ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2020-25

August 31, 2020

CALGARY BOARD OF EDUCATION

Case File Number 001007

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Summary: An individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), dated March 5, 2015, to the Calgary Board of Education (the Public Body). The Applicant is employed by the Public Body. The request was for records relating to him and the Public Body, including communications between the Public Body and outside or third parties.

The Public Body responded to the request, providing the Applicant with the records it located, with some information severed under sections 17, 24, and 25 of the Act.

The Applicant requested review by the Commissioner of the exceptions applied by the Public Body, as well as the adequacy of the Public Body's search, as he believed several records were missing. The Applicant subsequently requested an inquiry.

The Adjudicator determined that the search conducted by the Public Body was sufficient to meet the Public Body's obligations under section 10.

The Adjudicator found that the Public Body properly applied section 17(1) to withhold names of third parties who had been involved in separate proceedings with the Public Body, as well as the names of students.

The Adjudicator found that the Public Body properly applied section 24(1) to a request for advice about how to proceed on a matter dealing with the Public Body's work with another body.

The Adjudicator found that the Public Body properly applied section 25(1) to budgetary codes that could be used to charge purchases or issue accounts to the Public Body.

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

Authorities Cited: AB Decision F2014-D-01, Orders 96-006, 96-012, 97-006 99-013, F2004-026, F2007-013, F2007-021, F2007-029, F2008-028, F2010-036, F2013-13

Cases Cited: *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII)

I. BACKGROUND

[para 1] An individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), dated March 5, 2015, to the Calgary Board of Education (the Public Body). The Applicant is employed by the Public Body. The request was for records relating to him and the Public Body, including communications between the Public Body and outside or third parties, such as the Alberta School Employee Benefit Plan (ASEBP), Alberta Teachers' Association (ATA), and a named external investigator. The Applicant also named 25 individuals who have been directly or indirectly involved with his employment with the Public Body. The timeframe for the request is February 12, 2012 to the date of the request.

[para 2] On April 24, 2015, the Public Body responded and provided the Applicant with the records it located, with some information severed under sections 17, 24, and 25 of the Act. The Applicant requested review by the Commissioner of the exceptions applied by the Public Body, as well as the adequacy of the Public Body's search, as he believed several records were missing. The Applicant subsequently requested an inquiry.

II. RECORDS AT ISSUE

[para 3] The records at issue consist of the portion of the responsive records withheld under sections 17, 24 and 25.

III. ISSUES

[para 4] The issues set out in the Notice of Inquiry dated March 11, 2020, are as follows:

1. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

   In this case, the Adjudicator will consider whether the Public Body conducted an adequate search for responsive records.

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

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

4. Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information in the records?

IV. DISCUSSION OF ISSUES

1. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

The Public Body's duty to respond openly, accurately and completely

[para 5] A public body's obligation to respond to an applicant's access request is set out in section 10, which states in part:

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

[para 6] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the applicant (see Order 97-006, at para. 7).

[para 7] Under this first issue, the Notice of Inquiry specified that the issue is the adequacy of the search conducted by the Public Body. However, both parties also provided thorough submissions regarding whether the Public Body responded openly, accurately and completely.

[para 8] Specifically, the Applicant argues that the Public Body attempted to obstruct his requests for information. He states that he was told to make his request to the Employee Human Resource Center (EHRC), and that his request did not need to be in writing. He states that he later was told to fill out "proper forms" for a FOIP request and the FOIP Act had been applied to records he received.

[para 9] The Applicant states that he contacted this Office and was told that the forms he filled out did not permit this Office to become involved and that he would have to make a new FOIP request. The Applicant did not provide copies of this correspondence.

[para 10] The Applicant states that he was "duped" into a process that he understood to be a FOIP process. He later made an access request under the FOIP Act.

[para 11] With his request for review, the Applicant provided a copy of an email provided to him as part of the responsive records. The email is from a Public Body employee mentioning that the Applicant had come to the premises to ask for his file. The email also states that the Applicant was told that he would have to make an appointment. The email notes that the Applicant was told to ask for his file and that whomever told the Applicant to ask for his file was contacted by the employee and agreed that making an appointment was reasonable. There was no mention in this email of the FOIP Act or a FOIP request.

[para 12] The Applicant also provided copies of his access request he later made under the FOIP Act, as well as the Public Body's responses. He did not provide copies of the forms he filled out before this access request.

[para 13] The Public Body states that the Applicant did initially request his records from EHRC and was told to make an appointment. It states that the Applicant and Public Body could not find a mutually convenient time for the appointment. As such, the Public Body informed the Applicant that the records could be couriered to him if he made his request in writing on the standard form. The Applicant did so, and receive the records.

[para 14] The Public Body also acknowledged that it severed information from the records as some information was about third party individuals. It states that its practice is to inform the requesting individual of the legislation that applies and why the information was redacted. I don't have a copy of these records so I do not know what these redactions looked like or how they referenced legislation.

[para 15] The Public Body further states that redacting information is not intended to remove the request from the routine process for requesting a personal file. The Public Body states that the Applicant did not mention the FOIP Act or his intention to make a FOIP request during this process.

[para 16] Public bodies may have alternate processes for providing access to information; section 3(a) of the Act contemplates this. It states:

> *3 This Act*
>
> > *(a) is in addition to and does not replace existing procedures for access to information or records*

[para 17] As an example, the Workers' Compensation Board routinely provides claimants with copies of their files outside the FOIP Act, though a FOIP request may be made for additional information (see Order F2013-54, at paras. 20-28).

[para 18] Order F2013-20 discusses a situation in which the public body received a FOIP request but preferred to respond to that request via a routine process outside the FOIP process. It responded to the request and also informed the individual making the request that they had the right to seek a review of the response from this Office, pursuant to the FOIP Act. In that case, the adjudicator determined that while the public body clearly intended to respond outside the FOIP Act, it ultimately did not do so.

[para 19] This case is different insofar as I do not have evidence or an agreement between the parties that the Applicant initially made a request for his information under the FOIP Act. The Applicant requested his file, and the Public Body responded pursuant to a routine process outside the Act. The Applicant's request for review supports this account.

[para 20] Based on the information before me, I find that the Public Body did not fail to fulfill its duties under section 10(1) by responding to the Applicant's initial request under a routine disclosure process. In order to request a review of the Public Body's response by this Office, the Applicant had to submit a FOIP request, which he did.

[para 21] The Applicant's FOIP request is dated March 5, 2015. The Public Body responded in writing on March 11, 2015, acknowledging the FOIP request and providing an anticipated date for its response. By letter dated April 2, 2015, the Public Body informed the Applicant that it had extended its time to respond under section 14 of the Act. The Public Body provided responsive records on April 24, 2015. There is no evidence to indicate that once the Applicant made his March 2015 FOIP request that the Public Body failed to respond openly, accurately and completely.

[para 22] The Applicant also argued that it was very difficult for him to determine the process for making a FOIP request to the Public Body, and that he had difficulty finding the name and contact information of the Public Body's FOIP coordinator. The Public Body pointed to its website, which clearly sets out steps to request information under the FOIP Act and the other avenues for requesting information. I can confirm that the Public Body's website is currently very clear on this point although I do not know what it said at the time of the Applicant's request.

[para 23] Section 3 of the FOIP Regulation states that a FOIP request can be made to any office of a public body. Therefore, the Applicant needn't have made his request to the FOIP Coordinator in order for it to have triggered the Public Body's obligations to respond under the Act.

[para 24] I don't doubt that the Applicant had difficulty determining how to make a FOIP request to the Public Body; however, I do not have sufficient information to determine that this difficulty was due to a failure on the part of the Public Body.

[para 25] The next section of this Order will consider the Public Body's obligation to conduct a reasonable search for records under section 10(1).

Adequacy of search

[para 26] In Order F2007-029, the former Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

> In general, evidence as to the adequacy of a search should cover the following points:
>
> - The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> - The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> - The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> - Who did the search
> - Why the Public Body believes no more responsive records exist than what has been found or produced (at para. 66)

[para 27] In the Notice of Inquiry, I instructed the Applicant as follows:

> *In his initial submission, the **Applicant** should specify precisely what records he believes are missing from the Public Body's response, and precisely why he believes they exist. With his Request for Review, the Applicant provided a 10-page explanation; in some instances, the Applicant specifies what records he expects exist but in other instances it is not clear.*
>
> *Therefore, the Applicant should provide a clear and concise list of records he believes ought to exist (and briefly explain why) and/or areas that the Applicant believes should have been searched.*

[para 28] The Applicant did not provide the requested information with his initial submission, which relied only on the materials already provided by the Applicant with his request for review and request for inquiry.

[para 29] As the Public Body requested an extension to provide its initial submission, I informed the Applicant that with this extra time, the Applicant should provide the information I had requested (letter dated April 7, 2020). The Applicant did not respond to this request.

[para 30] By letter dated June 12, 2020, I listed each instance from the Applicant's request for review that identifies records he believes ought to have been located in the

Public Body's search. I asked the Public Body to address each item; it did so in its revised initial submission. As the Applicant did not respond to my request for additional information about missing records, the items listed in his request for review and specified in my June 12, 2020 letter are the items at issue regarding the adequacy of the Public Body's search for records.

[para 31] The Public Body provided an affidavit sworn by its FOIP Coordinator. The affiant states that its usual search process was followed, which included sending a search memo to all Public Body employees who may have responsive records. The affiant describes the search memo as follows (affidavit, Part D of revised initial submission, at para. 7):

> The search memo outlined the Applicant's Request, listed specific steps required to locate and identify responsive records, and provided guidelines around how to locate responsive records and how to conduct a comprehensive search. The search memo also asked individuals to identify any additional individuals or departments they thought may have records that could be responsive to the request.

[para 32] The affiant states that thirteen individual searches were conducted. I reviewed the search memos and forms provided by the Public Body with the affidavit; they appear comprehensive.

[para 33] Records provided to the Applicant by the Public Body refer to photographs taken of the Applicant. The Public Body specifically searched for photos but did not locate them. It noted that these photos were referenced but there is no indication they were ever provided to the Public Body and it couldn't find any indication they were provided to the Public Body.

[para 34] The Public Body states that many records the Applicant believes should exist relate to notations made in Medgate. Medgate is a program used by employees of the EHRC to make notes and track communications. The Public Body states that Medgate "typically includes all email, meeting notes, telephone call notes and other information relevant to the applicable file, in which any EHRC employee involved in the file participated" (revised initial submission, at para. 88). It further clarified (rebuttal submission, at para. 19):

> There is no obligation to record telephone calls or verbal conversations engaged in by individuals involved in a case file, although many have been noted in Medgate. It is common for duplication of records to exist within Medgate due to the number of individuals that may be involved in a case file (and therefore making entries into a case file), and accordingly, in order to reduce the cost and volume of records provided to the Applicant, exact copies of emails were removed, ensuring at least one complete email string was provided from at least one supplier of the records.

[para 35] The Public Body states that records may have been maintained outside Medgate, but all employees identified by the Applicant were asked to conduct a search

for responsive records. With respect to any employee no longer with the Public Body, employees with access to their records were assigned to conduct the search.

[para 36] I understand the Public Body to be saying that Medgate notes might refer to conversations, emails, etc. and that EHRC employees have attached those records they believed to be relevant. Other records not attached (or otherwise found in Medgate) would have been caught in the searches conducted by each relevant employee.

[para 37] I accept the Public Body's explanations. In many cases, the Applicant has pointed to conversations (by phone, email or meetings) that were referenced or recorded in records provided to him, and requested documentation of those conversations etc. I accept that the Public Body searched for all relevant records; I also accept its explanation that employees decide which conversations to record for the file.

[para 38] Given the age of the relevant records, it is not surprising that some notes or emails may no longer exist. The Public Body employees recorded what they needed for their files; other records may have been considered transitory.

[para 39] Even if the Public Body ought to have maintained additional records or not considered some to have been transitory, the Public Body can only retrieve records that continue to exist.

[para 40] I accept that the search conducted by the Public Body for responsive records was adequate, as required under section 10.

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

[para 41] The Public Body has withheld discrete items of information under section 17(1), on 17 pages of records.

[para 42] 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.*
>
> …

[para 43] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 44] 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 45] 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 46] The Public Body describes the information withheld under section 17(1) as personal information of third parties. Most of the information withheld under this provision consists of names of other individuals who had had been involved in a grievance (or similar) proceeding with the Public Body. Those names are personal information of third parties.

[para 47] In two instances, the Public Body has withheld a list of student names. That is the personal information of those students.

[para 48] Some information consists of comments about a Public Body's employee's work. 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). In this case, the comments have an evaluative component that gives them a personal dimension. I agree that this is personal information of a third party.

[para 49] In one instance, an email address of an employee of a third party organization is withheld under section 17(1). That employee was acting a work capacity. The Public Body has disclosed this employee's work email address where it appears; however, in two instances, this employee appears to have used a personal email address. Having

reviewed the records, it does not appear that this employee routinely uses their personal email address for work purposes. In these circumstances, I am satisfied that this personal email address is personal information of that employee.

Application of sections 17(2) – 17(5)

[para 50] Section 17(2) lists circumstances in which disclosure of personal information is not an unreasonable invasion of privacy. The Public Body states that none of the circumstances apply in this case and I agree. None of the provisions in section 17(3) seem to apply.

[para 51] Section 17(4) lists circumstances in which disclosure is presumed to be an unreasonable invasion of privacy. The Public Body has argued that several subsections of section 17(4) apply. The most obvious subsection is section 17(4)(g), which states:

> *17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> …
>
> *(g) the personal information consists of the their party's name when*
>
> *(i) it appears with other personal information about the third party, or*
>
> *(ii) the disclosure of the name itself would reveal personal information about the third party*

[para 52] This provision applies to all of the personal information withheld under section 17(1).

[para 53] The Public Body has also argued that sections 17(5)(e), (f) and (h) weigh against disclosing the personal information.

[para 54] The Applicant's submissions to this inquiry are minimal and do not mention the information withheld under section 17(1), or third party personal information. Nothing in his submissions addresses circumstances that would weigh in favour of disclosing the personal information (for example, that disclosure is necessary for public scrutiny, per section 17(5)(a)).

[para 55] While the Applicant is an employee of the Public Body and appears to have an objection to the manner with which the Public Body managed his employment, he has not provided an argument to suggest that disclosure of the requested information is relevant to a fair determination of his rights (section 17(5)(c)).

[para 56] The Applicant bears the burden of showing that the personal information should be disclosed, and because at least one presumption against disclosure applies (section 17(4)(g)), I find that the Public Body is required to continue to withhold that information. I do not need to consider whether the other factors discussed in the Public Body's submissions apply.

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

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body*
>
> *(ii) a member of the Executive Council, or*
>
> *(iii) the staff of a member of the Executive Council,*
>
> …

[para 57] A "consultation" occurs when the views of one or more officers or employees are sought as to the appropriateness of particular proposals or suggested actions; a "deliberation" is a discussion or consideration, by persons described in section 24(1)(b), of the reasons for and/or against an action (Orders 96-006 at p. 10 or para. 48; Order 99-013 at para. 48, F2007-021, at para. 66).

[para 58] The test for sections 24(1)(a) and (b), as stated in past Orders, is that the advice, recommendations etc. (section 24(1)(a)) and/or the consultations and deliberations (section 24(1)(b)) 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 was overly restrictive with respect to section 24(1)(a). She restated that part of the test as "created for the benefit of someone who can take or implement the action" (at paragraph 123). The person with authority to take an action or implement a decision needn't necessarily have received the advice or been part of every consultation or deliberation for either section 24(1)(a) or (b) to apply. The advice or consultations must be aimed at some action or decision but needn't necessarily hit the mark.

[para 60] In addition to the requirements in those tests, sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held on a particular topic (and not the *substance* of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

[para 61] Bare recitation of facts or summaries of information also cannot be withheld under sections 24(1)(a) or (b) unless the facts are interwoven with the advice, proposal, recommendations etc. such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48). As well, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at paras. 31 and 37).

[para 62] The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (which I will refer to as "advice etc.", section 24(1)(a)); and consultations or deliberations between specified individuals (section 24(1)(b)).

[para 63] The Public Body has withheld two paragraphs from an email on page 2014-50 under section 24(1)(a) and (b). In these paragraphs, a Public Body employee raises a question as to how to proceed on a matter dealing with the Public Body's work with another body, and opines on a possible course of action.

[para 64] The possible course of action being contemplated appears to be one that will be taken by the author of the email. Therefore, this isn't information to which section 24(1)(a) applies (public body employees cannot 'advise' themselves on a course of action, within the terms of section 24(1)(a)).

[para 65] However, it appears that the employee is seeking input on his proposed solution. That falls within the scope of section 24(1)(b).

Exercise of discretion

[para 66] 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 67] 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 68] 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 (at para. 104):

> 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)*.

[para 69] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII) (*EPS*), the Court provided detailed instructions for public bodies exercising discretion to withhold information under the Act. This decision was issued after the Public Body provided its submissions to this inquiry. However, it might be helpful for the Public Body to review the discussion.

[para 70] The Court said (at para. 416)

> What *Ontario Public Safety and Security* requires is the weighing of considerations "for and against disclosure, including the public interest in disclosure:" at para 46. The relevant interests supported by non-disclosure and disclosure must be identified, and the effects of the particular proposed disclosure must be assessed. Disclosure or non-disclosure may support, enhance, or promote some interests but not support, enhance, or promote other interests. Not only the "quantitative" effects of disclosure or non-disclosure need be assessed (how much good or ill would be caused) but the relative importance of interests should be assessed (significant promotion of a lesser interest may be outweighed by moderate promotion of a more important interest). There may be no issue of "harm" in the sense of damage caused by disclosure or non-disclosure, although disclosure or non-disclosure may have greater or lesser benefits. A reason for not disclosing, for example, would be that the benefit for an important interest would exceed any benefit for other interests. That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

[para 71] It further explained the weighing of factors at paragraph 419:

> …If disclosure would enhance or improve the public body's interests, there would be no reason not to disclose. If non-disclosure would benefit the public body's interests beyond any benefits of disclosure, the public body should not disclose. If disclosure would neither enhance nor degrade the public body's interests, given the "encouragement" of disclosure, disclosure should occur. Information should not be disclosed only if it would run counter to, or degrade, or impair, that is, if it would "harm" identified interests of the public body.

[para 72] Lastly, the Court described burden of showing that discretion was properly exercised (at para. 421):

> I accept that a public body is "in the best position" to identify its interests at stake, and to identify how disclosure would "potentially affect the operations of the public body" or third parties that work with the public body: EPS Brief at para 199. But that does not mean that its decision is necessarily reasonable, only that it has access to the best evidence (there's a difference between having all the evidence and making an appropriate decision on the evidence). The Adjudicator was right that the burden of showing the appropriate exercise of

> discretion lies on the public body. It is obligated to show that it has properly refrained from disclosure. Its reasons are subject to review by the IPC. The public body's exercise of discretion must be established; the exercise of discretion is not presumptively valid. The public body must establish proper non-disclosure. The IPC does not have the burden of showing improper non-disclosure.

[para 73] In its revised initial submission, the Public Body states that it considered the purpose of the Act as a whole, which weighs in favour of disclosure, but that the factors in favour of disclosure are outweighed by those against disclosure.

[para 74] The Public Body noted that the withheld information does not relate to the Applicant's specific situation, and only mentions his name. It therefore determined that the value of this information to the Applicant is minimal.

[para 75] The Public Body states that the advice sought by the employee related to an inter-agency relationship, and that disclosure could harm the Public Body's working relationship with the other body.

[para 76] These are relevant factors to consider in exercising discretion under section 24(1). I uphold the Public Body's exercise of discretion.

4. Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information in the records?

[para 77] Section 25(1) states:

> *25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:*
>
> *(a) trade secrets of a public body or the Government of Alberta;*
>
> *(b) financial, commercial, scientific, technical or other information in which a public body or the Government of Alberta has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value;*
>
> *(c) information the disclosure of which could reasonably be expected to*
>
> *(i) result in financial loss to,*
>
> *(ii) prejudice the competitive position of, or*
>
> *(iii) interfere with contractual or other negotiations of,*
>
> *the Government of Alberta or a public body;*

> *(d) information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee or the public body of priority of publication.*

[para 78] 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 79] 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 80] The Public Body has withheld two items of information under section 25(1)(b), on page 2015-192. It describes this information as financial information of the Public Body, "including specific budgetary codes used by [the Public Body]." It states

that these codes could be used to charge purchases or issue accounts to the Public Body, resulting in financial loss to the Public Body.

[para 81] From the records, I accept the Public Body's explanation that the information withheld under this provision consists of codes used to pay for goods and/or services. Disclosure of this information could lead to the use of those codes by unauthorized persons, resulting in financial loss. I am satisfied that section 25(1)(b) applies to this information.

Exercise of discretion

[para 82] Like section 24(1), section 25(1) is a discretionary exception. The discussion under Issue 3 is therefore also relevant here.

[para 83] In its revised initial submission, the Public Body states that it considered the purpose of the Act as a whole, which weighs in favour of disclosure, but that the factors in favour of disclosure are outweighed by those against disclosure. The Public Body noted that the harm that could arise from disclosing budgetary codes (discussed above) weighs against disclosure. It also noted that this information is not relevant to the Applicant's access request, and therefore has limited value.

[para 84] These are relevant factors to consider in exercising discretion under section 24(1). I uphold the Public Body's exercise of discretion.

V. ORDER

[para 85] I make this Order under section 72 of the Act.

[para 86] I find that the Public Body met its duties under section 10 of the Act.

[para 87] I find that the Public Body properly applied section 17(1) to withhold information in the records at issue.

[para 88] I find that the Public Body properly applied section 24(1) to withhold information in the records at issue.

[para 89] I find that the Public Body properly applied section 25(1) to withhold information in the records at issue.

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Amanda Swanek
Adjudicator