# ALBERTA

# OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

# ORDER F2019-09

March 21, 2019

# ALBERTA ENERGY REGULATOR

Case File Number 002162

**Office URL:** www.oipc.ab.ca

**Summary:** An individual made an access request to the Alberta Energy Regulator (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for an electronic copy of the complete staff directory for the Public Body, including job titles, phone numbers, email addresses and organization structure.

The Public Body located 61 pages of responsive records, but withheld all information citing sections 17(1) and 29. The Applicant requested a review of the Public Body's response.

In the course of the inquiry, the Public Body decided to apply section 18(1) to the records in their entirety.

The Adjudicator found that section 17(1) did not apply to any information in the records at issue. All of the information related solely to job positions and roles and lacked any personal dimension necessary for section 17(1) to apply.

The Adjudicator found that section 18(1) did not apply to all of the information in the records at issue. However, the fact that several employees had received exemptions to the disclosure of their information under the *Public Sector Compensation Transparency Act* indicated that section 18(1) might apply to the information relating to particular individual employees of the Public Body. The Adjudicator ordered the Public Body to provide notice to its employees, and provide to the Adjudicator the names of employees who object to the disclosure of their names, job titles and contact information on the basis of section 18(1). The Adjudicator retained jurisdiction to

determine the application of section 18(1) to the information relating to those individuals, after hearing from them.

The Adjudicator found that section 29 applied to the information of employees listed on the Public Body's website but not to the direct phone numbers and organization charts relating to those employees in the records at issue, as this information is not available to the public.

The Adjudicator also found that the Public Body must create a searchable electronic version of the records as requested by the Applicant. The Public Body's submissions indicate that it creates an electronic version of responsive records as a usual practice when responding to access requests.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 10, 17, 18, 29, 71, 72, *Health Information Act*, R.S.A. 2000, c.H-5, s.11, *Public Sector Compensation Transparency Act*, S.A. 2015, c. P-40.5, s. 6, **BC**: *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, C. 165, s. 6, **ON**: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 2

**Authorities Cited: AB:** Orders 2001-013, F2004-029, F2003-002, F2008-028, F2009-005, F2010-022, F2011-R-001, F2017-60, F2018-36, F2013-13, F2013-51, H2002-001, **BC**: Order F10-30, **ON**: Orders MO-2130 PO-3016 PO-3055

**Cases Cited**: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII)

## I. BACKGROUND

[para 1] An individual made an access request to the Alberta Energy Regulator (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for an electronic copy of the complete staff directory for the Public Body, including job titles, phone numbers, email addresses and organization structure.

[para 2] The Public Body located 61 pages of responsive records, but withheld all in their entirety under section 17(1). The Public Body also refused to provide access to the staff directory of a program area within the Public Body that is posted on its website, citing section 29.

[para 3] The Applicant requested a review of the response from the Public Body. The Commissioner authorized an investigation; this was not successful and the matter proceeded to an inquiry.

[para 4] In the course of the inquiry, the Public Body decided to apply section 18(1) to the records in their entirety.

## II. RECORDS AT ISSUE

[para 5] The records at issue consist the 61 pages of responsive records, in their entirety. The Public Body did not create a record from the staff directory posted on its website; however, the Public Body's application of section 29 to that information is at issue.

## III. ISSUES

[para 6] The issues as set out in the Notice of Inquiry, dated March 21, 2018, are as follows:

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

2. Did the Public Body properly apply section 29 of the Act (information that is or will be available to the public) to the information in the records?

3. If sections 17(1) and 29 do not apply to the information in the records, does section 10(2) require the Public Body to create a searchable electronic record of the information?

[para 7] In the course of the inquiry, the Public Body decided to apply section 18(1) to the information in the responsive records. Therefore I will consider the Public Body's application of that provision as well.

## IV. DISCUSSION OF ISSUES

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

[para 8] The Public Body withheld phone numbers assigned to Public Body employees in the staff directory under section 17(1).

[para 9] 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.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> > *...*
> >
> > *(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council,*
>
> *...*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*

*...*

*(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*

*...*

[para 10] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 11] Once a public body has established that the information consist of personal information, under section 71(2) it is up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 12] The first question is whether the phone numbers withheld by the Public Body consists of personal information.

[para 13] 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 14] Names of third parties are personal information under the FOIP Act. However, the disclosure of the names, contact information and job titles of individuals acting in their professional capacities is not information to which section 17(1) applies unless that information has a personal dimension in the circumstances (see Orders 2001-013 at para. 89, F2003-002 at para. 62, F2008-028 at paras. 53-54, F2017-28 at para. 27).

[para 15] The Public Body cites paragraph 122 of Order F2010-022, which states:

> Where personal information of third parties exists as a consequence of their activities as staff performing their duties, or as a function of their employment, this is a relevant circumstance weighing in favour of disclosure under section 17(5) (Order F2003-005 at para. 96; Order F2004-015 at para. 96). Information about the performance of work responsibilities by an individual is not, generally speaking, personal information about that individual, as there is no personal dimension (Order F2004-026 at 108; Order F2006-030 at para. 10). Absent a personal aspect, there is no reason to treat the records of the acts of individuals conducting the business of public bodies as "about them" (Order F2006-030 at para. 12). Further, where a name (which constitutes personal information) appears only with the fact that an individual was discharging a work-related responsibility (which is not personal information), the presumption against disclosure under section 17(4)(g) (name appearing with or revealing other personal information) does not apply (Order F2004-026 at para. 117).

[para 16] The Public Body argues that this passage "seems to indicate that the release of business card information in relation to a particular individual is justified where the focus of the access request is something done by that individual in the course of his or her job responsibilities or employment with a public body" (initial submission, at page 5). It further argued (at page 6):

> … access to a public body employee's business card information should be related to circumstances in which the employee was involved as a decision-maker or otherwise executed a function of his or her employment. None of that is present in this case. The applicant simply wants the entire list of AER employees, their roles, and their contact information. The request is not associated with a decision, action or function of any particular employee or employees, or even of the AER in general.

[para 17] Past orders of this Office discuss the application of section 17(1) to employee information in the context of the employee having made a decision or performed a function because that is often what the access request relates to. Few orders relate to a request for only business contact information, possibly because this is often already publicly available. However, nothing in the past orders of this Office limit the analysis of whether section 17(1) applies to employee information to situations in which the information shows the employees performing an activity. In this case, the employee names, job titles and contact information are listed in a staff directory because – and only because – they are employees of the Public Body (or were at the relevant time). That there is no additional information providing context does not make the list of names, job titles and contact information *more* personal; if anything, the absence of additional information indicates a lower likelihood of a personal dimension.

[para 18] In its submissions, the Public Body referred to the direct phone numbers as "personal phone numbers". By letter dated September 25, 2018, I asked the Public Body to confirm whether these phone numbers are *direct* phone numbers that employees have by virtue of their employment with the Public Body. The Public Body responded (October 15, 2018 submission, at page 2):

> Yes, these numbers are assigned by the AER to AER employees for work purposes and are therefore direct phone numbers of named AER staff by virtue of their employment with the AER.

[para 19] The Public Body further argues that since it has changed its phone system to Skype for Business, the phone numbers have a personal dimension. Specifically, it states (at page 7):

> - Since the AER's initial submission, AER desk phones have been migrated to **Skype for Business (VOIP)** technology. This functionality transforms traditional AER desk phones by making them mobile; simply put, employees no longer have a traditional desk phone. AER employees also have the ability to install (and are likely to install), the Skype for business application on both their personal and work devices (Android, IOS and Windows).
>
> - This allows employees to **make and receive phone calls, instant message and video** via their **personal** and **work phones** anywhere and anytime.
>
> …
>
> - Skype introduces a personal dimension to AER communication. Therefore, the AER argues the same point as in OIPC Order F2013-13 para 117. In that Order, the OIPC agreed that cell phone numbers have a personal dimension.

[para 20] The Public Body cites Order F2013-13, in which the adjudicator found that the work cell phone number of a police officer has a personal dimension because of the likelihood that officer carried and used the cell phone outside work.

[para 21] With respect to the first bullet point above, whether employees install Skype for Business on their personal phones does not render a work phone number 'personal'. The phone numbers listed in the records at issue are the numbers assigned by the Public Body for work purposes; they are not the personal phone numbers of the employee. This is true even if a Skype application permits a call to the work number to be answered from a personal phone that has a different phone number. This is akin to 'forwarding' calls from one phone number to another, which is not new technology and can be done from a landline. In other words, the fact that an employee could answer a work call from a personal phone via 'old-fashioned' call-forwarding or newer technology such as VOIP applications, does not change the phone number from work contact information to personal contact information. The direct phone numbers in the records at issue are still the phone numbers assigned to the employees by the Public Body for work purposes.

[para 22] Regarding Order F2013-13, subsequent Orders have rejected this idea that a work cell phone number has a personal dimension for the sole reason that it can be carried and/or used for personal purposes.

[para 23] In Order F2018-36 (currently under judicial review), the adjudicator found that a cell phone number is personal information if it is about an individual acting in a personal capacity. She cited Ontario Order PO-3016 wherein work cell phone numbers of police officers were found not to be personal information because they are associated with an individual in a professional, official or business capacity.

[para 24] Ontario's *Freedom of Information and Protection of Privacy Act* excludes business contact information from the definition of personal information (section 2). In Ontario Order PO-

3055 considered whether work cell phone numbers are personal information. The adjudicator noted that unlike business phone numbers or home phone numbers, "cell phone numbers can be ambiguous as to whether they represent the individual in their personal or professional capacity. In some circumstances, an individual can use a cell phone number in both contexts" (at para 243). She concluded (at para. 244):

> In my view, where a cell phone number appears in a business context, together with an individual's professional information, inviting one to contact the individual in a professional capacity as they do in the current appeal, it cannot be said to qualify as personal information within the meaning of that definition in section 2(1) of the *Act*. Rather, the cell phone number, as they appear in the records at issue, are more accurately described as professional or business information as contemplated by section 2(3) of the *Act*.

[para 25] The Public Body has also argued that the Skype system allows employees to make contact via instant messaging and video, which adds a personal dimension to the phone number. I do not see how the ability to message or text a work-issued cell phone number adds a personal dimension *to the phone number*. If the phone kept a recording of the employee's video calls, there may be recorded personal information of the employee (even if the video call were work-related). In that case, the personal information would be the video, not the phone number. The fact that a phone has video capabilities does not add a personal dimension to the assigned phone number. Further, how an employee uses a cell phone may have a personal dimension, but the work-assigned phone number alone does not.

[para 26] Employer-issued cell phone numbers (or landline numbers, for that matter) could reveal personal information about an employee if that number was associated with other personal information of the employee. For example, phone logs that reveal personal calls made by the employee to a medical specialist may constitute personal information. However, it is not the number that is personal information; the personal information is the fact that the individual contacted that medical specialist. In some circumstances, the employer-issued phone number might not be severable from the personal information, in which case it could reveal personal information as well.

[para 27] In this case, as the Public Body has pointed out, there is no such context that could add a personal dimension to the phone numbers. The phone numbers appear in a directory and provide no additional information about the employees to whom they are assigned.

[para 28] The phone numbers in the staff directory, whether assigned to landlines or cell phones, are assigned to the Public Body employees for the purpose of being contacted for their work. Nothing in the Public Body's submissions satisfies me that these numbers have a personal dimension such that section 17(1) could apply. Regarding cell phone numbers, I prefer the analysis from Order F2018-36 and the Ontario orders: the fact that an employee may use an employer-issued cell phone to make a personal call, or that the employee may carry the cell phone with them, does not alter the character of the work-issued cell phone *number* such that it has a personal dimension. Employees may also use landlines to make personal calls, or employer-issued email addresses to send personal emails; the occasional personal use of a work-issued phone or email address does not make the phone number (or email address) the personal information of the employee.

[para 29] The Public Body has also argued, with respect to its application of section 17(1), that the Public Body has experienced difficulty with employees not adhering to its rules regarding the dissemination of information. Specifically, the Public Body states that its Code of Conduct instructs employees to "refrain from providing non-confidential information and data to third parties if such information in available through Information Services and/or through an access request under the *Freedom of Information and Protection of Privacy Act*" (initial submission at page 6). The Public Body is concerned that if it discloses the direct phone numbers of employees, "it is likely that the AER would lose much ground in its efforts to ensure that dissemination occurs through proper channels."

[para 30] I understand this as a general argument for why the Public Body does not publish the direct phone numbers of its employees. However, concerns about how employees disseminate information via phone do not render the phone number personal. This concern seems to relate to a human resources or employee conduct matter, rather than a FOIP matter.

[para 31] The Public Body has argued that some of its employees have been subjected to harassing or threatening phone calls. It has also argued that it has four staff members who received exemptions under the *Public Sector Compensation Transparency Act*, such that their names and compensation are not disclosed. The fact that employees may have received harassing phone calls, or have valid safety concerns regarding disclosure of their names and workplace does not change the character of business contact information such that it has a personal dimension. In other words, an employer-issued phone number does not become the personal information of the employee to whom it was issued, for the reason that callers have misused the phone number. Other provisions of the Act address such circumstances; specifically section 18(1). For example, in Order F2017-60, I found that the names and contact information of employees of the Civil Forfeiture Office were properly withheld under section 18(1), due to a risk of threats to health and safety of the employees. I will therefore consider the Public Body's arguments regarding threatening or harassing phone calls under issue #2 (the application of section 18(1)).

[para 32] I find that the names, job titles and contact information in the records at issue is not personal information to which section 17(1) can apply.

**2. Did the Public Body properly apply section 18 of the Act (disclosure harmful to individual or public safety) to the information in the records?**

[para 33] The Public Body applied section 18(1)(a) to the phone numbers withheld in the responsive records. This provision states:

> *18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to*
>
> *(a) threaten anyone else's safety or mental or physical health*
>
> ...

[para 34] In its initial submission, the Public Body stated in its arguments under section 17(1):

> AER staff members have been, and are being subjected to abusive or harassing telephone calls from members of the public. In a few of these cases the AER has implemented communication protocols, whereby the offending individuals are instructed to direct all their AER communications through a single point of contact.
> …
> The AER is concerned that if the AER's directory of personal telephone numbers is provided to the access applicant, that information may be widely disseminated and as a result greatly increase the exposure of AER staff members to these kinds of calls.
>
> Related to the foregoing is the fact that some AER employees would have concerns about the release of their business contact information that fall within section 18 of the Act, "disclosure harmful to individual or public safety." For example, the AER currently has four staff members who have received an exemption from public disclosure under s. 6 of the Public Sector Compensation Transparency Act, S.A. 2015, c. P-40.5

[para 35] The Public Body cited section 6 of the *Public Sector Compensation Transparency Act* (PSCTA), which states:

> *6(1) The Lieutenant Governor in Council may, by regulation, exempt from the application of part or all of this Act part or all of a public sector body or a health entity referred to in section 5(3) to which this Act would otherwise apply.*
>
> *(2) The Minister may, in writing,*
>
> > *(a) on application by an employee of the Government of Alberta, exempt the Government of Alberta from any part or all of the requirement to disclose under this Act in respect of the employee if in the opinion of the Minister that disclosure could unduly threaten the safety of the employee;*

[para 36] By letter dated September 25, 2018, I noted that the Public Body had not actually applied section 18 to any information in the records at issue. I asked the Public Body whether it was applying that provision, and if so, to provide me with further arguments.

[para 37] I also asked whether the employees who had received an exemption under the PSCTA were listed in the records at issue. If they were, I asked the Public Body to tell me the rationale for their receiving the exemption and how this rationale relates to their direct phone numbers in the context of the FOIP Act.

[para 38] The Public Body responded on October 15, 2018, confirming that it was applying section 18(1) to the information in the records at issue, and that the four exempt employees are listed in the records. The Public Body further states that applications for exemptions under the PSCTA are not provided to the Public Body; it states that the exemption application is given to 'the Deputy Minister', who makes the decision. Possibly the Public Body is referring to a deputy minister of Justice and Solicitor General, which is the public body responsible for administering that Act. It further states (at page 5):

> The AER submits that disclosure of any combination of names, emails or phone numbers of the four AER employees that have been granted exemptions could be harmful to these individuals as per section 18 of the *FOIP Act* and is unreasonable as per section section 17(5). Given that the four individuals actually qualified for exemption status for reasons only of personal safety, it could be reasonably expected that disclosure of any of their personal information into the public domain could jeopardize their safety.

[para 39] By letter dated January 16, 2019, I informed the Public Body that this was not a sufficient answer. I said:

> I understand the Public Body's point that "exemptions given [under the *Public Sector Compensation Transparency Act*] by the Deputy Minister are confirmation that another decision maker has been convinced that there is a specific and credible threat to the safety of the applicant" (at page 3).
>
> However, that is not a full answer regarding the application of section 18(1). I am tasked with making an independent decision regarding the Public Body's application of section 18 of the FOIP Act to information in the records at issue. I cannot simply defer to a decision made by another decision maker in another context, under another Act. This is especially so when I do not know what test was applied by the Deputy Minister, what factors were presented and/or considered.
>
> Section 71(1) of the FOIP Act places the burden of proof on the Public Body to show that it applied section 18(1) section appropriately. Stating that another decision maker has found a similar test was met in a different context under a different statute is not sufficient.
>
> Section 18 permits a public body to withhold information that could reasonably be expected to threaten the health or safety of an individual. In other words, disclosure of information to which this section applies could have serious consequences for an individual. At this time, I have concerns about the adequacy of the arguments and evidence provided by the Public Body in support of this provision. I am providing the Public Body with a further opportunity to satisfy me that this provision was properly applied, with respect to the individuals who were exempted under the *Public Sector Compensation Transparency Act*, as well as any other information to which section 18(1) was applied.
>
> The Public Body may consider reviewing past Orders of this Office concerning the application of section 18(1). For example, Orders H2002-001, F2004-029, F2009-029 (upheld in *Mount Royal University v. Carter*, 2011 ABQB 28), F2013-51, F2017-60 and BC Order F14-22 address the applicable test for section 18 (or equivalent provisions in the *Health Information Act* and BC FOIP Act). The latter two Orders specifically consider the application of this exception to employee names and contact information. It would be helpful to have arguments regarding whether any of these cases are applicable or should be distinguished.

[para 40] The Public Body responded on February 4, 2019, stating (at page 5, footnotes omitted):

> Further, the AER submits that a public body is not required to prove that it is probable that an employee will be harmed by the release of the information, or to provide evidence of a threat to a named individual before it can refuse to disclose that individual's information. What the legislation requires is that the AER produce sufficient evidence that the likelihood is

> "considerably above a mere possibility" that an individual's safety will be threatened by the disclosure. The AER submits that the scope of the request itself provides that likelihood; with approximately 1,200 employees, the statistical likelihood that one or more is in a situation where their safety could be compromised by the release of their personal information in this manner is considerably above a mere possibility. In Alberta, "[i]n 2009 there were 45,837 women who indicated they had experienced one or more incidents of physical or sexual violence in the past five years by the hands of their ex-spouse or ex-partner. This means that in every hour of every day, a woman in Alberta is abused by her ex-partner or ex-spouse." Between 2000 and 2010, there were 121 deaths of intimate partner victims in Alberta. For individuals who have escaped abusive situations, the release of their work contact information could threaten their safety. One of the components of the safety plan recommended by the Calgary Women's Shelter is: "Keep your identity hidden. Remove your name and other personal information from as many listings as possible such as apartment building, listings on websites and social media like Facebook, etc." The AER has no way of knowing how many of its employees are in a situation where they could be threatened by the exposure of their identity. For the purpose of this request, the AER further submits that it would be unreasonable to inquire and gather this sensitive personal information from staff.

[para 41] In Order H2002-001, former Commissioner Work considered what must be established in order for section 11(1)(a)(ii) of the *Health Information Act*, which is similar to section 18 of the FOIP Act, to be applicable. He reviewed previous Orders of this Office addressing what is necessary to establish a reasonable expectation of harm under section 18 of the FOIP Act and adopted the following approach:

> In Order 2001-010, the Commissioner said there must be evidence of a direct and specific threat to a person, and a specific harm flowing from the disclosure of information or the record. In Order 96-004, the Commissioner said detailed evidence must be provided to show the threat and disclosure of the information are connected and there is a probability that the threat will occur if the information is disclosed.

[para 42] This analysis has been followed with respect to section 18(1)(a) of the FOIP Act. In Order F2013-51, the Director of Adjudication reviewed past orders of this office regarding the application of section 18. She summed up those orders as follows (at paras 20-21):

> These cases establish that section 18 of the FOIP Act applies to harm that would result from disclosure of information in the records at issue, but not to harm that would result from factors unrelated to disclosure of information in the records at issue. Further, a public body applying section 18 of the FOIP Act must provide evidence to support its position that harm may reasonably be expected to result from the disclosure of information (as must a custodian applying section 11(1)(a) of the HIA).
>
> Following the approach adopted by the former Commissioner in Order 96-004, and in subsequent cases considering either section 18 of the FOIP Act or section 11 of the HIA, the onus is on the Public Body to provide evidence regarding a threat or harm to the mental or physical health or safety of individuals, to establish that disclosure of the information and the threat are connected, and to prove that there is a reasonable expectation that the threat or harm will take place if the information is disclosed.

[para 43] In Order F2004-029, the adjudicator also stated that "being difficult, challenging, or troublesome, having intense feelings about injustice, being persistent, and to some extent, using offensive language, do not necessarily bring section 18 into play" (at para. 23).

[para 44] I agree with the above analyses. Further, the Supreme Court of Canada has clearly enunciated the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 18(1)(a)). In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Court stated:

> Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; *Merck Frosst*, at para. 195:
>
> > I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(c) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes. [Emphasis added.]
>
> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[para 45] The Supreme Court of Canada has made it clear that there is one evidentiary standard to be used wherever the phrase "could reasonably be expected to" appears in access-to-information legislation. There must be a reasonable expectation of probable harm, and the Public Body must provide sufficient evidence to show that the likelihood of any of the above scenarios is "considerably above" a mere possibility.

[para 46] In Order F2017-60, I accepted that the names and contact information of Civil Forfeiture Office (CFO) employees in Justice and Solicitor General could be withheld under section 18(1). The CFO restrains and forfeits property found to be obtained by crime or used to commit a crime.

[para 47] The evidence I considered persuasive in that case, as discussed in the order, included the fact that steps were taken to ensure that these employees do not deal directly with individuals whose property is seized; even contact with services providers is done with a general email address and not an address that identifies the individual employee.

[para 48] In that case, I also accepted that CFO employees deal with individuals accused of, or convicted of, serious offences under the *Criminal Code* or *Controlled Drugs and Substances Act*. I found that this "makes the likelihood of a threat to safety or health higher than it would be in relation to other public body employees that may deal with a very small percentage of such individuals" (at para. 45). I also noted that property confiscated by the CFO may not have been merely the proceeds of crime but also the means by which crimes were committed; this is an additional motive for those individuals to attempt to regain the property by harassing or threatening CFO employees who know the location of the property.

[para 49] I also stated in that order that the finding was fact-specific. I said (at para. 50):

> This finding should be kept to the particular facts of this case. It is not unusual for public body employees to have to deal with difficult, or even violent members of the public, in the normal course of their duties. I do not mean to suggest that the names of those employees also ought to be withheld from the public.

[para 50] In this case, the Public Body has told me that it has had to implement a communications protocol with respect to five individuals who subjected Public Body employees to abusive or harassing phone calls. These individuals are instructed to communicate with the Public Body through a single point of contact. The Public Body provided me with a copy of a letter written to one of these individuals, which details the restrictions placed on the individual in communicating with Public Body employees.

[para 51] As noted in Orders F2004-029 and F2017-60, it is not unusual for public body employees to deal with difficult, aggressive, harassing, abusive, or even violent individuals. The Public Body has a communications protocol to address these individuals, such that Public Body employees are not required to handle those calls, outside the single point of contact. Absent additional evidence of a specific threat or harm, the fact that some individuals are abusive on the phone is not sufficient to meet the standard required by section 18(1).

[para 52] The Public Body has also argued that spousal abuse is sufficiently common that it is reasonable to expect that one or more employees is in a situation such that the disclosure of their name, job title and contact information could compromise their safety.

[para 53] The next section of this Order (issue #3) discusses the public availability of the employee names, job titles and email addresses of the employees in a particular program area of the Public Body. The Public Body has not addressed why the concerns it has raised under section 18(1) did not prevent it from publishing this information on its website.

[para 54] With respect to the argument regarding spousal abuse, I find it too speculative to meet the standard of reasonable expectation of probable harm required for section 18(1) to apply to the records in their entirety. Pointing to a statistical likelihood that one or more employees of

the Public Body have experienced domestic violence at some point in their lives does not bring the likelihood of harm from disclosing the whole staff directory or organizational structure above a "mere possibility." The alleged harm – threat to the safety or health of an individual – must be reasonably expected to occur as a result of the disclosure of the particular information at issue. For example, disclosing a particular employee's name, job title and contact information might meet the threshold for section 18(1) where that employee has taken steps to avoid being located for fear of threats to health and safety. In that case, removing that employee's information from the staff directory and organizational structure before disclosing the records would appear to remove that risk of harm.

[para 55] I find that the Public Body has not met its burden to show that section 18(1) applies to the records at issue in their entirety. However, the fact that four individuals have received an exemption under the PSCTA strongly indicates that section 18(1) could apply to the specific information relating to those individuals. While the Public Body has failed to meet its burden of proof with respect to the records in their entirety, it has provided sufficient information for me to conclude that section 18(1) might apply to particular information relating to some individuals. Serious consequences could result from disclosing information to which section 18(1) would apply. As such, I am left in a situation in which the usual remedy for a public body's failure to meet its burden of proof – ordering disclosure of the records at issue – could result in harm to some individuals.

[para 56] I will therefore order disclosure of the records subject to objections received by Public Body employees on the grounds that disclosure could reasonably be expected to threaten their (or another's) safety or mental or physical health within the terms of section 18(1). This will require the Public Body to provide notice to its employees.

[para 57] The Public Body has indicated that information regarding spousal abuse is too sensitive for the Public Body to ask its staff about. However, the Public Body needn't inquire about that specific topic. There may be other reasons for the application of section 18(1) to an individual's name, title and contact information. In this case, I will direct the Public Body to inform its staff that it has been ordered to disclose their names, job titles, contact information and the organizational structures in the records at issue to an applicant, subject to individual objections on the grounds that disclosure could reasonably be expected to threaten their (or another's) safety or mental or physical health under section 18(1).

[para 58] I require the Public Body to inform the individual employees of the standard the Public Body will have to meet for section 18(1) to apply to their information. The Public Body can then inform me of the names of employees objecting to the disclosure of their names, job titles, and business contact information. The Public Body will be required to inform the Applicant only of the number of individuals who have objected on the grounds of section 18(1). I will then determine how best to obtain submissions from these individuals in order to determine if section 18(1) applies in each case.

[para 59] After employees have been notified and given an opportunity to respond and/or object, the Public Body will be required to disclose the information in the records at issue

relating to individuals who have not objected to the disclosure on the grounds that disclosure could reasonably be expected to threaten their (or another's) safety or mental or physical health.

**3. Did the Public Body properly apply section 29 of the Act (information that is or will be available to the public) to the information in the records?**

[para 60] The Public Body's submissions did not address its application of section 29. Its index of records did not reference any records being withheld under this provision; nor did the records themselves.

[para 61] By letter dated January 16, 2019, I asked the Public Body to clarify whether it continued to apply section 29. Its response, dated February 4, 2019, states that it applied section 29 to its Alberta Geological Survey personnel, as their contact information is publicly available on their website. It provided me with an updated link to that website. The Public Body further stated (at page 3):

> The AER did not compile records related to AGS personnel as that information is publicly available and therefore, did not consider that information as part of the responsive records that are now the subject of this Inquiry and previous Review.

[para 62] I understand that the information available on the Public Body website was not compiled for this inquiry and is therefore not part of the records at issue. Section 29 was listed as an issue in the Notice of Inquiry; as the Public Body's application of section 29 does not appear to have been otherwise resolved, it remains an issue for this inquiry.

[para 63] Section 29 states:

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

[para 64] The Public Body's February 2019 response provided sufficient information for me to make a finding. I reviewed the website using the link provided by the Public Body; it contains the names, job titles, and email addresses of the Alberta Geological Survey staff. The main phone number and fax number of that office are also listed. The direct lines of the staff are not included on the website; however, those lines are included in the staff directory in the records at issue.

[para 65] I find that section 29 applies to the information located on the website for the Alberta Geological Survey staff.

[para 66] Section 29 does not apply to the direct phone lines for the Alberta Geological Survey staff or the organizational charts in the records at issue, as this information does not appear on the website (i.e. it is not publicly available).

**4. If sections 17(1) and 29 do not apply to the information in the records, does section 10(2) require the Public Body to create a searchable electronic record of the information?**

[para 67] Section 10(2) states the following:

> *10(2) The head of a public body must create a record for an applicant if*
>
> *(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and*
>
> *(b) creating the record would not unreasonably interfere with the operations of the public body.*

[para 68] Section 10(2) requires a public body to create a record if that record can be created from another record that is in electronic form using the public body's normal computer hardware and software, and its expertise. This requirement is subject to the limit in section 10(2)(b) (unreasonable interference with public body operations). The duties imposed by section 10(2) have been described as "electronically manipulating existing data to create a record consisting of only the data the applicant wants or that is organized in a manner the applicant wants" (see Order F2011-R-001, reconsideration of Order F2009-005, at para. 19).

[para 69] In Order F2011-R-001, the adjudicator provided a thorough analysis of the manner in which section 10(2) operates. She stated (at para. 19):

> The phrase, "created from a record that is in electronic form" as it appears in section 10(2), could, in the abstract, refer to any of the following actions:
>
> - Making a copy (reproducing) in the same medium (e.g. electronic to electronic) to give to the applicant
> - Making a copy in a different medium (converting) - (e.g. electronic to paper) to give to the applicant
> - Converting records into a different electronic format (but with the same content and organization) (e.g. decompressing or unencrypting) in order to locate or obtain particular records or to see if they exist. (The applicant may ultimately be given all such records, only a part, or none, if no responsive records exist among the converted ones.)
> - Electronically manipulating existing data to create a record consisting of only the data the applicant wants or that is organized in a manner the applicant wants.
>
> Thus, in the abstract, section 10(2) could be taken to limit the duty to produce copies for an applicant, as well as the duty to search for responsive records, if fulfilling either of these duties could not be done within the terms of section 10(2)(a). In my view, as

> explained below, the better interpretation of the legislative scheme in the FOIP Act is that section 13, (but not section 10(2)), speaks to the first two bullets, section 10(1), (but not section 10(2)), speaks to the third, and section 10(2) speaks only to the last bullet.

[para 70] A similar provision to section 10(2) exists in the BC *Freedom of Information and Protection of Privacy Act* (section 6(2) of that Act). With respect to the application of that provision to an access request made to a government department asking for a record that correlates data from a Public Accounts database with other information not in that database, an order from the BC Office of the Information and Privacy Commissioner states

> … s. 6(2)(a) does not obligate the Ministry to undertake five days or one day of manual adjustments to create the record. Section 6(2)(a) requires the Ministry to create a record when it can do so using its normal computer software, hardware and technical expertise. There may be occasions when some element of manual processing is incidental to a public body's obligations under s. 6(2)(a). However, this is not one of them. This finding is consistent with Order F10-16 and other previous orders.

(Order F10-30, at para. 18)

[para 71] Similar decisions have been made with respect to Ontario's legislation as well (see Order MO-2130).

[para 72] In my view, the above-cited orders come to a very similar conclusion. Where a public body can create a record from information currently existing in electronic form by essentially manipulating the data, it has an obligation to do so in response to an access request, as long as it can be done using the public body's normal hardware, software and technical expertise and where creating the record would not unreasonably interfere with the public body's operations. Some incidental manual input may be required in order to do this, but such incidental input does not necessarily negate the duty.

[para 73] In this access request, the Applicant requested the records in "electronic searchable format (similar to that which the Alberta Government provides on their public website)." The Applicant rephrased this aspect of his request in his initial submission as a request for the records in "machine readable" format.

[para 74] The Public Body only briefly referred to this issue in its submission. It states (initial submission at page 4):

> The AER requests that the order to be issued in this Inquiry confirm that the AER is not required to provide the applicant access to the responsive information in the electronic format requested by the applicant, unless the AER already has the responsive information in that format or can readily prepare the information in that format (as stated in previous OIPC orders).

[para 75] The Public Body did not provide me with past Orders of this Office that support its position. By letter dated January 14, 2019, I asked the Public Body:

> If the Public Body means to argue that it cannot create the electronic record as requested by the Applicant, it must explain why, within the terms of the test set out for section 10(2). If the Public

> Body believes that past Orders of this Office support its position, please indicate which Orders and where the supporting reasons can be found.

[para 76] The Public Body responded on February 4, 2019, stating (at page 4):

> The AER's standard practice is to use Adobe Acrobat to process and disclose FOIP records in "electronic" pdf format; however, this may or may not meet the formatting requirements requested by the applicant, i.e. "similar to that which the Alberta Government provides on their public website". If the AER is required to release the records at issue, the AER will require further specifics of the requested format in order to assess whether a record in that format can be created using the AER's normal computer hardware and software and technical expertise without unreasonably interfering with AER operations.

[para 77] The Applicant initially requested records in an electronic searchable format; he restated this as "machine readable format" in his initial submission. Given the Public Body's statement that it processes records in pdf format, it seems quite likely that the Public Body can create the record as requested by the Applicant. Indeed, if the Public Body usually provides records in pdf format in response to an access request, then the Public Body's usual practice seems to satisfy the Applicant's request.

[para 78] That said, the Applicant's request for searchable and machine readable records means that the pdf must be in text-recognized format. A pdf image file can be converted to text-recognized format via the Adobe Acrobat program. As the Public Body has stated that it regularly uses this program, this is within its normal hardware, software and technical expertise.

[para 79] As I have found that the Public Body cannot withhold the responsive records in their entirety, I will order the Public Body to provide responsive records to the Applicant. I find that section 10(2) requires the Public Body to provide the Applicant with the records in searchable, machine readable format, as requested by the Applicant.

## V. ORDER

[para 80] I make this Order under section 72 of the Act.

[para 81] I find that section 17(1) does not apply to the records at issue.

[para 82] I find that section 18(1)(a) does not apply to all of the information in the records at issue. I order the Public Body to inform its staff, as described at paragraphs 56-58 of this Order. I order the Public Body to inform me of the names of employees objecting to the disclosure of their names, job titles, and business contact information. I further Order the Public Body to inform the Applicant only of the number of individuals who have objected on the grounds of section 18(1).

[para 83] I retain jurisdiction to decide the application of section 18(1) to the information relating to individuals who have objected to the disclosure of their names, job titles, and business contact information in the records at issue.

[para 84] I order the Public Body to disclose the information in the records at issue relating to employees who have not objected to the disclosure on the grounds that disclosure could reasonably be expected to threaten their (or another's) safety or mental or physical health.

[para 85] I find that section 29 applies to the information located on the Public Body website regarding the Alberta Geological Survey staff. It does not apply to the direct phone lines for the Alberta Geological Survey staff or the organizational charts in the records at issue, as this information does not appear on the website.

[para 86] I find that the Public Body has a duty to create an electronic searchable version of the records at issue that it is required to disclose to the Applicant, as discussed at paragraphs 77-78.

[para 87] 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