23(1)(b) (local public body confidences) and 24(1)(a) (advice from officials) to information in the Report.

The Adjudicator upheld the Public Body's claim of solicitor-client privilege (section 27(1)(a)) over the entire record comprising pages 1-22 of the records at issue. The Adjudicator did not accept the Public Body's claim of "public interest privilege" (section 27(1)(a)) over any of the information in the Report comprising pages 23-32 of the records at issue.

The Adjudicator determined that section 23(1)(b) (local public body confidences) did not apply to any of the information in the records at issue, as it did not reveal the substance of *in camera* deliberations of the Calgary City Council. While the Report appears to have been discussed by

Council, revealing only the subject-matter of a discussion is not the same as revealing the *substance* of the discussion.

The Adjudicator found that the Public Body properly withheld some information under section 24(1)(a) (advice from officials) but that this provision did not apply to information that consisted of mere background facts.

The Adjudicator determined that section 17(1) required the Public Body to withhold personal information of the unnamed individuals (including complainants and witnesses) who participated in the whistleblower investigation that resulted in the Report. The Adjudicator also found that the personal information of the named individuals who were the subjects of the investigation must also be withheld under section 17(1), in part because revealing the identity of the named individuals could also reveal the identity of the unnamed individuals.

The Adjudicator determined that the information that could reveal a confidential source of law enforcement information (section 20(1)(d)) was properly withheld under section 17(1). Information that did not identify an individual (and therefore to which section 17(1) could not apply) could not be withheld under section 20(1)(d).

The Adjudicator ordered the Public Body to disclose some additional information in the Report to the Applicant.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 17, 20, 22, 23, 24, 27, 71, 72, *Freedom of Information and Protection of Privacy Regulation*, Alberta Regulation 186/2008, s. 18, *Municipal Government Act*, R.S.A. 2000 c. M-26 s. 197, *Public Interest Disclosure (Whistleblower Protection) Act*, SA 2012, c. P-39.5, s. 5, **BC:** *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, C. 165, s. 12.

**Authorities Cited:** **AB:** Orders 96-006, 96-012, 96-019, 96-020, 97-002, 97-007, 99-010, 2001-040, F2004-015, F2004-026, F2008-009, F2008-011, F2008-015, F2008-020, F2008-028, F2009-008, F2009-040, F2010-036, F2012-10, F2013-13, F2013-23, F2014-16, F2014-29, F2015-30, **BC:** Order No. 326-1999.

**Cases Cited:** *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 (CanLII), *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), 580 A.R. 265, *John Doe v. Ontario (Finance)*, 2014 SCC 36, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII),

## I. BACKGROUND

[para 1] On July 30, 2015, an individual made a request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the City of Calgary (the Public Body) for:

... copies of two related reports which were done for the city auditor in 2014. The reports were done by an outside consultant at the city auditor's request. The reports are:

1. untitled report, dated November 26, 2014
2. Whistleblower investigation report. Topic: independent investigation. Dated: December 8, 2014.

[para 2] The Public Body responded to the Applicant, refusing to disclose the requested information citing sections 17(1) (invasion of third party privacy), 20(1)(d) (confidential source of law enforcement information), and 27 (privileged information).

[para 3] The records at issue consist of an unnamed report (pages 1-22) and a Whistleblower Investigative Report (pages 23-32).

[para 4] The Applicant requested a review of the response from the Public Body. The Commissioner authorized an investigation; this did not resolve the issues and the matter proceeded to an inquiry. Prior to the inquiry, the Public Body also applied sections 23(1)(b) and 24(1) to information in the Report.

[para 5] Pages 1-22 of the records at issue are described by the Public Body as a legal opinion to which section 27(1)(a) has been applied. The Public Body did not provide copies of these pages to me for the inquiry; however, the Public Body did provide information about these pages in accordance with the Office's *Privilege Practice Note*.

[para 6] Pages 23-32 of the records at issue are described by the Public Body as comprising a Whistleblower Investigative Report, which I will refer to as the Report. The information in the Report was withheld under sections 17(1), 20(1)(d), 23(1)(b), 24(1)(a) and 27(1)(a).

[para 7] The individuals named in the records at issue were invited to participate as affected parties. Six individuals, whose identities remained undisclosed to the Applicant, agreed to participate in the inquiry. These individuals have been referred to in inquiry documents as Affected Parties A-F and I will continue to refer to them as such. Each Affected Party provided initial and rebuttal submissions to the inquiry, except Affected Party E, who agreed to participate but did not provide any submissions.

## **II. RECORDS AT ISSUE**

[para 8] The records at issue consist of a 22-page unnamed report withheld in its entirety (pages 1-22), and a 10-page Whistleblower Investigative Report (the Report) also withheld in its entirety (pages 23-32).

## **III. ISSUES**

[para 9] The issues as set out in the Amended Notice of Inquiry dated April 13, 2017, are as follows:

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

2. Did the Public Body properly apply section 20(1)(d) of the Act (identify a confidential source) to the information in the records?
3. Did the Public Body properly apply section 23(1) of the Act (local public body confidences) to the information in the records?
4. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?
5. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

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

[para 10] I will begin by discussing the Public Body's application of section 27(1)(a) to the records in their entirety. The Public Body claimed solicitor-client privilege to the unnamed report in its entirety (pages 1-22), and public interest privilege to the Report in its entirety (pages 23-32).

[para 11] I will then discuss the Public Body's application of section 23(1) to the Report in its entirety.

[para 12] Lastly I will discuss the Public Body's application of sections 24(1), 17(1), and 20(1) to portions of the information in the Report, in that order. Often, two or more of sections 17(1), 20(1) and 24(1) were applied to the same information. Where I found that one exception was properly applied to withhold the information, I did not consider whether the other exceptions also applied to withhold that information

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

[para 13] Section 27(1)(a) of the Act states:

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

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

...

[para 14] The Public Body withheld pages 1-22 citing solicitor-client privilege. It also argued that "public interest privilege" applies to the information withheld on pages 23-32.

#### *Solicitor-client privilege*

[para 15] The Public Body did not provide me with copies of pages 1-22, citing solicitor-client privilege. In his rebuttal submission, the Applicant objected to this practice. He said:

The OIPC enjoys the trust and confidence of the Executive Council of the Government of Alberta and the legislative assembly. I share that trust in the office's ability to provide oversight and ensure the relevant legislation is being followed. However it is challenging that while an investigator for OIPC is satisfied with the Public Body's assurances that SCP is being applied correctly, the natural course of justice would require that as part of the inquiry process the material must actually be reviewed to uphold or overturn the review investigator's conclusion. Only then can the reassurances actually be verified by someone qualified to do so.

[para 16] On November 25, 2016, the Supreme Court of Canada issued its decision regarding the Commissioner's ability, under the FOIP Act, to compel records over which solicitor-client privilege has been claimed (*Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII)). In that decision, the Court determined that the language in the FOIP Act is not sufficient to authorize the Commissioner (or me, as her delegate) to compel the production of information over which a public body has claimed solicitor-client privilege. The Court also suggested that the rules applicable to claims of solicitor-client privilege in the context of civil litigation apply to privilege claims in the context of access requests. The Court also cited *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), 580 A.R. 265 (*ShawCor*) as the relevant authority in Alberta. In *ShawCor* the Alberta Court of Appeal stated:

Accordingly, under either interpretation of the relevant Rules, a party must provide a sufficient description of a record claimed to be privileged to assist other parties in assessing the validity of that claim. From this, it follows that all relevant and material records must be numbered and, at a minimum, briefly described, including those records for which privilege is claimed. As noted, though, this is subject to the proviso that the description need not reveal any information that is privileged.

[para 17] I reviewed the Public Body's submissions regarding its claim of solicitor-client privilege. In its exchanged submissions, the Public Body states that it sought advice from an external lawyer retained by the Public Body for advice related to the Whistleblower investigation. It further states that the communication was kept confidential and was not shared with external parties.

[para 18] The Public Body also provided two *in camera* affidavits sworn by individuals with direct knowledge of the record comprised of pages 1-22, including the lawyer who authored the opinion and the Public Body employee who sought the opinion. I cannot reveal the content of those affidavits, except in general terms. The Public Body has provided context for the creation of the unnamed report, as well as the general legal issue that led to the request for a legal opinion.

[para 19] In cases where a public body claims solicitor-client privilege and does not provide the relevant records to this Office for review, it is very helpful to have sworn statements from individuals with direct knowledge of the records, especially the source of the claimed legal advice. In this case, the information provided in the affidavits provided with the Public Body's initial submission satisfy me that the unnamed report comprising pages 1-22 of the records at issue is a legal opinion and is subject to solicitor-client privilege.

### *Public interest privilege*

[para 20] The Public Body argues that “public interest privilege” applies to the information withheld on pages 23-32 of the records. It states (at para. 133 of its initial submission):

Public interest privilege applies if the public interest in maintaining the confidentiality of certain information outweighs the public interest in disclosing the information for the administration of justice.

[para 21] The Public Body cites Order 96-020 in support of its argument; that case involved record that would reveal the identities of “informants” who provided information about patient care in the course of an investigation of a health facility by a public body. Former Commissioner Clark considered whether “public interest privilege” applied, akin to police informer privilege, to withhold that information.

[para 22] In this case, the Public Body withheld some of the information in the Report under sections 17(1) (invasion of third party privacy) and 20(1)(d) (information that would reveal the identity of a confidential source of law enforcement information). For the reasons discussed later in this Order, I have upheld the Public Body’s decisions to withhold the information in the Report that would identify any of the participants in the Whistleblower investigation. Therefore, all that remains at issue is non-identifiable information.

[para 23] The Public Body’s arguments regarding “public interest privilege” address disclosing identifiable information, how disclosure of identifying information could affect the individuals who participated in the investigation, and how it could be detrimental to the whistleblower protection program insofar as individuals may not participate in the future if their identities could be disclosed. The case law cited by the Public Body relates to the application of a case-by-case privilege to information that would reveal the identity of a confidential source. The Public Body did not apply section 17(1) to the Report in its entirety, nor do its submissions argue that the Report is comprised entirely of information that could identify individuals. However, the Public Body did not explain why it claims “public interest privilege” over the Report in its entirety, including non-identifying information. Further, it is not clear from the Report itself how a public interest privilege would apply to that information in the Report.

[para 24] Given this, I am of the view that the “public interest privilege” does not apply to the Report in its entirety. Whether that privilege could apply to the information about the participants is not an issue I need to decide, as that information must be withheld for other reasons.

[para 25] I am also of the view that the Legislature has codified the balance between the public interest in disclosure and the public interest in withholding information in the custody and control of public bodies, by enacting the FOIP Act. The FOIP Act is based on a balance between the public interest in disclosure versus the public interest in confidentiality of information. Section 2(a) of the Act states:

*2 The purposes of this Act are*

*(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act,*

[para 26] The Legislature created an access-to-information scheme in which the default position is to disclose public body information, subject to the limited exceptions laid out in the Act. If an exception to disclosure does not apply, then the default position must apply. In other words, the balancing between the public interest in disclosure versus confidentiality has already been undertaken by the Legislature in enacting the FOIP Act; therefore, substituting my own case-by-case balance, without authority to do so, would thwart the intention of the Legislature.

[para 27] Having already determined that all information in the Report that identifies individuals who participated in the investigation must be withheld under section 17(1) of the Act, my finding regarding the application of section 27(1)(a) to the information in the Report (pages 23-32) applies only to the remaining non-identifying information. I find that there is no “public interest privilege” that applies to that information on pages 23-32, such that section 27(1)(a) applies.

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

[para 28] The Public Body applied section 23(1)(b) to pages 23-32. This provision states:

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

...

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

[para 29] In order to apply this section, each of the following questions must be answered in the affirmative:

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

(ii) Does an Act, or a regulation under the FOIP Act, authorize the holding of that meeting in the absence of the public?

(iii) Could disclosure of the information reasonably be expected to reveal the substance of deliberations of that meeting? (Order F2009-040 at para. 38, citing Order 2001-040 at para. 9)

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

[para 30] The Public Body is a “local public body” as defined in section 1(j) of the FOIP Act. In its initial submission, the Public Body states (at para. 92):

Under Section 1(j) of the Act, “local public body” means a “local government body”. The term “local government body” is defined under Section 1(i) to include a municipality as defined in the Municipal Government Act, RSA 2000, c.M-26, s1(1)(s) (“MGA”) [Tab 32]. The Public Body is a municipality and therefore considered to be a “local public body” as defined in the Act. The Public Body’s elected officials comprise of 14 Councillors and the Mayor of The City of Calgary (“City Council”). On December 8 and 15, 2014, open City Council meetings were held during which City Council resolved to go in camera to receive information regarding personnel matters (the “City Council Meetings”)... The Public Body submits that there was a meeting of its governing body.

[para 31] I have reviewed the City Council meeting minutes provided by the Public Body and agree that there was a meeting of a local public body.

*Does an Act, or a regulation under the FOIP Act, authorize the holding of that meeting in the absence of the public?*

[para 32] The Public Body cites section 197 of the *Municipal Government Act* (MGA) as authority for the Council to hold meetings *in camera*. It also cites sections 18(1)(e) of the FOIP Regulation as authority to hold the relevant portion of the meeting in camera. That section of the Regulation states:

*18(1) A meeting of a local public body’s elected officials, governing body or committee of its governing body may be held in the absence of the public only if the subject matter being considered in the absence of the public concerns*

...

*(e) a law enforcement matter, litigation or potential litigation, including matters before administrative tribunals affecting the local public body,*

[para 33] Presumably the Public Body means to argue that where the City Council discussed the Report *in camera*, it was discussing a law enforcement matter. Law enforcement is defined in section 1(h) of the FOIP Act as:

*1 In this Act,*

...

*(h) “law enforcement” means*

*(i) policing, including criminal intelligence operations,*

*(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction,*



*including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or*

*(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceeding are referred;*

[para 34] The Public Body has provided me with sufficient information about the Whistleblower Program for me to determine that it falls within the above definition. It provided me with an affidavit sworn by the City Auditor of the Public Body, whose office administers the Whistleblower Program. The City Auditor explained that her office investigates whistleblower complaints, and administers sanctions where appropriate. Although disciplinary actions may be taken against City Councillors only by a resolution of Council, there is an administrative investigation that can lead to a sanction by Council, which receives the investigation report.

[para 35] Where the City Council was discussing the Report, it was discussing a law enforcement matter; therefore, the second part of the test for section 23(1)(b) is met.

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

[para 36] In Order F2013-23, the adjudicator considered the meaning of “substance of deliberations”; he cites *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 (CanLII), in which the Court considered whether the mere indication of the topics and issues discussed form part of the substance of deliberations. The Court states:

The OP [Office of the Premier of British Columbia] submits that the records at issue that identify the topics of discussion of the committees would allow someone to draw an accurate inference about the “substance of deliberations” of Cabinet or a Cabinet committee.

The IPC [Information and Privacy Commissioner] Delegate concluded that the severed words do not consist of “descriptions” of the issues or topics of discussion, but are “a barebones series of subjects or agenda items”. She concluded that there is no “substance” to them and that they reveal no “deliberations”.

The OP submits that the headings describe the specific issues to be discussed and therefore reveal the substance of deliberations. Having reviewed the records in dispute, I cannot agree with that submission. In my view, the IPC Delegate’s characterization that “there is no ‘substance’ to them and they reveal no ‘deliberations’” is reasonable.

In my view, the conclusion of the IPC Delegate, that headings that merely identify the subject of discussion without revealing the “substance of deliberations” do not fall within the s. 12(1) exception, was a reasonable decision. I can find no reviewable error with regard to Order F08-17.

[para 37] The adjudicator in Order F2013-23 adopted this approach endorsed by the BC Supreme Court. He stated (at paras. 61-64):

The *British Columbia (Attorney General)* decision approves an approach by which mere indications of topics and issues discussed may not be withheld as part of deliberations unless their disclosure would permit a reader to draw an accurate inference about the substance of the deliberations. For the purpose of Alberta’s legislation, I prefer this approach. In my view, the “substance” of deliberations refers to more than merely a topic or issue being discussed, in that it refers to the views, advice, recommendations, pros and cons, reasons, rationales, etc. that were conveyed and considered in relation to the topic or issue.

The foregoing also accords with this Office’s interpretation of section 24(1)(b), which uses the same term “deliberations”. As noted earlier in this Order, section 24(1)(b) does not permit a public body to withhold the fact that consultations or deliberations on a particular topic took place; topics may only be withheld if their indication would, in and of itself, reveal the content of the consultations or deliberations (Order F2004-026 at para. 71).

Also consistent with this Office’s interpretation of “deliberations” within the terms of section 24(1)(b), I find that section 23(1)(b) does not apply to merely factual information unless it reveals the substance of the deliberations. A similar conclusion was reached in the *Aquasource* decision (at para. 50). The Court noted that background information cannot be withheld as part of the substance of deliberations unless interwoven with that substance.

Finally, the substance of a deliberations, within the terms of section 23(1)(b) of the Act, does not include information revealing a decision that has been made. Deliberations are what lead up to a decision and are not the decision itself.

[para 38] Where the Public Body may hold a meeting in the absence of the public under section 18 of the FOIP Regulation, the Public Body may withhold only information that would reveal the substance of those discussions under section 23(1)(b), in response to an access request.

[para 39] The Public Body argued that disclosing the Report would reveal the substance of *in camera* deliberations. It said (at paras. 99 and 101, initial submission):

The Public Body submits that the phrase “reasonably be expected” should be given its ordinary and plain meaning. Consideration should be given to whether disclosure of the information, having regard to all of the circumstances, could reasonably be expected to reveal the substance of the deliberations of the City Council Meetings. The Public Body submits the term “deliberations” involve the careful weighing of information, a consideration of the pros and cons of proceeding with a course of action... As set out in the minutes of the public portion of the City Council meetings, recommendations were considered and adopted. Further, Council turned its mind to the application of the Act. Refer to Tab 33 for minutes of the public City Council meetings.

...

As set out in Order F2013-23 at para. 63 [Tab 30], when background information is interwoven with the substance of deliberations, it may be withheld. The Public Body submits that while the release of any single factual statement may not reveal the substance of the deliberations at the City Council Meetings, when all of those statements are reviewed collectively the substance of the deliberations conducted by City Council are revealed.

[para 40] The Public Body made a similar argument in Order F2014-29; in that case, the same provision was applied to a report prepared for consideration by the Calgary City Council, and discussed by that Council *in camera*. The following analysis and decision are consistent with the finding in that Order (see paragraphs 45-50 of that Order).

[para 41] The Public Body's arguments confuse "substance of deliberations" with the *topic* of deliberations or issues being deliberated. The latter is much broader than the former. The disclosure of factual statements or document headings would reveal the subject-matter of the deliberations; however, the test is whether the information would reveal views, advice, recommendations, pros and cons, reasons, rationales, etc. that were conveyed and considered by Council.

[para 42] The Public Body cited Order F2013-23 in support of its position; however, in that Order the records included notes or minutes taken at the *in camera* meeting. In this case, the records consist of the Report that was prepared by a third party and later considered by Council in a meeting.

[para 43] The same issue was considered by former BC Information and Privacy Commissioner Loukidelis in Order No. 326-1999. Specifically, former Commissioner Loukidelis considered whether section 12(3)(b) of the BC Act (equivalent to section 23(1)(b) of the FOIP Act) applies to a report that had been commissioned by a city council and considered in an *in camera* meeting of that council. He stated:

... Still, disclosure of the report would not reveal anything about those discussions. Council members may have debated the IAO Report vigorously, with many different views being expressed and various possible courses of actions being suggested. The IAO Report itself is silent about this. Its disclosure tells us nothing about what was said at the council table, much less what was decided. We simply do not know, and cannot tell from the IAO Report – which was prepared by outside consultants - what the deliberations of council were. The most that can be said is that disclosure of the report would disclose one subject of such meetings. We already know the IAO Report was one of the subjects addressed at the meeting or meetings discussed above, of course, from the Montain Affidavit and the City's submissions in this inquiry.

...  
... As was said in Order No. 113-1996, at p. 4, one can – in cases such as this one – release the source documents without disclosing the substance of deliberations about them.

[para 44] As I noted in Order F2014-29, a comparison of sections 22(1) and 23(1) of the FOIP Act support the application of the former BC Commissioner's. Section 22(1) applies to Cabinet and Treasury Board confidences; it states (in part, emphasis added):

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

[para 45] This provision specifically encompasses advice etc. that has been prepared for or submitted to Cabinet or Treasury Board.

[para 46] In contrast, section 23(1)(b) applies only to the substance of deliberations. Had the Legislature intended to include advice etc. prepared for or submitted to an *in camera* meeting of a local public body, it would have included language similar to that in section 22(1).

[para 47] The Public Body has not made any arguments to persuade me that the above reasoning does not apply in this case. The fact that the City Council discussed the Report *in camera* does not reveal the substance of that discussion.

[para 48] Therefore, as in Order F2014-29, I adopt the approach taken by the former BC Commissioner to section 23(1)(b). Although the Council may have deliberated on the contents of the Report, the Report is itself silent as to whether relevant deliberations occurred.

[para 49] The Public Body has also argued that “information that may be available publicly can still be subject to the exception to the disclosure set out in Section 23(1)(b)” (initial submission at para. 102). It is not clear what public information the Public Body is referring to, or how that may reveal the substance of the City Council’s *in camera* deliberations. However, the Public Body had also stated (at para. 99):

As set out in the minutes of the public portion of the City Council meetings, recommendations were considered and adopted.

[para 50] The Public Body’s argument appears to be that this information revealed in the public portion of the meeting minutes does not negate the ability to apply section 23(1)(b) to information in the Report. It cites the adjudicator in Order F2013-23 (cited above), who said (at para. 48):

To put the point differently, the fact that the general subject-matter of something was discussed publicly does not preclude the application of section 23(1) to the more specific subject-matter of the deliberations in relation to that something, which deliberations include a consideration of the reasons for making a decision, the pros and cons of a course of action, or other details in relation to the particular subject-matter (see Order F2009-040 at para. 37).

[para 51] I agree with the reasoning in the above citation. In this case, the fact that the public meeting minutes reveal that the Report had been discussed by City Council has no bearing on my finding regarding the application of section 23(1)(b).

[para 52] The Public Body may also be arguing that the information in the public meeting minutes, together with information in the Report, would reveal the substance of the *in camera* deliberations. Having reviewed the public minutes and the Report, I disagree. The Report itself still reveals only the topic put before Council; the Report itself cannot reveal the substance of the Council’s deliberations (having been written before the deliberations), and the public minutes reveal the decisions made as a result of the deliberations. As noted in Order F2013-23, “the substance of a deliberations, within the terms of section 23(1)(b) of the Act, does not include information revealing a decision that has been made. Deliberations are what [led] up to a decision and are not the decision itself” (at para. 64).

[para 53] At most, the public meeting minutes might indicate that Council took the Report seriously. In my view, an indication that the Report was taken seriously is not the same as revealing the specific views, advice, recommendations, pros and cons, reasons, rationales, etc. that were conveyed and considered by Council.

[para 54] The Public Body noted that the public meeting minutes state that the recommendations in the Report were considered and adopted; it may be argued that disclosing the content of the recommendations in the Report would reveal specifically what Council considered.

[para 55] For the reasons discussed later in this Order, I have found that the Public Body properly withheld the recommendations made in the Report under section 24(1). Therefore, whether disclosing those recommendations could reveal specifically what Council considered in its *in camera* meetings is moot. That said, I am of the view that without more information about the Council meetings, it is impossible to know whether Council participated in a lengthy debate, what parts of the recommendations were discussed, or whether members of Council simply stated that they read the recommendations and agreed to implement them.

[para 56] I find that section 23(1)(b) does not apply to the information in the Report.

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

[para 57] The Public Body applied section 24(1)(a) to information on many pages of the records at issue. This section states:

*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*

[para 58] In previous orders, the former Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action. (See Order 96-006, at p.9)

[para 59] In Order F2013-13, the adjudicator stated that the third arm of the above test should be restated as "created for the benefit of someone who can take or implement the action" (at paragraph 123).

[para 60] Further, section 24(1)(a) applies only to the records (or parts thereof) that reveal substantive information about which advice was sought. In Order F2004-026, former

Commissioner Work clarified the scope of section 24(1) (including 24(1)(a) and (b)) as follows (at para. 71):

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

[para 61] As indicated above, facts can be withheld if they are interwoven with the advice etc. such that they facts cannot reasonably be separated (Order F2009-008).

[para 62] As well, section 24(1)(a) does not apply to a decision itself (Order 96-012, at paras. 31 and 37).

[para 63] Regarding factual information, including opinions about factual situations, the adjudicator in Order F2012-10 found (at paras. 44-45):

That an employee offers an opinion regarding a factual situation does not, in and of itself, support a finding that the information is subject to either section 24(1)(a) or (b). Recently, in Order F2012-06, I rejected the argument that an objective evaluation or assessment of factual information constitutes information that is subject to section 24(1)(a), if that information reveals only a state of affairs, rather than advice or analysis directed at taking an action.

Similarly, in Order 97-007, former Commissioner Clark rejected the argument that a collection of facts, without evidence that the facts were collected and presented in order to influence a decision, is subject to section 24(1)(a).

Upon reviewing the briefing notes, I note that there is no reference to a possible course of action for the Minister. In short, the briefing notes appear to be a narration or a status report. The authors of the briefing notes were not advising the Minister as to what he should do or not do, nor were they providing an analyses of the events using their expertise. “Analyses” is defined in the *Concise Oxford Dictionary*, 9th edition, (New York: Oxford, 1995) as:

*a detailed examination of the elements or structure of a substance etc.; a statement of the result of this.*

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

In Order 96-012, I stated that I took section 23(1)(a) to contemplate the protection of information generated during the decision-making process. There is nothing in the information to indicate a decision or a pending decision.

[para 64] The Public Body argues that the test cited in the jurisprudence from this Office is overly restrictive. It cites the Supreme Court of Canada case, *John Doe v. Ontario (Finance)*, 2014 SCC 36, in which the Supreme Court overturned a finding of the Ontario Information and Privacy Commissioner on the Ontario legislation's equivalent of section 24(1)(a). The Court found that it was unreasonable for the Ontario Commissioner to require evidence that advice had been communicated in order for the provision to be properly applied. Rather, the provision can also apply to drafts of advice (see paras. 50-51).

[para 65] Section 24(1) of the FOIP Act is broader than the equivalent exception in Ontario's Act, insofar as section 24(1) is not limited to advice and recommendations; it also includes proposals, analyses and policy options. Evidence that advice had actually been communicated is not a requirement for the application of section 24(1)(a). In fact, in Order F2013-13, the adjudicator specifically found that requiring that advice be made to the decision-maker is overly restrictive. She said (at para. 123):

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. This purpose would not be achieved if information otherwise falling under section 24(1)(a) were automatically producible prior to the decision maker actually receiving it, or in cases where a public body elected to follow another course and the advice did not ultimately reach the decision maker. So long as the information described in section 24(1)(a) is developed by a public body or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a) regardless of whether the individual or individuals ultimately responsible for making a decision receives it. The third arm of the test should therefore be restated as "created for the benefit of someone who can take or implement the action" to better accord with the language and purpose of section 24(1)(a), and I will review the information to which the Public Body has applied section 24(1)(a) with that in mind.

[para 66] The adjudicator's analysis above, from a 2013 Order of this Office, is consistent with the Supreme Court's finding in *John Doe*. (It was also presented to the Supreme Court as part of the factum of this Office as intervener in the *John Doe* case.)

[para 67] The Public Body noted the change to the third part of the test for section 24(1)(a) at paragraph 104 of its initial submission. It is therefore unclear why the Public Body continues to argue that the test for applying section 24(1)(a) remains overly restrictive, citing *John Doe*. If the Public Body believes the test to be overly restrictive for reasons other than those discussed in *John Doe*, it hasn't said so.

[para 68] In my view, the test consistently applied by this Office for the application of sections 24(1)(a) is appropriate.

[para 69] The first step in determining whether section 24(1)(a) was properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options. Section 24(1)(a) does not apply to a decision itself (see Orders 96-012, at paras. 31 and

37); in this case, the Report contains findings and recommendations of the investigator, but the investigator did not have authority to make a decision. The Report does not contain decisions of a Public Body official with the authority to make them.

[para 70] The Public Body has applied section 24(1)(a) to portions of pages 23-25, 27, 28, 29; and to pages 26, 30 and 31 in their entirety.

[para 71] The Report comprising pages 23-32 was created by an external investigator retained by the Auditor's Office, which is responsible for oversight of the Public Body's Whistleblower Program. In its initial submission, the Public Body states (at para. 114):

The recommendations made by the Investigator to the Public Body and contained in FOIP p.29-31 of the Report are directed towards taking an action. The Report contains specific advice, recommendations, and analysis as to the actions the Public Body should take to address these matters. The Report was created for the benefit of the Public Body's Auditor and was discussed with the Public Body's governing body (City Council). The Auditor and City Council can each take and implement the advice contained in the Responsive Records.

[para 72] The external investigator created the Report, which outlines the background, facts gathered, analysis of the facts, and recommendations. I agree that this Report was clearly sought by the Auditor's Office and also provided to Council, both of which have the responsibility for addressing the findings of the Report. The three-part test for applying section 24(1)(a) seems to be fulfilled.

[para 73] However, much of the information withheld under section 24(1) consists of background facts, which section 24(1)(a) does not encompass unless they are so interwoven with the advice that the facts and advice cannot be separated. Further, some of the background facts include citations from relevant policies.

[para 74] Section 24(2)(g) states that section 24(1) does not apply to information that

*is a substantive rule or statement of policy that has been adopted by a public body for the purpose of interpreting an Act or regulation or administering a program or activity of the public body.*

[para 75] In Order F2008-011, the adjudicator considered the scope of this provision. She considered the definitions of "substantive", "rule" and "policy" in the *Canadian Oxford Dictionary* and concluded (at paras. 20 and 21):

A substantive rule by which a public body interprets an Act or regulation, or administers a program or activity, under subsection 24(2)(g) would therefore be an important or significant principle to which actions or procedures of a public body conform or adhere when it interprets its statute or administers its programs or activities.

...

The intent of subsection 24(2)(g), in my view, is to ensure transparency and accountability in the manner by which public bodies perform their statutory functions and duties, which may involve making decisions affecting the rights of citizens under legislation.



[para 76] I agree with the above analysis. It seems clear to me that information consisting of citations from policies relevant to the investigation fall within the scope of section 24(2)(g) such that it cannot be withheld under section 24(1).

*Application to the information withheld under section 24(1)*

[para 77] Previous Orders of this Office have discussed the application of section 24(1) to headings; where headings identify the subject of advice etc. without revealing the substance of that advice etc. it cannot be withheld under section 24(1). This is consistent with the findings of the BC Supreme Court (cited above) that headings that reveal only the subject of discussion and not the “substance of deliberations” cannot be withheld under a provision applying to information that would reveal the substance of deliberation of Executive Council.

[para 78] In my view, none of the underlined headings on pages 23-32 reveal the substance of advice etc. in the Report. Only the underlined headings on the middle of pages 24 and 25 are more than the most basic of headings that can be found in any report. The underlined headings at the middle of pages 24 and 25 do reveal two subjects considered by the investigator, and therefore provide some information as to the scope of the investigation. However, as discussed above, past Orders of this Office have found that revealing *the fact that* something was considered is not the same as revealing the considerations/analysis themselves. I find that none of the underlined headings reveal the substance of any advice etc. and cannot be withheld under section 24(1). That said, this finding relates only to underlined headings. The italicized (but not underlined) headings on pages 29-31 reveal the substance of recommendations, to which I have found section 24(1)(a) applies (see paragraph 84 of this Order). The bolded (but not underlined) headings on the bottom of page 27 and the top of page 28 consist of third party personal information. For the reasons provided in the next section of this Order, I found this information was properly withheld under section 17(1), except the last bolded heading (see paragraph 104 of this Order).

[para 79] Regarding the information on page 23, the first sentence withheld under section 24(1) constitutes advice. The second sentence withheld on that page under section 24(1) reveals the subject matter of the recommendations. In my view, there is sufficient detail in that sentence to reveal the substance of the recommendations made later in the Report. Therefore, section 24(1) applies.

[para 80] The information withheld under the first heading on page 24 identifies which Public Body policies were relevant to the investigation, and to whom those policies apply. There is no analysis of how the policies apply to the facts of the case, in this part of the Report. Identifying the relevant policies might reveal something about the subject matter of the investigation, but that does not transform otherwise factual information into analysis, advice, recommendations, etc. Section 24(1) applies to the *substance* of the advice, etc.; it does not apply to information that reveals merely what the subject of the advice was. Therefore, section 24(1) cannot apply to the information withheld under this heading.

[para 81] Section 24(2)(g) applies to the policies cited on pages 25-27 under the heading on the middle of page 25. Some of the information withheld under section 24(1) under this heading

is a paraphrasing or explanation of the policy and related legislation. If the paraphrasing or explanation included an analysis of how that legislation or policy applied to the facts at hand, section 24(1) might apply; however, under this heading, it is merely a recitation of the applicable policies and legislation. Therefore, section 24(1) does not apply.

[para 82] Under the underlined heading near the top of page 27, the Public Body withheld information from the third and fifth (of five) paragraphs under that heading. Some of the information consists of the investigator's observations regarding staff training, and some consists of the investigator's analysis of the facts gathered. The latter information is information to which section 24(1) applies and includes only the sentence withheld under section 24(1) in the fifth paragraph. The observations regarding staff training are mere recitations of fact, separable from any analysis or advice; as such section 24(1) does not apply.

[para 83] The information withheld citing section 24(1) under the underlined heading at the middle of page 28 consists of the investigator's findings, which is properly characterized as analysis to which section 24(1)(a) applies (this does not apply to the heading itself, as discussed at para. 78).

[para 84] Under the underlined heading at the middle of page 29, much of the information consists of the investigator's analysis and recommendations to which section 24(1) applies. However, the first paragraph under the heading, including the list under that paragraph, consists of a factual statement of the scope of a Public Body policy. For the same reasons given at paragraph 80 above, section 24(1) does not apply to that information. It does apply to the three paragraphs under the list (the last three paragraphs on that page), as well as all of the information to which it was applied on pages 30 and 31. This includes the italicized headings on pages 29-31.

[para 85] I have previously found that neither section 23(1) nor section 27(1)(a) apply to any information in the Report, and the Public Body did not apply sections 17(1) or 20(1) to any of the information identified above as information to which section 24(1) does not apply. Therefore, I will order the Public Body to disclose that information to the Applicant.

### *Exercise of discretion*

[para 86] Section 24(1) is a discretionary exception. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.

[para 87] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

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

- the decision failed to take into account relevant considerations

[para 88] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded:

In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*. (At para. 104)

[para 89] In its initial submission, the Public Body listed the factors it considered in exercising its discretion to withhold information from the Applicant, including the purpose of the Act and section 24(1) more specifically. The Public Body was also concerned about maintaining the integrity of the Whistleblower program, and the confidence employees have in that program.

[para 90] I find that the Public Body properly exercised its discretion to withhold information to which section 24(1) applies.

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

[para 91] The Public Body withheld information in the Report under section 17(1). Some of the information withheld under section 17(1) is information that I found was properly withheld under section 24(1). I will consider only the remaining information withheld under section 17(1).

[para 92] Affected Parties A, B, C, D and F made submissions on the application of section 17(1) on their own behalf. The Public Body made arguments regarding the disclosure of the Affected Parties' personal information as well as the personal information of the unnamed individual staff members.

*Is the information withheld in the Report under section 17(1) about identifiable individuals?*

[para 93] Section 1(n) defines personal information under the Act:

*1 In this Act,*

...

*(n) "personal information" means recorded information about an identifiable individual, including*

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

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

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

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

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

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

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

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

*(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 94] The information in the records relating to the Affected Parties includes information about their employment history, their opinions, and opinions about them. It is their personal information.

[para 95] The Public Body has also argued that the Report contains personal information of third parties, other than the Affected Parties. Specifically, the Public Body states that complainants and witnesses who participated in the investigation are identifiable from the information in the Report. I can refer to these other individuals generally as "Council staff".

[para 96] The Public Body states that Council staff that participated in the investigation are not named in the Report as they gave their views in confidence. Public Body argues that while these individuals were not named in the Report, their identities could be discerned by others (for example, current or former colleagues) because the pool of staff was very small. It states (at paras. 15-16 of the Public Body's exchanged initial submission):

However, the Report also contains information that could identify other individuals. As noted in *University of Alberta v. Alberta (Information and Privacy Commissioner)*, [citation omitted] it is not necessary for a record to specifically name individuals for there to be recorded information about an identifiable individual. While a single data element in isolation may not reveal the individual's identity, multiple data elements in combination can reveal the identity of an individual. Also, information cannot be viewed in isolation of its context, as the context can provide additional information that can be used to identify an individual. Disclosure of personal information in a specific context can be an unreasonable invasion of third party personal privacy. The OIPC has also recognized that an individual does not have to be identifiable by every person viewing the record; the individual only needs to be identifiable by someone. [Citation omitted]

When considered in the context of the individuals' workplace environment and the Whistleblower Investigation, information contained in the Report could identify individuals who participated in the Whistleblower Investigation. The information in the Report describes specific events that involved a discrete group of identifiable individuals who are well known to each other. The Public Body submits that the events and personal descriptors contained in the Report would reveal not only the identity of the individuals who reported complaints or participated in the Whistleblower Investigation, but also the identity of the individuals who are the subject of the investigation.

[para 97] I asked the Public Body to provide me with further information about how these unnamed staff members could be identifiable from the information in the Report. In its exchanged response, the Public Body states that:

There is specific information contained in the Report that describes important workplace events of some individuals who participated in the Whistleblower Investigation... The Report contains unique descriptions of events derived from an individual's personal knowledge that can be used to identify that individual, or other individuals. These specific events involved a discrete group of identifiable individuals who are well known to each other. (January 26, 2018 submission, at page 2).

[para 98] The Public Body provided further details about the various workplace events in *in camera* submissions, including the numbers of staff working in the relevant areas of the Public Body and City Council.

[para 99] I agree with the Public Body that some of the information in the Report could render unnamed staff members as identifiable, whether those staff members participated in the investigation or were otherwise referred to in the Report. The small number of individuals employed to work with Council, as well as references to specific incidents or comments could allow a particular individual to be identifiable.

[para 100] I note that an individual's identity need not be discernable by the public at large (or even the Applicant) for section 17(1) to apply to the information. In Order F2008-020, the adjudicator determined that disclosing a video containing the image of an unidentified individual would disclose that individual's personal information. He said (at para. 30):

Although the Applicant argues that the unidentified male has not been conclusively *identified*, he is nonetheless *identifiable*. An individual does not have to be identifiable by every person reviewing a particular record in order for there to be personal information about that individual; the individual needs only to be identifiable by someone. In this particular case, even if neither the Public Body nor I can conclusively identify the individual in the Video, he is identifiable by other persons viewing the Video, such as his friends, his family members and himself.

Even if the unnamed individuals who participated in the investigation (or were discussed in the Report) could be identified only by a small number of people and not by the public at large, that information is still about an identifiable individual such that section 17(1) may apply.

[para 101] I also agree with the Public Body that the identities of the individual staff members are inextricably linked to the information about the Affected Parties. Disclosing the names of the Affected Parties would render other unnamed individuals identifiable. Therefore, I must consider the personal information of those staff members in my section 17(1) analysis.

[para 102] That said, I find that not all of the information withheld under section 17(1) is about an identifiable individual. Disclosing information that would reveal whether a particular workplace is pleasant, hostile, difficult, etc. does not equate to disclosing personal information about the employees that work there. This is the case even though for each employee it is likely that there is someone who can identify that workplace as the employee's. If it were otherwise,

information about public bodies would often be required to be withheld under section 17(1) because information about a public body's general workplace might also be characterized as personal information of a public body employee known to work there.

[para 103] I have said that references in the Report to particular incidents or comments involving staff members could render those staff identifiable. In contrast, general statements about circumstances that affect staff members as a group (e.g. the state of the workplace) are not statements that identify a particular individual, and are therefore not information about an identifiable individual.

[para 104] Information that is not about an identifiable individual is not information to which section 17(1) can apply. Below I list information the Public Body withheld under section 17(1) that is not information about an identifiable individual and therefore to which section 17(1) cannot apply. (Information to which section 17(1) was applied that is not specifically listed below is information about an identifiable individual and I will consider the application of section 17(1) to that information in the next section).

- Page 23, paragraph 1 (of 8): the particular work areas named by the Public Body do not identify any particular individual; however, the number associated with each area could conceivably permit identification. Only the three numbers in the second (of two) sentences, as well as the last word of the third line and the entire fourth line is information to which section 17(1) might apply. The remainder must be disclosed.
- Page 23, paragraph 2: the information withheld does not identify any particular individual, either by itself or from the surrounding context. Therefore it must be disclosed.
- Page 23, paragraph 3: only the first sentence is information to which section 17(1) might apply. The remainder of that paragraph must be disclosed.
- Page 23, paragraph 4: the number and following word in the first sentence is information to which section 17(1) might apply, as is the information in the second sentence and the last (fourth) sentence. The remainder must be disclosed.
- Page 23, paragraph 5: None of this information identifies a particular individual and must be disclosed.
- Page 24, paragraph 4 (of 10): The three numbers in the withheld sentence and the remainder of the sentence after the word "and" is information to which section 17(1) might apply. The remainder must be disclosed.
- Page 27, paragraph 4 (of 8): The first four words of the first sentence, and the remaining sentences in the paragraph except the last sentence, is information to which section 17(1) might apply; the remainder of the first sentence, and the last sentence of the paragraph must be disclosed.
- Page 27, paragraph 6: The number occurring as the first word in the paragraph is information to which section 17(1) might apply, everywhere it occurs in that paragraph. The names are clearly identifiable but the name of Affected Party C cannot be withheld under section 17(1) as he consented to the disclosure of his personal information (see the discussion below under section 17(2)(a)). The remainder of the paragraph (except the number and names of Affected Parties A, B, D, E and F) is not information about an identifiable individual and must be disclosed.

- Page 27, paragraph 7: Only the name of the Affected Party is information to which section 17(1) can apply. With the name withheld, the remainder of the second sentence is not about an identifiable individual and must be disclosed.
- Page 28, paragraph 4 (of 9) and preceding heading: the name of Affected Party C cannot be withheld under section 17(1); neither can the first five words of paragraph 4, which refers only to the Affected Party. This information must be disclosed. The remaining information in that paragraph relates also to other individuals and is therefore information to which section 17(1) might apply, despite the consent of Affected Party C.
- Page 29, paragraph 6 (of 11): the first four words and the last two words of that paragraph are about Affected Party C only and therefore must be disclosed. The remainder of that paragraph could reveal the identity of another participant and is information to which section 17(1) might apply.

[para 105] The above-listed information was also withheld under section 20(1)(d). For the reasons provided under that section of this Order, I find that provision also doesn't apply. I have previously found that neither section 23(1) nor section 27(1)(a) apply to any information in the Report, and the Public Body did not apply section 24(1) to any of the above-listed information; therefore, I will order the Public Body to disclose the above-listed information to the Applicant.

*Does section 17(1) require the Public Body to withhold the personal information in the Report?*

[para 106] Section 17 states in part:

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

...

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

...

*(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*

...

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

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

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

...

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

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

...

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

...

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

...

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

*(i) the personal information was originally provide by the applicant.*

[para 107] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 108] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 109] Previous orders from this Office have found that section 17 does not apply to personal information that reveals only that the individual was acting in a formal, representative, professional, official, public or employment capacity, unless that information also has a personal dimension (Order F2008-028, para. 54).

[para 110] While the investigation that led to the Report was a workplace investigation, the information relating to the Affected Parties does not relate solely to the performance of their work duties. Rather, the information is about allegations of inappropriate behaviour. Therefore, there is a personal dimension to the information such that section 17(1) can apply. The same reasoning applies to information that could identify unnamed Council staff.

[para 111] In this next part I will consider the applications of sections 17(2)-(5) to the information that is personal information.

### *Section 17(2)*

[para 112] Section 17(2) prescribes a number of circumstances in which it is not an unreasonable invasion of privacy to disclose personal information. Section 17(2)(a) is relevant to this inquiry; none of the parties have argued that other provisions of section 17(2) are relevant and, from the face of the records, none appear to apply.

[para 113] Section 17(2)(a) states:

*17(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*



*(a) the third party has, in the prescribed manner, consented to or requested the disclosure*

[para 114] Affected Parties A, B, D and F specifically did not consent to the disclosure of their personal information. Affected Party E did not provide submissions.

[para 115] Affected Party C consented to the disclosure of their personal information in the records. In their rebuttal submission they state (at para. 4):

With this in mind, Undisclosed Affected Party “C” maintains its responsibility over the actions raised against it in the records. Undisclosed Affected Party “C” acknowledges the actions referenced in the records about it and notes that an apology for these such actions was issued to the Public Body. Undisclosed Affected Party “C” does consent to the disclosure of its personal information contained in the records provided that the disclosure of its personal information does not disclose the personal information of other individuals or the identity of others involved in the Whistleblower Investigation regarding its actions.

[para 116] Other Affected Parties pointed out that Affected Party C’s consent cannot extend to their personal information, even when it is intertwined with C’s. Affected Party C acknowledged this, as well as the fact that its consent cannot extend to personal information of other unnamed individuals. I agree. Affected Party C’s consent can extend only to information that is about C alone.

[para 117] At paragraph 104 of this Order I have identified the information that relates to Affected Party C only and which must be disclosed. The remaining information that relates to this Affected Party is information that could reveal the identity of other participants in the investigation, or is information that was properly withheld under section 24(1) (discussed earlier in this Order).

*Section 17(3)*

[para 118] None of the parties has argued that section 17(3) applies to any of the withheld information, and from the face of the records, this provision does not apply.

*Section 17(4)*

[para 119] The Public Body argued that sections 17(4)(d) and (g) are relevant. One of the Affected Parties has also argued that sections 17(4)(f) applies.

[para 120] Section 17(4)(d) creates a presumption against disclosure of personal information that relates to employment or educational history. The Affected Parties argue that their personal information in the Report consists of information relating to their conduct at work and is information that could appear in a personnel file. I agree that this factor applies to the Affected Parties’ personal information. It also applies to some of the personal information of the individual staff members in the Report.

[para 121] Section 17(4)(g) creates a presumption against disclosure of personal information consisting of a third party's name when it appears with other personal information about that third party, or where the name alone would reveal personal information about the third party. This section applies to the Affected Parties' personal information in the Report.

[para 122] Section 17(4)(f) creates a presumption against disclosure of personal information that consists of personal recommendations or evaluations, character references or personnel evaluations. In Order 97-002, former Commissioner Clark considered the dictionary meanings of "evaluate" and determined that the following criteria were relevant in determining whether personal information constitutes "personal evaluations" or "personnel evaluations":

- i. Was an assessment either made according to measurable standards or based upon professional judgment?
- ii. Was the particular evaluation done by a person who had the authority to do the evaluation?

[para 123] These criteria were followed in Order F2008-015 (at para. 39) and I agree they are appropriate criteria. In this case, while the third party personal information includes opinions about the Affected Parties, those opinions do not meet the criteria above. Therefore, I find this factor does not apply.

#### *Section 17(5)*

[para 124] The Public Body has argued that section 17(5)(h) is relevant. The Affected Parties have also argued that sections 17(5)(e), (f), and (g) apply. The Applicant has argued that section 17(5)(a) applies.

[para 125] Section 17(5)(a) weighs in favour of disclosure where the disclosure is desirable to subject the Public Body's activities to public scrutiny. In order for the desirability of public scrutiny to be a relevant factor, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information in order to subject the activities of the public body to public scrutiny. (See Order 97-002, at para. 94; Order F2004-015, at para. 88; Order F2014-16, at para. 34.)

[para 126] In Order F2014-16, the Director of Adjudication discussed appropriate factors to consider in determining whether public scrutiny is desirable. She said (at paras. 35-36):

In determining whether public scrutiny is desirable, I may consider factors such as:

1. whether more than one person has suggested public scrutiny is necessary;
2. whether the applicant's concerns are about the actions of more than one person within the public body; and
3. whether the public body has not previously disclosed sufficient information or investigated the matter in question.

(Order 97-002, paras 94 and 95; Order F2004-015, para 88).

It is not necessary to meet all three of the foregoing criteria in order to establish there is a need for public scrutiny. (See *University of Alberta v. Pylypiuk* (cited above) at para 49.) For example, in Order F2006-030, former Commissioner Work said (at para 23) that the first of these factor “is less significant where the activity that has been called into question, though arising from a specific event and known only to those immediately involved, is such that it would be of concern to a broader community had its attention been brought to the matter”, commenting that “[i]f an allegation of impropriety that has a credible basis were to be made in this case, this reasoning would apply”.

[para 127] In the attachment to his request for inquiry, the Applicant accepts that “personal information should be exempted under the Act. However... the public does not know what types of activities or events were investigated or why. There’s also no insight provided as to how well or poorly the City handled the situation. It is hard to believe that every single word in this report must be exempted from the Act” (at para. 2).

[para 128] In his rebuttal submission, he states (at paras. 8-10):

The conclusions of the investigation of the allegations seem to indicate there was some impropriety. A reasonable person could conclude this based on a few facts. In the Public Body's submission to the inquiry, page 29 of 41, paragraph 129, regarding the Investigator's opinion on the matters:

"The Opinion was prepared for the dominant purpose of litigation that was, and continues to be, reasonably anticipated by the Public Body. The Public Body's anticipation of this litigation was and continues to be reasonable."

Also, the Mayor of Calgary has spoken publicly about the results of this investigation, saying that there were three substantiated allegations of wrong-doing involving city council members. ((See: <http://www.cbc.ca/news/canada/calgary/calgary-city-council-integrity-ethics-commissioner-1.3497497> and <http://calgaryherald.com/news/local-news/city-council-to-hire-integrity-boss>))

These are serious matters of public concern and the public is entitled to information, especially if the allegations were substantiated and there was wrong-doing.

...

The public may never know the names of the people who were investigated. However, the public does deserve to know the nature of the wrong-doing, given that the City Auditor felt it necessary to hire an independent investigator and the matter cost over \$75,000 for this unplanned audit.

It could be argued that the expectations to privacy of the 15 elected members of City Council may be legally protected. But given they are in positions of public trust, public expectations of them are higher than the expectations of any of the other 15,000 City of Calgary employees.

[para 129] He further argues (at para. 21):

Based on the points already made, the Public Body has applied Section 17 of the Act (disclosure harmful to personal privacy) in an overly broad way so as to protect every person named in the document, not just the whistle-blowers who were promised anonymity. Even if the OIPC agrees with this overly broad protection afforded to everyone involved (victims, witnesses and perpetrators of whatever inappropriate behaviour these documents are about), the public is

entitled to know WHAT behaviour was being investigated. A cloud is already cast over every member of City Council, not just the guilty party/parties in these substantiated allegations. Why is the protection being extended to all involved especially if complaints are substantiated? (See Merali case noted above) If evidence were lacking, it would be proper to protect the innocent.

[para 130] Significant allegations were made against several individuals; the Public Body determined that these allegations required internal scrutiny. The Applicant argues that the public deserves to know what was being investigated. He argues that Council members are in a position of public trust and therefore public expectations are higher of them than other Public Body employees. In my view, the fact that Council members are elected is relevant, although it is not an overriding consideration.

[para 131] The fact that the actions of some individuals were called into question, in circumstances involving elected officials, does not mean that the actions of the Public Body are being called into question. One Affected Party argued that the Applicant has not provided evidence that the Public Body mishandled the investigation and that if there are concerns about the investigation process, the City Auditor's Office procedures can be scrutinized.

[para 132] Past Orders of this Office have made the distinction between allegations of wrongdoing by a public body employee, and allegations of a more systemic nature against a public body. For example, in Order F2015-30, I discussed the application of section 17(5)(a) to allegations made against a police officer in a disciplinary decision. I said (at para. 43, emphasis added):

I find that the Applicant has not provided credible evidence to suggest that activities of the Public Body require scrutiny. The unredacted portions of the Decision reveal that the actions of the Detective were called into question; however, there is no indication that the activities of the Public Body more broadly are being called into question, beyond this particular case in which the Detective may have provided deficient advice to a colleague. I may have found otherwise had the Applicant provided some evidence that the Detective routinely advised colleagues to lie or use misleading language on warrant applications or similar documents. However, the Applicant's arguments merely speculate that this is the case, and the records themselves do not support such a finding.

[para 133] In this case, it is possible that the alleged inappropriate actions are somewhat systemic in nature. Further, the nature of the allegations and the fact that elected officials are involved lead me to conclude that the public would have a justifiable interest in scrutinizing the events described in the Report.

[para 134] Despite the above, I agree that there is no evidence presented to me to indicate that the Public Body erred in its handling of the investigation leading to the Report. Further, while the third party personal information in the Report could lead to a greater understanding of the subject matter of the Report, the personal information is not necessary to gain a general understanding.

[para 135] I find that section 17(5)(a) is a relevant factor in favour of disclosing the personal information in the Report, but that it does not weigh heavily.

[para 136] Section 17(5)(e) weighs against disclosure of personal information where disclosure would expose the third party unfairly to financial or other harm. Section 17(5)(h) weighs against disclosure of personal information where disclosure may unfairly damage the reputation of the third party. The Affected Parties argue that disclosure would result in unfair assumptions about misconduct and impair their ability to seek future employment and financial stability. One of the Affected Parties argued that the allegations made against them in particular were found to be unsubstantiated and past Orders of this Office have found the disclosure of unsubstantiated allegations to be particularly concerning. Another Affected Party argues that the allegations were neither proven nor disproven in the Report and that there is a potential for the loss of that Party's current position. Another Affected Party pointed out the possibility of psychological harm from disclosure.

[para 137] None of the Affected Parties (nor the Public Body) specifically addressed whether the possible harms from disclosure are "unfair", given the context in which they are found (a whistleblower investigation). In Order F2008-009, the adjudicator stated that he did not believe that *unfair* harm or *unfair* damage to reputation would result on disclosure of the personal information of officers who were found guilty of misconduct. Conversely, there may be unfair harm or unfair damage to reputation if personal information were disclosed in cases where the charges against the officer were withdrawn or proven to be unsubstantiated.

[para 138] In his rebuttal submission, the Applicant states (at para. 19):

... when harm befalls individuals due to their own actions, even those exemptions can be removed in the public interest. For example, when a senior government official uses public money in a way that contravenes internal regulation:

<http://www.cbc.ca/news/canada/edmonton/senior-ahs-official-spent-thousands-on-high-end-restaurants-1.1155033>

Here we see an example where releasing the name of the official both shed light on a situation and allowed the public the chance to see there was sanction as the release of the documents under FOIPP did lead to financial harm/loss of position. Despite the personal harm which befell [a named individual], the information about the person committing the wrong was released. In the case at hand, the Public Body (City of Calgary) would assert these documents should never be released under FOIPP because of the wrong that was exposed and that its employees would face sanction.

[para 139] In this case, the Report includes findings of the investigator, so I do not agree that the allegations were neither proven nor disproven as an Affected Party argued, though in some circumstances they were found to be unsubstantiated. I find that these factors weigh against disclosure of the personal information of the Affected Party against whom the allegations were unsubstantiated, but not the others. These factors also weigh against disclosure of the personal information of the individual staff members. Whistleblowers often still experience harm to their reputations and may be perceived as untrustworthy. It is difficult to determine from the Report which staff members complained, such that any staff member that is identifiable in the Report might be characterized as a whistleblower. It seems clear that identifying the individual staff members in the Report could lead to unfair harm, especially to their reputation.

[para 140] Section 17(5)(f) weighs against disclosure of personal information where that information was provided in confidence. The Affected Parties all state that they participated in the investigation with an understanding that their information would be kept in confidence. Given the context of the investigation and Report, I agree that this information would have been provided with a reasonable expectation of confidentiality. This factor weighs against disclosure of the Affected Parties' personal information, as well as that of the individual staff members.

[para 141] Section 17(5)(g) weighs against disclosure of personal information where the information is likely to be inaccurate or unreliable. One Affected Party argued that this provision applies because the information is based on untrue rumours. However the investigator spoke to the alleged wrongdoers, as well as staff members, and made findings based on what he was told. There is no other indication that this information is inaccurate or unreliable. I find that this factor does not apply.

#### *Other factors*

[para 142] The Public Body argues that maintaining the integrity of the whistleblower program is a factor weighing against disclosure of third party personal information in the records. This is not a listed factor under section 17(5), but in my view, is relevant in this particular case.

[para 143] The Public Body has provided me with a copy of the Whistleblower policy (Tab 2 of Public Body's initial submission). The policy states the purpose of the Whistleblower Program as follows:

The purpose of this policy is to establish specific program responsibilities regarding the reporting and investigation of allegations of waste and/or wrongdoing within The City of Calgary. This policy reflects The City's ongoing effort to support open, ethical, accountable, and transparent local government.

[para 144] The Public Body argues that the program requires confidentiality for it to function effectively. It states that "[w]ithout an assurance that confidentiality would be maintained, individuals would not come forward to make reports or participate in an investigation." (Affidavit of Public Body FOIP Officer, Tab 1(a) of Public Body's initial submission, at para. 28).

[para 145] The policy also speaks to the confidentiality of a reporter/complainant:

Every reasonable effort will be made to maintain the confidentiality of the reporter. However, the reporter's identity may be disclosed to ensure that a thorough investigation is conducted. The identity may be disclosed to parties on a need-to-know basis, including as required by law.

[para 146] Clearly this policy does not overrule the application of section 17(1) of the FOIP Act and public bodies cannot point to a promise of confidentiality as the reason not to disclose information in response to an access request (such rationale would be circular insofar as a public body could conceivably promise confidentiality in order to evade disclosing information in response to a FOIP request). However, a common aspect of whistleblower programs is the

confidentiality of reporters/complainants. By way of analogy, Alberta's *Public Interest Disclosure (Whistleblower Protection) Act*, SA 2012, c. P-39.5, requires the chief officer of a public body to create procedures for protecting the identity of individuals involved in a whistleblower investigation (including the complainant and alleged wrongdoer), and respecting the confidentiality of information collected during an investigation (section 5(2)).

[para 147] Accordingly, I find that the integrity of the whistleblower program, of which confidentiality is an important part, is an appropriate, rebuttable factor to consider under section 17(5). That said, it is not a factor that weighs heavily against disclosure.

#### *Weighing factors under section 17*

[para 148] Section 17(5)(a) is a factor that weighs in favour of disclosing third party personal information in this case. There is a systemic nature to the matters described in the Report that indicates the desirability for public scrutiny, even though there is no indication that the Public Body's response (the investigation) requires scrutiny.

[para 149] In this case, while I find that section 17(5)(a) does apply, it does not outweigh the factors against disclosure in this particular case. Having reviewed the records carefully, I agree with the Public Body that disclosing the personal information of the alleged wrongdoers would also disclose the personal information of the individual staff members involved in the investigation as complainants and witnesses.

[para 150] In my view, the factors against disclosure of the personal information of these staff members outweigh the factors in favour of disclosure. Section 17(4)(g) applies to the Affected parties and section 17(4)(d) applies to all the third party personal information; these provisions create a presumption that disclosure would be an unreasonable invasion of privacy. Section 17(5)(f) also weighs against disclosure of all of the personal information, as it was all provided in confidence. Section 17(5)(e) and (h) apply to the personal information of the staff members, as well as to the Affected Party against whom the allegations were unsubstantiated.

[para 151] In this case, it is most clear that the disclosure of the personal information of the Council staff members would be an unreasonable invasion of their privacy. While there is some desirability for public scrutiny, that factor does not have sufficient weight to outweigh the staff members' expectation of confidentiality – especially in the context of a whistleblower investigation. It also does not outweigh the harm to their reputations that could result from disclosing how they participated in the investigation.

[para 152] The balance is somewhat less certain in the case of the individuals being investigated. However, because the staff members could reasonably be identified if the personal information of the alleged wrongdoers were disclosed, I find that section 17(1) also requires that the personal information of the alleged wrongdoers must also be withheld. This means that all personal information of identifiable individuals in the records must be withheld under section 17(1).

**Did the Public Body properly apply section 20(1)(d) of the Act (identify a confidential source) to the information in the records?**

[para 153] The Public Body applied section 20(1)(d) to some information in the Report pages of records. This provision states:

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

...

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

...

[para 154] In order for section 20(1)(d) to apply, the Public Body must establish that (i) law enforcement information is involved, (ii) there is a confidential source of law enforcement information, and (iii) the information in question could reasonably be expected to reveal the identity of that confidential source (Order 96-019).

[para 155] A confidential source is someone who supplied law enforcement information to a public body on the implicit or explicit assurance that his or her identity will remain secret (see Order 99-010).

[para 156] It is my view that not all of the information withheld under section 20(1)(d) is information that could reasonably be expected to reveal the identity of the confidential sources. As such section 20(1)(d) cannot apply to that information.

[para 157] I have found that all of the information in the Report that could identify a third party (including any party that provided information as a confidential source) must be withheld under section 17(1). Therefore, only non-identifying information remains at issue. Information that cannot be withheld under section 17(1) (the information listed at para. 104 of this Order) also cannot be withheld under section 20(1)(d) as it is not information about an identifiable individual. Accordingly, I find that section 20(1)(d) does not apply to any information in the records to which section 17(1) was found not to apply.

**V. ORDER**

[para 158] I make this Order under section 72 of the Act.

[para 159] I find that section 27(1)(a) applies to pages 1-22 of the records at issue in their entirety.

[para 160] I find that section 27(1)(a) does not apply to the information on pages 23-32 of the records at issue.

[para 161] I find that section 23(1)(b) does not apply to the information on pages 23-32 of the records at issue.



[para 162] I find that section 24(1) applies to some of the information in pages 23-32 of the records at issue.

[para 163] I find that section 24(1) does not apply to the information withheld under that provision as described at paragraphs 78, 80, 81, 82, and 84 of this Order. I order the Public Body to disclose further information to the Applicant as described in those paragraphs.

[para 164] I find that section 17(1) requires the Public Body to withhold the third party personal information in pages 23-32 of the records at issue.

[para 165] I find that section 20(1)(d) applies to the same information that was properly withheld under section 17(1). I find that section 20(1)(d) does not apply to the remaining information to which it was applied.

[para 166] I find that none of the exceptions applied by the Public Body apply to the information listed at paragraph 104 of this Order and order the Public Body to disclose the information as described in that paragraph.

[para 167] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek  
Adjudicator