ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2007-002

August 13, 2007

BARBARA SHEPTYCKI (REGISTERED PSYCHOLOGIST)

Case File Number P0295

Office URL: www.oipc.ab.ca

Summary: An Applicant made a request to a Psychologist under the *Personal Information Protection Act* ("PIPA") for a copy of the all the Psychologist's files relating to a custody assessment the Psychologist had conducted relative to the Applicant, his former wife, and their two children.

The Psychologist refused to provide the parts of the files consisting of information about the former spouse, the children, and another individual. She was willing to provide most of the information about the Applicant that he had provided to her himself. However, she refused to provide information about the Applicant provided by other persons, both private individuals and some professionals. As well, she refused to provide the materials in her "correspondence" folder, which consisted primarily of communications between herself and the lawyer of the Applicant and that of his former spouse, as well as some letters requesting information about the Applicant she sent to others. The Psychologist also refused to provide materials relating to the psychological testing of the Applicant, including his test results and scores.

The Adjudicator held that the Psychologist had properly designated as unresponsive, or properly applied the mandatory exceptions to, most of the information she had been unwilling to provide.

Much of the information in the Psychologist's files relating to the custody assessment is not about the Applicant, hence is not his personal information, and is not responsive to a properly-framed request under PIPA. There is no obligation to disclose this information under PIPA.

Some parts of the files consist of opinions and other information about the Applicant provided by private individuals, and these parts are his personal information. However, most of this information has to be withheld: section 24(3)(b) requires withholding of that part of this information that at the same time reveals the personal information of the

persons providing it, or of other persons. There is some information about the Applicant scattered throughout the Psychologist's files for which, if the name of the individuals providing it were removed, they could not be identified, and thus the disclosure would not reveal their personal information. However, for these minor items of information, the Adjudicator took into account the 'reasonableness' limitation on the duty to provide access under section 24 of PIPA. She concluded it would not be reasonable in this case to require the Psychologist to review each of the files to identify these minor items of information and provide them to the Applicant. Thus the Psychologist was entitled to withhold all the personal information about the Applicant provided by private individuals by reference to section 24(3)(b).

The Adjudicator also considered the Psychologist's contention that section 24(3)(c) (identity of an opinion giver) applied to some of the documents. For most of these, she concluded that it was not necessary to decide this issue, for one of the following reasons: she had already decided the documents have to be withheld on a mandatory basis under section 24(3)(b); the documents had been designated as disclosable in another bundle of the materials, or; the document, though referred to in the submission, did not appear in the materials provided. For the remaining two documents, she decided that section 24(3)(c) did not apply, as its terms were not met.

The outstanding items of information were: some of the Applicant's personal information in the "correspondence" folder (Folder 2) and in "Package C", a letter about the Applicant created by an employee of the Department of Justice, some of the Applicant's test scores and results from his psychological testing, and an item of the Applicant's personal information in Folder 3. With respect to these items, certain discretionary exceptions were potentially applicable. The Psychologist had raised these discretionary exceptions to disclosure in her submission, but had not mentioned them in her initial reply to the Applicant. The Adjudicator addressed these exceptions despite the fact they were raised late, because this case is one of the first to review the application of discretionary exceptions.

The Psychologist argued that the first of the discretionary exceptions (section 24(2)(b) - confidential information of a commercial nature) applied to the psychological testing materials. The Adjudicator first noted that there is no obligation to provide parts of the testing materials that do not disclose the Applicant's personal information. With respect to those parts that do, she held that only those parts of the testing materials that would compromise the commercial value of the tests can be withheld under this provision. This does not necessarily apply to the Applicant's answers, scores and results, and to the extent it does not, this information cannot be withheld under section 24(2)(b).

With respect to the remaining discretionary exceptions, the Adjudicator held that one of them (section 24(2)(d) - disclosure could result in information no longer being provided) had been properly applied to those of the records in which identifiable private individuals had made statements about the Applicant, as well as to a psychologist's interpretation of psychological tests administered to the Applicant. As for the final discretionary exception (section 24(2)(c) – information collected for an investigation or legal proceeding) the

Adjudicator agreed that the exception is applicable to all the information in the files, including the Applicant's own personal information. However, as the Psychologist had given no indication of the basis on which she had exercised her discretion to withhold the records under this provision, it was not possible for the Adjudicator to decide whether it had been properly applied. The Adjudicator ordered the Psychologist to re-exercise her discretion under this heading with respect to the records that had not been properly withheld under the other provisions.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 1(n)(ix), 17(4)(g); *Health Information Act*, R.S.A. 2000, c. H-5, s. 11(1)(b), 11(1)(e); *Personal Information Protection Act* S.A. 2003, c. P-6.5, ss. 1(i)(v), 1(k), 4(3)(d), 4(3)(k), 8(2), 20(a), 24, 24(1), 24(1)(b), 24(1)(c), 24(2)(a), 24(2)(b), 24(2)(c), 24(2)(d), 24(3), 24(3)(b), 24(3)(c), 24(4), 52; **B.C.:** *Personal Information Protection Act***,** S.B.C. 2003, c. 63: ss. 23(4)(d), 23(5); **CAN**: *Personal Information Protection and Electronic Documents Act* S.C. 2000, c. 5.

Authorities Cited: AB: Orders 96-008, 96-020, 97-011, 98-007, 98-021, 2000-023, 2001-008, F2003-005, F2004-015, F2004-026, F2005-009, F2007-007, P2006-002.

A **Table of Contents** is attached as an Appendix.

I. BACKGROUND

[para 1] By letter dated March 10, 2005, the Applicant made a request to the Organization (a psychologist)[1] for a copy of the Psychologist's entire set of files respecting a court-ordered custody assessment the Psychologist had conducted relative to the Applicant, his former wife, and their two children. The Applicant made his request under the federal *Personal Information Protection and Electronic Documents Act* (the "PIPED Act"). However, the Psychologist treated it as a request under the provincial *Personal Information Protection Act* ("PIPA" or "the Act"), and applied the provisions of the latter Act in her response.

[para 2] The Psychologist offered to provide some records from her files, but refused to provide other records on the basis of a number of exceptions in the Act. The Applicant was not satisfied with this response, and made a request for review to this Office. Mediation was not successful, and the matter proceeded to inquiry.

[para 3] The Psychologist provided her entire set of files to this Office. She provided some of it *in camera*, and some of it not *in camera.* I believe her intent was that this Office release the portions not provided *in camera* to the Applicant. However, it is not the practice of this Office to disclose records on behalf of a respondent organization. The records which the Psychologist has indicated a willingness to disclose are outside the scope of this inquiry, and will be returned to her. I will deal in this Order only with those

[1] I will refer to the Organization in most of this order as "the Psychologist", as it is awkward to refer to a person as an "organization". The Psychologist is an "organization" under section 1(i)(v) of PIPA ("an individual acting in a commercial capacity").

records which the Psychologist has contended, in her submissions, are to be withheld under the provisions of PIPA

[para 4] The material which the Psychologist indicated she was providing *in camera* consists of the following:

- three reports containing information about the Applicant obtained by the Psychologist from third parties and provided directly to her (listed on page 3 of the initial custody assessment), and a July 23, 2001 letter from Alberta Justice (these documents are all said to be from "Package B", but, as discussed at para 66 below, one of the three reports does not appear to be in this package)
- a list of persons to contact provided to the Psychologist by the Applicant and the Psychologist's handwritten notes about conversations with some of these persons; character reference letters and other information about the Applicant obtained from third parties; a document apparently written by the Applicant or by someone else recording information provided by him; and testing materials pertaining to psychological tests administered to the Applicant (these records are all in "Package C")
- a file folder (Folder 2) containing correspondence and communications relating to the custody case, primarily between the lawyers for the parties and the Psychologist; also some requests made by the Psychologist for information about the Applicant from others, and some information provided by others (professionals)
- material provided by or pertaining to the former spouse, the children, and a third party (a person in a relationship with the former spouse), and character and other reference material for the former spouse and children (this constitutes Folders 3 to 8 and part of 9 [the reference material for the Applicant that had been contained in that folder appears to constitute "Package B" (of which the Psychologist wishes to withhold only a part) and all of Package C"]
- notes of audiotapes (Folder 10) and two audiotapes (numbers 5 and part of 6, the former consisting of information provided by the former spouse, and the latter containing information provided both by the Applicant and by the former spouse [a copy of the Applicant's portion has, according to the submission of the Psychologist, already been provided to him]).

II. RECORDS AT ISSUE

[para 5] The records at issue are the parts of the Psychologist's custody assessment files that the Psychologist wishes to withhold from the Applicant, as described above.

III. ISSUES

[para 6] The issues stated in the Notice of Inquiry are:

Issue A: Does section 24(3)(b) (information revealing personal information about another individual) apply to certain requested records or parts thereof?

Issue B: Does section 24(3)(c) (information revealing identity of a person who provided opinion in confidence) apply to certain requested records or parts thereof?

Issue C: If the withheld records contain personal information of the Applicant, and if section 24(3)(b) or 24(3)(c) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?

[para 7] The Psychologist raised the additional question of whether some of the records (psychological tests) may be withheld on the basis of section 24(2)(b) (confidential information of a commercial nature). As well, the Psychologist argued that section 24(2)(c) (information collected for an investigation or legal proceeding), and 24(2)(d) (will result in information no longer being provided) applies to some of the records. I will therefore add the following issues:

Issue D: Did the Organization properly apply section 24(2)(b) (confidential information of a commercial nature) to certain requested records or parts thereof?

Issue E: Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to certain requested records or parts thereof?

Issue F: Did the Organization properly apply section 24(2)(d) (will result in information no longer being provided) to certain requested records or parts thereof?

IV. DISCUSSION OF ISSUES

Preliminary Questions

[para 8] Before turning to the specific issues listed above, I will deal with a number of preliminary points, as follows. I will address two arguments made by the Applicant that are not relevant to this proceeding. I will also discuss the meaning of "personal information" as this phrase pertains to opinions or other information about a requestor given by others (which constitute a significant portion of the records in this case), and to correspondence written by professionals on the Applicant's behalf. Finally, I will comment on which parts of the records in this case are responsive to a properly-limited PIPA request.

The Applicant's reliance on an undertaking and a court order: jurisdiction
[para 9] The Applicant argues that, in the course of an examination for discovery held in the context of the contested custody proceedings in which he and his former spouse were involved, his former spouse provided an undertaking that she would provide particular records to him. The undertaking was to "provide a release for authorization for all the

documentation given to [the Psychologist] by the defendant [the former spouse] for the custody assessment". The Applicant feels the former spouse did not comply with this undertaking. Regardless of the meaning and scope of this undertaking (which is not clear), and whether or not it was honoured, I do not regard it as bearing on the question of what information the Psychologist was required to provide to the Applicant on an access request under the *Personal Information Protection Act* in this case. A failure to comply with such an undertaking is a matter for the court, and is outside my jurisdiction.

[para 10] The second of the Applicant's arguments has to do with the following order made in the context of a divorce judgment:

> THAT the Plaintiff [the Applicant] shall have access to all medical and school information regarding the children and, where necessary, the Defendant [the former spouse] shall facilitate this access of information, which includes but is not limited to providing all necessary authorizations and documentation to the appropriate individuals and schools.

Even if, which seems doubtful, this order could be taken to relate to some of the information the Applicant seeks, enforcement of such an order is, again, a matter for the courts and outside my jurisdiction. As with the undertaking discussed in the preceding paragraph, the order has no bearing on the question of what information the Psychologist was required to provide to the Applicant on an access request under PIPA (which can be only for his own personal information in any case).

Opinions and other information about a requestor, provided by others, as "personal information"

[para 11] As just noted, it is only "personal information" that an applicant may properly request under the legislation. Personal information is defined in section 1(k) of the Act as "information about an identifiable individual".

[para 12] The records in this case contain a great deal of information in which one person states an opinion or gives other information about the Applicant. To decide which records must be provided in response to the Applicant's request for information, it is necessary to consider whether such opinions and information are the personal information, within the terms of the Act, of the person about whom the opinions are expressed, or the personal information of the giver of the opinions or information, or both.

[para 13] The Psychologist takes the position that opinions expressed about the Applicant by other persons are in substance "information about *the information provider's* own thoughts, beliefs, perceptions, history and opinions", and thus these opinions are their personal information rather than that of the Applicant.

[para 14] I do not accept this argument. Whether or not a statement of opinion about another person is also the personal information of the giver of the opinion, it is hard to dispute that a statement as to, for example, whether a person is a caring and responsible

parent is information "about" him and is thus, according to the definition in the Act, his personal information.

[para 15] Further, section 24(3)(c) of the Act does not permit me to accept the Psychologist's argument. This section provides:

> *24(3) An organization shall not provide access to personal information under subsection (1)[2] if …*
>
> *(c) the information would reveal the identity of an individual who has in confidence provided an opinion about another individual and the individual providing the opinion does not consent to disclosure of his or her identity.*

Section 24(3)(c) is an exception to the general duty to provide personal information of the person seeking the information. Unless the information described in the provision includes personal information of the person seeking it, an exception makes no sense. Thus, the provision implicitly treats an "opinion about another individual" that reveals the identity of its maker as the personal information of the other individual (the requestor).[3] This inference may be taken to establish that under the Act, an opinion about a person is the personal information of the person about whom it is given.

[para 16] There is a second question of whether the information (the opinion) is to be treated under the Act as at the same time both "about" the Applicant and "about" the giver of the opinion. If I say "I think John is a nice fellow", this is arguably information about me as well as about John. The idea that John is a nice fellow is about him, but the fact I think this is about me. This question is important because section 24(3) contains another exception to access - for personal information of third parties, as follows:

> *24(3) An organization shall not provide access to personal information under subsection (1) if …*
>
> *(b) the information would reveal personal information about another individual;*

If an opinion constitutes personal information about its maker, it must be withheld under section 24(3)(b) whether or not it meets the conditions of section 24(3)(c).

[para 17] Arguably section 24(3)(c) answers this second question by necessary inference as well. If a statement of opinion (that identifies its maker) were also the personal

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[2] Subsection (1) of section 24 requires organizations, who have in their control the personal information of a person, to provide that information to that person on request. Subsections (2) and (3) qualify this obligation.

[3] Conceivably, in some circumstances, there could be other personal information of a requestor that would reveal the identity of a person who gave an opinion about them. It is hard to imagine what that might be, but in any event it does not arise in this case. I believe the section is primarily intended to permit withholding of the name of the giver and of as much of an opinion itself as would reveal their identity.

information of the maker of the statement, it would be excepted from disclosure under section 24(3)(b). There would be no need for a separate exception in 24(3)(c). Under this line of reasoning, by inference from the existence of section 24(3)(c), the Act does not treat a statement of opinion about another person as the personal information of the person making the statement. The same can be said about the very fact that an identifiable person gave an opinion about another person. If this were the personal information of the giver of the opinion, there would be no need to create an exception for disclosure of this information (whether or not the opinion is given in confidence), as it would be covered by 24(3)(b). Arguably, therefore, by inference, the fact a person gave an opinion about another is not treated under the Act as the personal information of the giver.

[para 18] I note as well that the definition of "personal information" in section 1(n)(ix) of the *Freedom of Information and Protection of Privacy Act* [the "FOIP Act"] deals with opinions expressly, and provides that an opinion given by A about B is the personal information of B only.[4] It is also arguable that this aspect of the definition in FOIP is to be imported into the definition of "personal information" in PIPA, by reference to the interpretive principle that where statutes deal with the same subject matter, they are to be read as offering a coherent and consistent treatment of the subject.

[para 19] Despite the points made in the two preceding paragraphs, it is counter-intuitive that a person's statement that he or she thinks something (even if it is about someone else) can never be said to be a statement they are making about themselves (hence is their own personal information). The same is true of the very fact that a person gives an opinion about someone else – there will be circumstances in which this information has an element that is personal to the giver of the opinion. The following scenario illustrates these points. A consulting firm is hired to evaluate the performance of the director of an organization, to help determine if her appointment should be continued. The employees are asked about their views. The director's appointment is approved, and she makes an access request to the consulting firm for her personal information. In such a case, the content of the opinions given by the employees may be information about the director and is thus her personal information. However, the views the employees expressed about her, and the very fact that they expressed views, give the director significant information about the employees, and thus they may be, both from the perspective of the director and of the employees, as much about them as about her.

[para 20] As well, the part of the opinion giver's (A's) statement that reveals why he or she holds an opinion about B – for example, that it arises from their observations, relationship, or experience with B, or that some third person shared information with them about B, is personal information about A. Such information may be inextricably interwoven with the opinion itself.

[4] This provision includes, in the list of information regarded as "personal information", "the individual's personal views or opinions, *except if* they are about someone else". It has been interpreted to mean that under the FOIP Act, a person's opinion about someone else is not, at the same time, their own personal information. (See, for example, Order 97-011 at para 32, and Order 98-021 at para 15.)

[para 21] In my view, the more significant point in considering FOIP and PIPA together is that each statute contains a different definition. The definition in PIPA encompasses information about an identifiable individual *without restriction.* The definition in FOIP is more restrictive in that it excludes from the category of information about an individual the opinions that individual expresses *about someone else*. Furthermore, it is not clear the two statutes treat subject matter that is sufficiently similar to import the principle. Even if they do, it would be wrong to try to force consistency upon these distinct definitions for the sake of the interpretive principle.[5] I do not think it proper to adopt a definition from another, albeit related, statute, that legislates a meaning for a term that is contrary to common perception.

[para 22] That the fact a person holds or gives an opinion about another conveys something personal about the maker will not be true for all opinions. In some circumstances, an opinion held by a person may be abstracted from their personal life to such a degree that it does not seem to have the quality of personal information. An example is where the opinion is a professional one – for example, a psychologist's opinion from interpreting a psychological test that B has a particular personality disorder. However, for situations where the opinion that is held, or the fact it is given, does reflect something personal, and especially something sensitive, about the person making it, it is, in my view, commonly and quite properly regarded as also being information about that person. The fact A is able to give an opinion about B because they have a personal relationship may be an indicator that the opinion is also the personal information of A. The same may be true where the fact A gives a particular opinion about B has the potential to significantly affect A's personal relationship with B.

[para 23] Adopting this more intuitive approach to opinions under PIPA, assuming the 'given in confidence' and 'no consent' conditions of section 24(3)(c) are met, this provision can be treated as applying to those opinions given by others in which there is

[5] I note that this conclusion runs contrary to statements on the Alberta Government publication on Private Sector Privacy (*Information Sheet 3: Personal Information*), which is located on the government website at www.psp.gov.ab.ca. Under the heading "Opinions" this document cites Order 96-020 (an order under the *Freedom of Information and Protection of Privacy* Act) and states: "In privacy legislation, an individual's personal information or opinions are considered to be that individual's personal information, unless the views or opinions are about someone else. Views or opinions about another individual are the personal information of the other individual." My conclusion might also be seen as contrary to a decision of the federal Privacy Commissioner which reads an implied exemption into section 9(1) of the *PIPED Act* (which says an organization must not give access to personal information if doing so would likely reveal personal information about a third party) akin to the express exemption in section 3(e) of the federal *Privacy Act* (which excepts from the definition of personal information the personal opinions or views of the individual about another individual). In the Privacy Commissioner's view, the records that had been withheld (allegations of harassment made by third parties) *referred* to third parties who had made allegations, but could not be said to be *about* those parties for purposes of the Act; rather, they were *about* the complainant. (Case Summary #50.) However, as just discussed, in my view some opinions about others are at the same time about the giver of the opinion. Given the significant difference in the definitions as between the two Alberta statutes, I reject the idea that the definition in the FOIP Act is to be incorporated into the PIPA one simply on the basis that both statutes deal with similar topics.

no personal element.[6] If such opinions meet the conditions in the provision, they are to be withheld even in the absence of a personal element relative to the maker.[7]

[para 24] I adopt this interpretation of the combined provisions. In the result, to the extent opinions convey personal information about the giver of the opinion, they must be withheld under 24(3)(b). Whether or not they have such a personal element, if they were given by an individual (whom they necessarily identify) in confidence, and the giver does not consent to disclosure of their identity, opinions must also be withheld under section 24(3)(c).

[para 25] A final issue relative to ownership of information is as to statements about the Applicant by others that are statements of fact rather than of opinion. A statement that B was in a particular place at a particular time, that he is a member of a particular profession, or that he is six feet tall, unless its maker is deluded or mistaken, is a statement of fact. In my view, purely factual statements made by one person about matters such as the activities or attributes of another are the personal information of the person about whom they are.[8] However, if the statement reveals something about A, for

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[6] According to this analysis the provision would also apply to opinions having a personal element if the conditions are met, but as such opinions are to be withheld under 24(3)(b) whether or not the conditions are met, it is not necessary for this purpose.

[7] Another possible purpose for section 24(3)(c) can be derived from comparing it to a similar provision in the British Columbia private sector legislation (section 23(4)(d)). That legislation has very similar wording. It directs that information about the requestor provided by another person not be disclosed unless the provider of the information consents to disclosure of their identity. However, it does not confine the type of information to opinions, but rather speaks more generally of the "personal information" of the requestor, so that any personal information provided to an organization about the requestor must be withheld in the absence of the consent. This provision, with its broader scope, seems to be intended to protect people who would come forward to an organization with information about another person that it is important for the organization to know (for example, that someone is abusing a child, or stealing from a till), against access by the requestor of the information as to "who told?". In both jurisdictions, the preceding subsection (that prohibits providing to a requestor the personal information of anyone else) might in some circumstances also achieve the same result (that the information cannot be disclosed). However, the broader scope of the British Columbia version makes the intention seem clearer: the purpose seems to be to provide assurance that the sources of such information will not be revealed. If Alberta's version has the same purpose, it can be reconciled with section 24(3)(b) as having been added to provide this assurance - rather than to treat an entirely separate subject matter (opinions about others) that will never fall as well under section 24(3)(b). In making this comparison with B.C. legislation, I note further that the narrower scope of Alberta's provision - confined as it is to opinions only – is somewhat unaccountable. There is little difference in principle between saying "I saw X steal from the till" and "I think X is a thief", yet arguably, only the provider of the latter information would be protected by section 24(3)(c). I note finally that according to the provision, if the giver of the opinion refuses to consent to disclosure of their identity, this must be honoured whether or not the refusal is reasonable in the circumstances. In contrast, in the *Health Information Act* (HIA), an otherwise similar provision makes appropriateness, rather than refusal to consent, the test for keeping confidential the identity of someone providing health information. (See section 11(1)(b) of the HIA.) In my view, particularly in the case of opinions that do not involve personal information of the giver, this might be a more suitable test. Even under the existing wording, there may be circumstances in which, despite the absence of any direct evidence that the giver of an opinion did not consent, the absence of consent can be inferred because disclosure of the identity would clearly not be appropriate in the circumstances.

[8] As a practical matter, it may be hard to decide whether a statement is purely factual. If I say that A is a tall man, this may be a function of the fact that I am shorter than he is, and may in some circumstances be

example, the reason A knows the thing about B – that he was told it, observed it, or had some experience with it - the entire statement may, at the same time, if A is identifiable, also be the personal information of A. Thus, for example, A's statement that B assaulted him, or gave him a ride home, is the personal information of both of them.

Personal information about the Applicant in the "correspondence" folder
[para 26] The "correspondence" folder contains letters (and accompanying fax cover sheets), and records of phone calls, from the Applicant's lawyer to the Psychologist, that I presume were written or made with the Applicant's concurrence and on his behalf. These Applicant's communications are, in my view, about him, and are his personal information. (Similarly, communications made and letters sent by the former spouse's lawyer on her behalf are her personal information.) Some of these letters discuss only work-related matters, rather than any personal matters relating to the client. However, while this means that the contents are not the personal information of the lawyer, it this does not detract from the idea that it is the personal information of the client, because it conveys information as to how he or she instructed their lawyer. A similar point applies to requests made by the Psychologist for information about the Applicant to persons whose names the Applicant provided for this purpose, or by the Psychologist on the Applicant's behalf, to which the Applicant consented, as well as to a "to whom it may concern" letter written by the Psychologist on the Applicant's behalf. These are communications of the Applicant (speaking through the Psychologist), and are all his personal information.

What must be provided on a PIPA request, and the application of exceptions
[para 27] In an inquiry under PIPA, it is critical to remember that an organization is required to provide to an Applicant *only the Applicant's own personal information.* A request for information that is not the Applicant's personal information is not a proper request under PIPA.[9]

[para 28] If, in a given bundle of documents, only some are or contain the Applicant's personal information, it is not necessary to apply PIPA exceptions to those of them, or parts of them, that do not contain the Applicant's personal information. Such documents or parts of documents do not need to be provided, *but the reason they do not is that they are unresponsive to an appropriately-circumscribed PIPA request.* In other words, the exceptions in sections 24(2) and 24(3) are applicable only where releasing the Applicant's own personal information will *at the same time* have one of the effects described in the subsections – for example, where the personal information of both the Applicant and another person is so inseparably interwoven that it cannot be severed so as to enable the release of only the Applicant's personal information. In such a case, the

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better classed as an opinion. However, if he is six feet tall, that is a fact. Though there may be cases in which it is difficult to distinguish between fact and opinion, it is a valid distinction in principle.

[9] The Act also requires an organization to provide specific related information under clauses 24(1)b) and (c), but this is all related to the applicant's personal information.

parts of the personal information of the Applicant that reveal the personal information of another must be severed.[10]

[para 29] I note as well that if a record contains the personal information of a requestor, and also contains other information, it may or may not be open to an organization to provide the other information rather than severing it. If the balance of the information would disclose personal information of third parties who have not consented to disclosure, or if disclosure would contravene some other provision of the Act, the implicated information would have to be removed before the rest of the record was provided. However, for information relative to which there is no prohibition in PIPA, if an organization is minded to disclose it rather than going through a severing exercise, although it is not required to disclose such information, it may do so.

[para 30] Based on the foregoing discussion, the following records consist of personal information of the Applicant in File Folder 2 (the "correspondence" folder[11]): pages 1; 2; 3; 4 (except the marked portions); 7; 8 (except the marked portion); 12; 13; 15; 16; 17; 18; 19; 21; the unmarked part of 22; 25; 26; parts of 27; the unmarked parts of 28 and 31; parts of 32 and 33; the unmarked parts of 38, 39 and 40; the unmarked parts of 46; 49; 50; 53; the unmarked part of 66; 67; 68; parts of 69; the unmarked parts of 70 and 73; 75 to 79 (except the information of persons who created these records and in one of these

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[10] Arguably, this conclusion is at odds with section 24(4), which deals, specifically, with severing. Section 24(4) provides:

> *(4) If, in respect of a record, an organization is reasonably able to sever the information referred to in subsection (2)(b) or (3)(a), (b) or (c) from a copy of the record that contains personal information about the individual who requested it, the organization must provide the individual with access to the record after the information referred to in subsection (2)(b) or (3)(a), (b) or (c) has been severed.*

This section can be taken to suggest that if a *document* contains personal information of a requestor, and information described in subsection 3(a), (b) or (c), and the latter can be severed, the *rest of the document* is to be provided. However, if the rest of the document also contains some information that is not responsive because it is not the requestor's personal information, there is no obligation to provide it under subsection (1). Thus, in my view, it is necessary to read into the word "record" in subsection (4) the intention to refer only to a record that consists entirely of the requestor's personal information. It must be remembered that the whole of subsection (3) deals only with *personal information of the requestor* that has one of the consequences described in 3(a), (b) or (c). It does not deal with *records containing* personal information of the requestor, *other parts of which* may have such consequences. Parts of records that are not the requestor's personal information do not need to be provided, but this is, again, because they are not responsive to a request that is appropriately limited, rather than because they fall within an exception. (As well, if these other parts would reveal personal information about others, those parts must be removed - not by virtue of section 24(4), but because the Act, except in specified circumstances, prohibits the disclosure of personal information without consent.) I am supported in my reading of this provision by the British Columbia *Personal Information Protection Act*, which contains the following, largely parallel, provision (which clearly expresses the intention that the requirement to give access extends only to the requestor's personal information):

> *23(5) If an organization is able to remove the information referred to in [the earlier provisions] from a document that contains personal information about the individual who requested it, the organization must provide the individual with access* ***to the personal information*** *after the information referred to in subsection (3)(a), (b) or (c) or (4) is removed.*

[11] I have copied and numbered this folder as pages 1 to 94, and have marked selected areas of text by surrounding them with a highlighter.

cases, of their associates); the parts of 80 to 94 that record telephone messages to the Psychologist from the Applicant and a handwritten note on 84 (the parts of these pages that are unmarked).

[para 31] With respect to Folders 3 to 8 and parts of 9, and the withheld audiotapes and transcripts of audiotapes (Folder 10), some parts of these records contain frequent references to and statements about, and in some cases statements attributed to, the Applicant, and these are his personal information.[12]

[para 32] All the records that the Psychologist seeks to withhold from "Package B" contain the Applicant's personal information (though some of them also contain the personal information of others, as well as a small amount of information that is not personal). As well, a great deal of the information in "Package C", which largely consists of information about the applicant provided by others, is his personal information.

[para 33] However, some of the records do not contain personal information of the Applicant (and there is therefore no obligation on the Psychologist to provide them to him).[13] These are as follows:

- the following parts of File Folder 2 (the "correspondence" folder): the marked parts of 4; 5; 6; the marked part of 8; 9; 10; 11; 14; 20; the marked parts of 22; 23; 24; parts of 27; the marked parts of 28; 29; 30; the marked part of 31; parts of 32 and 33; 34 to 37, the marked parts of 38, 39 and 40; 41 to 45; the marked parts of 46; 47; 48; 51; 52; 54 to 65; the marked parts of 66; parts of 69; the marked parts of 70; 71 and 72; the marked parts of 73; 74; the parts of 75 to 79 that are the information of the persons who created the records, and in one of these cases, of their associates; the (marked) parts of 80 to 94 that record telephone messages from persons other than the Applicant or his lawyer, and all but one of the handwritten notes of which the authors are unknown [the exception is on 84];
- the parts of File Folders 3 to 8 that do not refer to the Applicant;
- the parts of File Folder 9 that contain reference material pertaining to the former spouse and children (the reference material for the Applicant that had been contained in that folder appears to constitute part of "Package B" and much of "Package C");
- the parts of audiotapes nos. 5 and 6 that do not refer to the Applicant.

[para 34] I turn now to the specific issues listed in the Notice of Inquiry.

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[12] It is not necessary to identify which parts of these files do and do not contain information about the Applicant. Those that do are intertwined with the personal information of his former spouse, the children, and another individual. As discussed further below, the intertwined information cannot be disclosed. The balance of the information is the personal information of other persons. As none of the information can be disclosed, there is no point in identifying to whom the information belongs.

[13] I will discuss further below (at paras 44 and 45) which of these records may be disclosed at the Psychologist's option and which must be withheld because of the general prohibition in the Act that personal information is not to be disclosed without consent.

Issue A: Does section 24(3)(b) (information revealing personal information about another individual) apply to certain requested records or parts thereof?

[para 35] Section 24(3)(b) was quoted above at para 16.

[para 36] The Psychologist's first argument under this heading is that the custody assessment conducted by her is not about the Applicant, it is about what custody and access arrangements would be in the best interests of the children. I take this to be, in essence, an argument that much of the information in the records is unresponsive to a proper access request, which can be made only for a requestor's own personal information. I accept this argument insofar as it applies to information in the records that is not about the Applicant.

[para 37] However, as discussed in the preceding section, there is much information in the records that is "about the Applicant".

Personal information about the Applicant in the "correspondence" folder
[para 38] As discussed earlier (at para 26), the letters and records of phone calls, from the Applicant's lawyer to the Psychologist, written or made on his behalf, are his communications and thus are his personal information. These letters or notes do not have to be withheld even though they contain references to other persons and some information about them, for example the names and ages of his children. This is information that the Applicant himself supplied; its disclosure would not *reveal* this personal information to him, and it would make no sense to withhold it. The same is true for requests made by the Psychologist for information about the Applicant to persons whose names the Applicant provided for this purpose, or to which the Applicant consented. There is also no reason for the Psychologist to withhold a "to whom it may concern" letter that she wrote on the Applicant's behalf (and it is thus his personal information) by reference to section 24(3)(b).

[para 39] The "correspondence" folder also includes letters, containing personal information about the Applicant, that were written to the Psychologist by counsel for the former spouse, and that were written by the Psychologist to the Applicant's lawyer. The Applicant is entitled to the personal information about himself in these letters that does not reveal the personal information of anyone else. There is also personal information of the Applicant in some parts of the letters that is intertwined with the personal information of others. Despite this, in my view, section 24(3)(b) does not preclude provision of this information to the Applicant. As all these letters were either written or copied to the Applicant's lawyer, the Applicant has already received this correspondence by way of his lawyer.[14] Therefore, although some parts of these letters contain some personal information of others intertwined with his own, disclosing it to the Applicant through this information request would not *reveal* the personal information of anyone else.

[14] There may be circumstances in which a lawyer has some obligation to withhold from a client a letter written to the lawyer concerning the client, but this does not appear to be such a circumstance.

[para 40] With respect to the balance of the information in these copied letters that is not about the Applicant, the Psychologist is not obliged to disclose it. However, she may do so at her option, even if it contains the personal information of others, for those of the letters that the Applicant has already received through his lawyer, because disclosing the letters in their entirety would not *reveal* information to the Applicant.

[para 41] I note that the documents just referred to are records of the work product of the professionals who created them, and that removing the names of these people would not de-identify them. I do not need to decide in this case whether disclosure of this information would violate section 24(3)(b), because even if this information were the personal information of these professionals, it has already been provided to the Applicant and thus its disclosure would not reveal this information to him. (In my view, however, the work product information is not the personal information of these people, for the reasons discussed at para 50 below.)

[para 42] These records also contain the business contact information of the persons who created them, as well as the names and contact information of the associates of the lawyers of the Applicant and of his former spouse. This information is not responsive, and the Psychologist may sever it if she chooses. However, she is not obliged to do so. Again, these records have already been provided to the Applicant, and disclosing them would not reveal this information to him. Even if they had not been so provided, in my view, in this context, the names and business contact information, though personal information, could be disclosed. Business contact information that appears on letterhead, business cards, or similar material is intended for wide dissemination, and can in fact be regarded as a form of advertising. In my view, people who consent to inclusion of their names and contact information in such material may be deemed to consent to the purpose that it be broadly disseminated to people who might use it to contact them (incidentally, through specific transactions that may not necessarily involve them, and even though the discloser may have no specific intention to disclose for this purpose). Thus, barring some circumstance indicating the contrary, the persons whose business contact information it is can be deemed to consent to incidental inclusion of such information in a response to an access request.[15] It would be unreasonable to require organizations to go through what will sometimes be an arduous process of identifying and removing such information in an access request when its inclusion in the related materials was for the purpose that the information be widely available. Alternatively, the business contact information can be seen as falling within the exception in section 20(a) of the Act that the persons whose information it is "would not reasonably be expected to withhold consent" to the incidental disclosure of the information in response to an access request.[16]

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[15] Section 8(2) of the Act deems consent to disclosure for a particular purpose (in this case, of wide dissemination) where the information is voluntarily provided and it is reasonable that the person would voluntarily provide it for that purpose.

[16] Section 20(a) provides:

> *20 An organization may disclose personal information about an individual without the consent of the individual but only if one or more of the following are applicable:*
>
> *(a) a reasonable person would consider that the disclosure of the information is clearly in the interests of the individual and consent of the individual cannot be obtained in a timely way or the individual would not reasonably be expected to withhold consent;… .*

[para 43] I have listed the parts of the records in the "correspondence" folder that are the Applicant's personal information at para 30 above. Of these parts of the records, the following must be withheld by reference to section 24(b) (as intertwined with, and also revealing, the personal information of others): 15, 27, 32, 33, 38, 66, 69, the note about the Applicant on 84.

[para 44] The following parts of the "correspondence" folder may optionally be disclosed, even though they do not consist of the Applicant's personal information , either because they do not contain the personal information of anyone else, or, if they do, these same documents have already been provided to the Applicant, and thus their disclosure would not reveal this information to him: the marked parts of 4; 6; 9; 10; 20; the marked parts of 22; 24; the marked parts of 28; 30; the (marked) parts of 39 and 40 that are not the Applicant's personal information; 41; 43; 45; the (marked) parts of 46 that are not about the Applicant; 48; 52; 54; 55; 58; 59; 61(except the marked part, which must be withheld); the (marked) parts of 70 that are not about the Applicant; 71, the (marked) parts of 73 that are not about the Applicant. (As well, I notice that pages 70 and 73 are also contained in "Package A", which was designated by the Psychologist as releasable, and page 73 is also attached to the Psychologist's affidavit in her submission.)

[para 45] The following of the remaining parts of the "correspondence" folder do not contain the Applicant's personal information, but they do contain the personal information of others: 5; the marked part of 8; 11;14; 23; 29; the marked part of 31; 34 to 37; 42; 44; 47; 51; 56; 57; 60; the marked part of 61; 62, 63; 64; 65; 72; 74; the parts of 80 to 94 that record telephone messages from persons other than the Applicant or his lawyer, and the handwritten notes of which the authors are unknown (with the exception of a note on page 84 that is about the Applicant).[17] Because they do not contain the Applicant's personal information, these parts of the file are not covered either by the duty to provide access created by section 24(1), or by the exceptions to this duty in section 24(3). However, the Psychologist does not have the option to disclose them because organizations are generally prohibited by the Act from disclosing personal information without the consent of the person whose information it is (subject to specific exceptions).

[para 46] The following documents or parts thereof in the "correspondence" folder consist of or contain the Applicant's personal information and cannot be withheld by reference to section 24(3)(b): pages 1; 2; 3; the unmarked part of 4; 7; the unmarked

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Another similar rationale for permitting disclosure of this type of information is based on section 4(3)(d), which provides that the Act does not apply to the disclosure of business contact information if it is for the purposes of contacting an individual in that individual's capacity as an employee or an official of an organization and for no other purpose. When business contact information is disclosed as an incident of some other transaction (including an access request), that particular information is in fact disclosed (albeit without any such intention on the part of the discloser) for its advertising purpose. Therefore, the Act does not apply to this information.

[17] In accordance with the earlier conclusion that communications by a lawyer on a person's behalf are that person's personal information, I have treated the correspondence that the lawyer of the Applicant's former spouse wrote on her behalf, and the associated fax covers, as well as phone calls the lawyer made to the Psychologist, as the former spouse's personal information.

parts of 8; 12; 13; 16; 17; 18; 19; 21; the unmarked part of 22; 25; 26; the unmarked parts of 28; the unmarked parts of 31, 39 and 40; the unmarked part of 46; 49; 50; 53; 67; 68; the unmarked parts of 70; the (unmarked) parts of 73 that are about the Applicant; 75 and 76, and 77 to 79[18]; and the parts of 80 to 94 (unmarked) that record telephone messages from the Applicant.[19]

Statements about the Applicant contained in Folders 3 to 8 and parts of 9, and in the withheld audiotapes and transcripts of audiotapes (Folder 10)

[para 47] The Psychologist describes these records and tapes in her submission as consisting of personal information of the former spouse, the children, and a person with whom the former spouse was in a relationship. However, these documents contain many references to the Applicant and statements made by him, and parts of them are his personal information. The folders pertaining to the former spouse also contain some transcriptions of statements the Applicant made or purportedly made in telephone calls. However, in most of the records, this information is inextricably intertwined with the personal information of the people just referred to. The telephone statements are intertwined with another person's comments to such a degree that it is not clear if all of the statements attributed to the Applicant are accurate. By virtue of section 24(3)(b), the Psychologist may not disclose any of this intertwined information. (There is one case in which personal information of the Applicant in a folder pertaining to his former spouse (Folder 3) is sufficiently discrete that it can be separated from the personal information of others that surrounds it. I have identified this item of information as Tab 1.)

[para 48] As well, some parts of these Folders contain court records. While parts of these might be described as the Applicant's personal information, they are excluded from the coverage of the Act by section 4(3)(k), which excludes personal information contained in a court file or a record of a judge.

Statements about the Applicant in "Package B"

[18] Copies of pages 75-76, and 77-79, which are reports about the Applicant created by professionals, were also included in "Package B". According to the submissions of the Psychologist about "Package B", these reports are not among the documents the Psychologist seeks to withhold. I note that the supporting documentation for one of these reports was, according to the updated Custody Assessment Report, provided to the Psychologist by the Applicant himself. I believe the other could be obtained directly from its source. Therefore I will assume that their inclusion in the releasable part of "Package B" governs her intentions relative to them. For this reason, there is no reason for the Psychologist to withhold any part of these records by reference to section 24(3)(b).

[19] Pages 22, 28, 39 and 40, 46, and 70 require further explanation. The Applicant has already received these letters, through his lawyer. Parts of them are the Applicant's personal information, parts are the personal information of others intertwined with his own, parts are other people's personal information not intertwined with his, and parts are not anyone's personal information. Section 24(3)(b) does not apply to the parts that are his personal information that is intertwined with that of others, because disclosure would not involve revealing this information to him. Similarly, the parts that are other persons' personal information only can optionally be disclosed because this information has already been provided to him. The parts that are no one's personal information can optionally be disclosed. Thus section 24(3)(b) does not apply so as to require withholding of any parts of these letters. I have marked the parts of the letters that consist of other people's personal information not intertwined with that of the Applicant, and parts that are not anyone's personal information. Though there is no obligation to disclose them, the Psychologist has the option to do so.

[para 49] The parts of this package of materials that were withheld by the Psychologist include a letter written by another psychologist about the Applicant and his former spouse, as well as a cover letter with an appended "Psychological Report" provided by another psychologist.[20] The Psychologist withheld these documents on the basis of section 24(3)(c). However, it is not necessary for me to determine if the conditions in that provision[21] are met for these records. Both the factual and opinion information about the Applicant in these letters is inseparably interwoven with such information about the former spouse and in some cases the children. On this account these documents fall within the exception in section 24(3)(b). (I note, however, that a copy of three pages of one of these records (the "Psychological Report") is included in Folder 1, which the Psychologist indicated is releasable in its entirety. Because this folder is outside the scope of this inquiry, I make no order about it, but the Psychologist may wish to consider if that copy should also be withheld on this account.)

[para 50] "Package B" also contains a letter the Psychologist received about the Applicant, dated July 23, 2001, from the Department of Justice. Most of this letter is factual (rather than opinion) information about the Applicant. However, the person who wrote the letter signed it, and there is thus a question whether the contents are also the personal information of the author. In my view, they are not. In this regard, I adopt the reasoning in Order F2004-026, at paras 109-113, which held that "a record of what a public body employee has done in their professional or official capacities is not personal or about the person, unless that information is evaluative or is otherwise of a 'human resources' nature, or there is some other factor which gives it a personal dimension". That case was decided under the *Freedom of information and Protection of Privacy Act*, but in this case, this reasoning applies as well to a person in private enterprise acting in a professional capacity. It also applies to the very fact that the person provided information about the Applicant.

[para 51] With regard to the signature on this letter, which is followed by a professional designation, this is not the Applicant's personal information and does not have to be disclosed, as it is not responsive to the request.[22] However, conceivably, disclosure of the letter even with the signature removed reveals to the Applicant, by virtue of other information he has, that person's name.

[para 52] I note that under the FOIP Act, a person's name alone is their personal information. If its disclosure would be an unreasonable invasion of a person's personal privacy, a name alone must be withheld. However, the presumption (in FOIP section 17(4)(g)) that disclosure of a name would be an unreasonable invasion applies only if the name is associated with or would reveal other personal information about the person, (and even if the presumption applies, other factors can outweigh it).

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[20] These are the second and third of "the three reports listed on page 3 of the Initial Report" referred to in the Psychologist's initial submission at para. 8.
[21] The provision was quoted at para 15.
[22] There may be situations in which the identity of the holder of an opinion about a person (A) may be as much A's personal information as the opinion itself. However, this is not such a case.

[para 53] In contrast, PIPA has an outright prohibition, in responding to an access request, against disclosing any other person's personal information. It does not have provisions for balancing the related interests of parties or the public in deciding whether to disclose the information. If a name alone (unattached to any personal information of the bearer) is regarded as personal information under PIPA, section 24(3)(b) could make it necessary to withhold information that identifies the person who created or recorded it even though doing so would reveal no personal information of that person other than their name. Therefore, in my view, at least in a situation such as the present, the identity (name alone) of a person creating a document containing personal information of another (but none of their own) is not "about" the creator, and is not to be treated as their personal information. Thus if by virtue of other information the requestor has, such a record would, even if it did not record the name of the creator or that name were removed, identify the particular other person who created it, the fact the identity would be revealed does not require that the record be withheld by reference to section 24(3)(b). For the same reason, the Psychologist is not required to delete the signature on this letter in order to provide it to the Applicant (though she may do so because it is not the creator's personal information).[23]

Statements about the Applicant by other individuals contained in "Package C"
[para 54] A large part of this information consists of statements made about the Applicant by individuals who were interviewed by the Psychologist to prepare the custody assessment, or by others who provided information about the Applicant on request. It is not clear to me, for much of this information, whether if the names of the persons providing it were removed, the Applicant would in the absence of the names be able to tell who the providers were. Much of the information is provided in a context that would likely be familiar to the Applicant, or has a content that would be familiar. Thus for much of it, it seems likely he would be able to identify the provider even without the name. For those items of information where I cannot tell if this is so, I must err on the side of caution and find the givers are identifiable. If I did otherwise I would be in danger of directing disclosure of information that must be withheld under the Act on a mandatory basis. (However, there are some minor items of information about the Applicant, scattered throughout the Psychologist's files, for which it does appear that if the name of the provider were removed, the Applicant would be unable to identify who provided them. I will deal with these items of information under Issue C below.)

[para 55] I have already discussed my view, at paras 19 and 20 above, that where A is identifiable, statements of opinion made by A about B may also be the personal information of A under the Act, and that the same may be true of statements as to what A observed, was told, or experienced, relative to B. Where a statement is at the same time the personal information of the Applicant and that of another person, the information of both is inextricably intertwined. Thus, to the extent that the personal information of the Applicant is contained in statements about him made by identifiable individuals, the part of the information that is also the personal information of the individuals making the statements must be withheld, on a mandatory basis, under section 24(3)(b).

[23] The Psychologist's submission also refers to another document about the Applicant, provided by a medical doctor. However, as discussed at para 66 below, this document is not contained in this package.

[para 56] I have reviewed the statements of opinion or other information about the Applicant contained in "Package C" that were provided by other private individuals. Most of the statements contain personal information of the providers of the information that is inextricably interwoven with the personal information of the Applicant. Almost all the statements - whether of opinion or fact – arise in consequence of personal interactions between the maker of the statements and the Applicant. As well, much of this information contains and is interwoven with the personal information of other persons in addition to that of the providers. For these reasons, this information must be withheld.

[para 57] "Package C" also contains a handwritten list of names and telephone numbers of individuals (the first page of the package, which I have marked as Tab 2). This list appears to have been written by the Applicant and provided to the Psychologist. If that is the case, this is in my view the Applicant's personal information, insofar as it indicates which people he thinks could provide information about him that would be useful for the custody assessment. Although it also contains the personal information of the people on the list, since the Applicant supplied the information, giving it back to him would not, in these circumstances, reveal this personal information of others to him, and therefore it does not have to be withheld on the basis of section 24(3)(b).

[para 58] "Package C" also contains a signed letter from an employer's payroll supervisor describing the Applicant's work position and salary (I have identified this document as Tab 3). There is no basis for withholding the body of this letter under section 24(3)(b). The signature of the payroll supervisor can be deleted, as it is not responsive. (Alternatively, as discussed at para 53 it can be disclosed at the option of the Psychologist, on the basis that it is not to be treated as the personal information of that employee in this context.) As well, "Package C" contains a typewritten document that appears to be either written by the Applicant himself or is based on someone's notes of events as related by the Applicant himself (Tab 4). Some parts of this document (marked) consist of the personal information of the Applicant's former spouse, and these do not have to be provided (though they may be if the Applicant is the person who recorded or supplied this information). The remainder of the document consists of or contains the personal information of the Applicant. While it describes events that involve other people and thus contains the personal information of those people as well, disclosing it to the Applicant would not reveal the personal information of others, as he provided or recorded this information. There is thus no basis for applying section 24(3)(b) to the intertwined information in this record.

Issue B: Does section 24(3)(c) (information revealing identity of a person who provided opinion in confidence) apply to certain requested records or parts thereof?

[para 59] Section 24(3)(c) was quoted above at para 15.

Opinions provided by private individuals
[para 60] As previously noted, many parts of the records consist of opinions about the Applicant given by private individuals, and many of these opinions would reveal the

identity of the person who gave them. I have already decided that these opinions are the personal information of the givers as well as of the Applicant, and must be withheld on a mandatory basis under section 24(3)(b). Therefore, it is not necessary for me to decide if these opinions must also be withheld under section 24(3)(c).

Professional opinions

[para 61] The Psychologist relied on section 24(3)(c) to withhold a number of reports about the Applicant provided by professionals.

[para 62] I note with respect to professional opinions generally that, as already noted, records of the work product of people acting in their professional capacities are not their personal information unless there is some personal dimension in the work product relative to its creator. As I can see no such element in the case of any of these opinions, the bodies of these reports are not to be withheld (under section 24(3)(b)) on the basis that they contain the personal information of the giver of an opinion. Therefore, I must decide if the bodies of the reports are to be withheld under 24(3)(c).

[para 63] Further, with respect to the names of persons providing the reports, I note first that in the present case this information is not responsive in that it is not the Applicant's personal information, and thus it can be removed. Even if removing it would fail to de-identify the authors, however, for the reasons discussed in para 53, the names in this context should not be treated as the authors' personal information. Therefore, the names of professionals giving opinions must be considered under 24(3)(c).

professional opinions in the "correspondence" folder

[para 64] The Psychologist relied on this provision to withhold two professional reports in the "correspondence" folder (Folder 2)[24] which are duplicated in "Package B". As noted earlier, according to the submissions of the Psychologist about "Package B", these two reports as they appear in that package are not among the documents the Psychologist seeks to withhold. Therefore I do not need to decide whether section 24(3)(c) applies to them.

professional opinions in "Package B"

[para 65] The Psychologist seeks to withhold two other professional reports (which are included in "Package B" and are listed at footnote 22). With respect to these, I have already decided that they must be withheld on the basis that disclosing them would reveal the personal information of third parties. Therefore I do not have to consider them under section 24(3)(c).

[para 66] The Psychologist's submission also refers to a report by a medical doctor (which she says is contained in "Package B") and which she argues is also to be withheld on the basis of section 24(3)(c).[25] However, the version of "Package B" which was

[24] One of these was created by a psychologist and the other by another professional. I have numbered them as pages 75 and 76, and 77 to 79, of the "correspondence" folder.

[25] This is the first of "the three reports listed on page 3 of the Initial Report" referred to in the Psychologist's initial submission at para. 8.

provided to me does not appear to contain a copy of a report by this person. Therefore I cannot deal with this document, if it exists.[26]

[para 67] The Psychologist also relies on section 24(3)(c) for withholding a letter she received about the Applicant, dated July 23, 2001, from the Department of Justice. (This document was included in "Package B".) Even if this information were provided in confidence (of which there is no evidence), I note that this letter consists exclusively of factual statements rather than opinions. Section 24(3)(c) applies only to opinions. Therefore the personal information about the Applicant contained in it does not fall within section 24(3)(c), and cannot be withheld on this basis.

professional opinions in "Package C"

[para 68] The first such documents consist of two "Clinical Interpretive Reports" (which I have identified as Tabs 6 and 7 in this package) in relation to the Applicant. They appear to be opinions about him derived from his psychological testing results, and apparently were provided to the Psychologist by another psychologist.

[para 69] In my view, the "in confidence" conditions in section 24(3)(c) are met for these opinions. A statement on the face of the reports says that they are not to be provided to the test subjects. This suggests that the other psychologist provided the opinions to the Psychologist in confidence as against the person tested, and would not want the information to be released to the subject whether or not his or her identity would thereby be revealed. However, apart from the name on the cover of the report, there is nothing in the opinions themselves that would reveal the identity of the person who provided them. The name of the psychologist who provided these professional opinions in this case could be removed. If this were done, disclosure of the opinions themselves would not reveal the identity of the person providing them. Therefore, I cannot find that the provision could be relied on to withhold these reports in this case. (It is not necessary for me to direct that the name be deleted and the opinions provided, however, because I conclude (in para 94 below), that these opinions were properly withheld in their entirety under section 24(2)(d).)

Issue C: If the withheld records contain personal information of the Applicant, and if section 24(3)(b) or 24(3)(c) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?

[para 70] Section 24(4) provides

> *4) If, in respect of a record, an organization is reasonably able to sever the information referred to in subsection (2)(b) or (3)(a), (b) or (c) from a copy of the record that contains personal information about the individual who requested it,*

[26] I note the three reports referred to in the previous paragraph are prefaced by the description: "written or verbal reports and/or records". Conceivably this item, which is the first on the list, was provided to the Psychologist by the medical doctor verbally. If that is incorrect and the Psychologist is in fact in possession of a record of such a report, I will direct that this be provided to me so that I may make a decision about it.

the organization must provide the individual with access to the record after the information referred to in subsection (2)(b) or (3)(a), (b) or (c) has been severed.

[para 71] I have already discussed my view that for large parts of the records, information that falls within section 24(3)(b) (the personal information of private individuals providing information about the Applicant) cannot be severed from the Applicant's personal information. The only information that could possibly be provided to the Applicant consists of those opinions or factual statements made by private individuals about him where it is clear that disclosure would not identify who made the statements. This would be only a small proportion of the information provided by other individuals.

[para 72] Section 24(1) requires an organization, in providing access, to take into account what is reasonable.[27] As well, section 24(4) requires severing to be done only if the organization is reasonably able to do so.[28] In this case, the Psychologist would have to expend a very considerable effort to provide the Applicant with the relatively few disclosable parts of the large bundles of documents. She would first have to sort through the records to identify those that consist of information about him. She would then have to sever out those parts of that information, intertwined with the Applicant's personal information, that consisted of the personal information of others. Next, for the remaining information, the Psychologist would have to decide for each case whether the maker of the statement or opinion was or was not identifiable from the statement or opinion alone by reference to its content or context (so that the person would remain identifiable even if their name were removed). This is a judgment which might often be very difficult, or even impossible, to make. In the result, because much of the Applicant's personal information is in the form of the opinions or other statements about him by other individuals whom he could likely identify from the statements alone, most of it would have to be removed. Only the small parts of the information that were opinions or statements of fact about the Applicant, and about which it was clear that the statements alone could not identify their maker, would be left. In my view, even if it were possible to accomplish this, it is not reasonable in this case to require an organization to undertake such an arduous and largely fruitless exercise. The same reasoning applied to minor, discrete items of information generated by the Applicant himself that are interspersed throughout the information of others. There may be circumstances in which, despite the fact that it would be difficult to do so, it would be important to identify and disclose

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[27] Section 24 provides in part:

> *24(1) Subject to subsections (2) to (4), on the request of an individual for access to personal information about the individual and* ***taking into consideration what is reasonable****, an organization must provide the individual with access to the following:*
>
> *(a) the individual's personal information where that information is contained in a record that is in the custody or under the control of the organization;… .*

[28] Arguably the latter restriction targets records in which severing is not practically possible by reference to the format of the documents and of the information in them, rather than to situations in which severing can be done as a practical matter, but it is not reasonable to impose such a requirement on the organization given the time or effort it would take relative to what would be achieved. However, the words of section 24(4) are open to either interpretation. In any event, section 24(1) addresses the reasonableness of imposing the requirement in the circumstances.

small, discrete items of information. However, this is not such a case in my view, and in these particular circumstances, I will not require the Psychiatrist to do this.

Issue D: Does section 24(2)(b) (confidential information of a commercial nature) apply to certain requested records or parts thereof?

Late raising of discretionary exemptions

[para 73] From a review of the Psychologist's letters to the Applicant, it does not appear that she had either section 24(2)(b), or any of the remaining discretionary provisions (under Issues E and F below) in mind when she responded to his request initially. One may surmise that at some point between when the letters were written and the submissions were provided, the Psychologist obtained legal advice, and this included advice that the requested information fell within exceptions in the Act other than the ones mentioned in the response letters.

[para 74] Before considering the substantive application of these remaining, discretionary, exceptions, I must consider whether to allow them to ground the Psychologist's refusal to disclose even though they were not raised until after the response letters were written, and possibly not until the submissions were provided to this Office.

[para 75] A number of orders relative to the FOIP Act have dealt with the matter of late raising of discretionary exceptions. In an early order that raises this question[29], the then-Commissioner adverted to the Ontario practice of refusing to allow such exceptions to be raised later than 30 days prior to an inquiry. However, he said that "A certain degree of tolerance is in order during the first year of applying the Act, but if the late raising of discretionary exemptions results in delays or works to the prejudice of other parties, a policy may have to be made". No such policy appears to have been laid down. In Order 2000-023, the former Commissioner refused to consider a discretionary exception first raised at the inquiry stage, and then developed in the *final* written submission, because to do so would prejudice the applicant by permitting the Public Body to put in a broad, after-the-fact justification for its original exercise of discretion.[30] Most recently, in Order F2007-007, Adjudicator Bell refused to give a Public Body the opportunity to raise a new discretionary exception at the inquiry stage in order to justify its earlier decision to withhold the records. (See paras 13 and 14.)

[para 76] This is only the second order that considers the discretionary exceptions under PIPA, and the first one dealt only with section 24(2)(a) – to which unique considerations

[29] Order 96-008.

[30] A more recent Order F2005-009, permits the late raising of a discretionary exception in a submission, on the basis that "there was no delay or prejudice to a party, and the public body had the burden of proof". (Order 2001-008 is offered as authority for this ruling, but that order does not appear to stand for the quoted proposition.) The Commissioner has recently allowed late raising of a discretionary exception under the FOIP Act where the exception that was raised late was grounded in the same policy considerations as other exceptions that were initially raised in the Public Body's response. (See Order F2004-006, at paras. 48 to 53.)

apply.[31] In reviewing the manner in which organizations are applying the Act, it is therefore appropriate, for the moment, to permit "a certain degree of tolerance", to allow organizations to learn about how the Act is to be applied. I will accordingly consider the discretionary exceptions that the Psychologist raised in her submission in this early case (including those under Issues E and F below). However, I remind organizations that the decision of an organization which is under review at an inquiry is the one that it made in responding to the Applicant's request, and that this Office may in future find it necessary to reject the application of exceptions that were not considered at an earlier stage.

Substantive application of section 24(2)(b)

[para 77] Section 24(2)(b) provides:

> *2) An organization may refuse to provide access to personal information under subsection (1) if …*
>
> *(b) the disclosure of the information would reveal confidential information that is of a commercial nature and it is not unreasonable to withhold that information;*

[para 78] I note first that some of the information in the bundle of tests is instructional or explanatory material that does not appear to be the personal information of the Applicant, and there is no obligation to provide those parts of the material.

[para 79] Further with regard to this material, I agree with the Psychologist's submission that information that compromises the validity and integrity of psychological testing materials falls within the exception in section 24(2)(b).

[para 80] Section 24(2)(b) is a discretionary provision. It permits the organization to refuse to provide access to information, but before the organization does so, it must properly exercise its discretion. In doing this, it must take into account relevant considerations, including the purpose of the Act. In earlier orders under the *Freedom of Information and Protection of Privacy Act*, the Commissioner said that public bodies, in exercising their discretion, should take into account not only the broad, general purposes of the Act, but they should also consider whether, under the particular circumstances of the case, the purpose of the particular exception to disclosure on which they rely will be served by withholding the requested information. In my view this applies equally to organizations in the exercise of their discretion to refuse to disclose personal information under the discretionary exceptions in PIPA. As well, an organization must not take into account irrelevant considerations.

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[31] In Order P2006-002, the Commissioner held that he would not review the exercise of discretion relative to the provision in the Act (section 24(2)(a)) that permits withholding of information protected by legal privilege. This was because section 4(5)(a) states that the Act is not to be applied so as to affect any legal privilege. The Commissioner held that an evaluation of the exercise of discretion in this circumstance could have the potential to affect the legal privilege claimed, and therefore, the wording of section 4(5)(a) precluded such a review.

[para 81] In regard to the considerations she took into account in relation to the testing materials, the Psychologist provided Practice Bulletin, January 2005, issued by the College of Alberta Psychologists, entitled "Protection and Disclosure of Psychological Test Data and Materials: Ethical and Legal Obligations of Psychologists". The Psychologist's submission states that she adopted the rationale in this document for withholding the testing materials at issue. This document refers to a concern about the negative impact that release of psychological test protocols has on the commercial utility of the testing instruments. I agree that this concern provides a sound basis for the exercise of discretion so as to refuse part of these materials.

[para 82] However, the materials at issue contain not only the questions in the tests and other interpretive material (that has a commercial value), but also the Applicant's answers, results and scores – his own test data, as well as interpretation of this data by another psychologist. Insofar as the answers, results and interpretations do not reveal the questions or other information that would compromise the future commercial value of the tests, it is not "confidential information that is of a commercial nature", and in my view section 24(2)(b) does not apply.[32] (Though some of the answers the Applicant gave to the questions in some of the tests include the personal information of others, for example, of his children, the Applicant provided this information, and giving it back to him would not reveal it. Therefore section 24(3)(b) does not preclude disclosure of this information either.)

[para 83] I note that part of the psychological testing material pertaining to the Applicant consists of results or scores that are meaningless in isolation from the test, at least to a person unfamiliar with the test. Previous orders have held that the Commissioner will not order the disclosure of meaningless material. It seems unlikely the Applicant himself could interpret these results. However, a trained professional could possibly help him do so. Thus in my view even these 'meaningless' parts of the results and scores that could not, by their release, compromise the commercial value of the testing materials, cannot be withheld from the Applicant on the basis of section 24(3)(b).

[para 84] I conclude that to the extent the answers, scores, results and interpretations do not have the harmful effects mentioned above, these results cannot be withheld on the basis of section 24(2)(b). I will give further instructions as to how this material is to be treated in the "Order" section below.

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[32] A similar conclusion was reached with respect to the FOIP Act section 26, which permits withholding of testing or auditing procedures or techniques, details of specific tests to be given or audits to be conducted, or standardized tests used by a public body, if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits. See Order F2004-015. I note as well that the *Health Information Act* section 11(1)(e) permits a custodian under that Act to refuse to disclose standard diagnostic tests or assessments, including intelligence tests, if their disclosure could prejudice the use or results of such materials. Again, whether an individual's raw scores from the administration of such tests to them should be disclosed would depend on whether the disclosure would have such a prejudicial effect.

Issue E: Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to certain requested records or parts thereof?

[para 85] Section 24(2)(c) provides:

> *24(2) An organization may refuse to provide access to personal information under subsection (1) if*
>
> > *(c) the information was collected for an investigation or legal proceeding*[33]*; . . .*

[para 86] All the information at issue in this case was collected by the Psychologist for the purpose of preparing a custody assessment report, and it appears this report was to be provided to the court to help it determine the custody of the children of the Applicant and his former spouse. The evidence of the Psychologist is that the Initial Custody report, dated March 1, 1999, was filed as evidence in a Court of Queen's Bench Action, and it was made "Exhibit B" in an affidavit sworn by the Applicant (on March 28, 2000) and filed in the court action. The custody proceeding that was pending at the time the information was collected was a legal proceeding. As well, in my view, the preparation of the assessment reports constitutes an "investigation".

[para 87] Thus I conclude that all the information – including the personal information of the Applicant - was collected for an investigation or legal proceeding.

[para 88] However, the Psychologist provides no indication of the basis upon which she exercised her discretion to refuse to disclose the personal information of the Applicant under this heading. The paragraph in the submission that raises this provision goes no further than to demonstrate that the custody assessment was performed in the context of a legal proceeding. There is no explanation as to why in this circumstance, refusing the information that was collected for the investigation or legal proceeding would promote the goals of the Act or of the particular exception being relied upon.[34] Neither are any

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[33] Under the Act, "legal proceeding" includes a civil, criminal or administrative proceeding that is related to a remedy available at law. "Investigation" includes an investigation related to circumstances or conduct that may result in a remedy or relief being available at law.

[34] An example of a situation in which withholding information would achieve the policy goals of this heading is where an investigation was under way and providing an applicant's own personal information to him could compromise its effectiveness. This might happen where the investigation was into some wrong-doing on the part of the Applicant and providing the information could help him conceal evidence of the wrongdoing, or where providing to the Applicant some of the statements others were making about him relative to the matter being investigated would dissuade others who remain to be interviewed from providing information. In this regard, I note the parallel provision in British Columbia does not apply after an investigation or legal proceeding has been concluded, so that disclosure of information that was collected for such purposes, but can no longer harm the investigation or proceeding, cannot be withheld on the basis of this provision. The Alberta provision does not contain this restriction. However, in my view, there is still an implicit restriction that before information is withheld, it must be clear that disclosing the information would or likely would have some consequence that is contrary to the policy goals of the provision permitting withholding of information collected for an investigation or legal proceeding.

other considerations mentioned. I cannot, therefore, decide that this discretion was properly exercised or that the provision was properly applied.

[para 89] I have already decided that most of the information at issue was properly withheld either on the basis of mandatory exceptions, a discretionary exception (section 24(2)(b)), or the 'reasonableness' limitation on the duty to give access under section 24. The only information at issue for which this is not true is:

- some parts of the "correspondence" folder that is the Applicant's personal information[35];
- the part of the Applicant's answers and results (and the interpretation of these) in psychological tests (Tabs 6 and 7 of "Package C"), that cannot be withheld under section 24(2)(b) (as discussed in the foregoing section);
- the body of the letter dated July 23, 2001 provided to the Psychologist by the Department of Justice (from "Package B");
- some personal information of the Applicant in "Package C" (Tabs 2 to 4);
- some personal information of the Applicant in Folder 3 (Tab 1).

As with all the information, this information was created or collected for the investigation or legal proceeding then pending, and therefore all of it falls under section 24(2)(c). For the most part, no rationale for withholding this particular information by reference to this heading, but potentially such rationales exist.[36] I will therefore direct the Psychologist to re-exercise her discretion under section 24(2)(c) with respect to these items of information. If she chooses to withhold this information, she must do so in light of all the relevant circumstances, including the purpose of the provision.

Issue F: Did the Organization properly apply section 24(2)(d) (will result in information no longer being provided) to certain requested records or parts thereof?

[para 90] Section 24(2)(d) provides:

> *(2) An organization may refuse to provide access to personal information under subsection (1) if …*
>
> > *(d) the disclosure of the information might result in that type of information no longer being provided to the organization when it is reasonable that that type of information would be provided; … .*

[35] The portions of this folder that consist of or contain the Applicant's personal information and are not withholdable on the basis of other exceptions were listed at para 46.

[36] A possible rationale comes to mind with respect to the opinions of the second psychologist about the Applicant – the professional interpretation of his test data. A statement on the cover of the tests says the results are not to be shared with subjects and are to be used only by professionals (possibly because it is not seen as in the best interests of some subjects to disclose it). There could conceivably be a reluctance by professionals to provide interpretations of such tests if there is a chance this information might have to be disclosed. This might interfere with the ability of the court, in a case such as the present one, to obtain the information necessary to reach a proper decision about custody, and thus refusal to disclose might achieve one of the policy goals of this provision.

[para 91] Under this heading, the Psychologist provided both an argument as to why the information at issue, or some of it, fell within this exception, and as to why it was important to withhold information in this case having regard to the purposes of this exception. She argued that disclosure of the information would impact the likelihood that such information would be provided in a frank and forthright manner.

[para 92] This provision potentially applies where one person gives information about another, but it does not necessarily apply in every such case. Whether the result described in 24(2)(d) is likely to ensue in any given situation requires an examination of the circumstances.

[para 93] I accept that disclosure might have the result described in section 24(2)(d) for much of the information at issue in this case – information about the Applicant provided by identifiable private individuals who might not, if asked, want the contents of their statements or their identities to be revealed. It is important, in order to provide services such as custody assessments, that psychologists be able to provide an assurance of confidentiality to those voluntarily providing information about others, as otherwise these volunteers might become reluctant to provide the necessary information. I do not need to decide specifically to which portions of this information the provision applies in this case, because I have already held that all this information is properly withholdable under section 24(3)(b).

[para 94] With respect to the information that was provided by professionals (and has not already been dealt with), the provision applies to a psychologist's interpretations of particular test data referred to above at para 68 (from "Package C"). A concern about the effect of disclosure on the mental well-being of test subjects could impact the willingness of psychologists to provide this kind of information for the purpose of custody assessments. However, I see no parallel concern relative to the letter from the Department of Justice contained in "Package B".

[para 95] As well, I do not see that this provision has application to the parts of the Applicant's personal information in the records that was not provided by others - for example, to the information provided by the Applicant himself or through his lawyer, nor to information about him in documents that were already provided to him. Section 24(2)(d) also has no application to correspondence that mentions the Applicant only in passing, nor to other items of information about him that were not created by any identifiable person.

V. ORDER

[para 96] I make this Order under section 52 of the Act.

[para 97] I find that much of the withheld information requested by the Applicant is not his personal information and there is no obligation on the Organization (the Psychologist) to provide it. This consists of:

- the following parts of File Folder 2 (the "correspondence" folder): the marked parts of 4; 5; 6; the marked part of 8; 9; 10; 11; 14; 20; the marked parts of 22; 23; 24; parts of 27; the marked parts of 28; 29; 30; the marked part of 31; parts of 32 and 33; 34 to 37, the marked parts of 38, 39 and 40; 41 to 45, the marked parts of 46; 47; 48; 51; 52; 54 to 60; the marked part of 61; 62 to 65; the marked parts of 66; parts of 69; the marked parts of 70; 71; 72; the marked parts of 73; 74; the parts of 75 to 79 that are the information of the persons who created the records, and in one of these cases, of their associates; the parts of 80 to 94 that record telephone messages from persons other than the Applicant or his lawyer, and all but one of the handwritten notes of which the authors are unknown [the exception is on 84];
- the parts of File Folders 3 to 8 that do not refer to the Applicant;
- the parts of File Folder 9 that contain reference material pertaining to the former spouse and children (the reference material for the Applicant that had been contained in that folder appears to constitute part of "Package B" and much of "Package C"); and the parts of audiotapes nos. 5 and 6 that do not refer to the Applicant.

The Psychologist is not obliged to disclose any of this information, though she may disclose some of it, at her option, as discussed at para 44.

[para 98] With respect to the parts of the requested information that was the Applicant's personal information, I find section 24(3)(b) applies to most of this information because disclosing it would reveal the personal information of others [the exceptions will be dealt with specifically, below]. Accordingly, most of the Applicant's personal information in the materials must be withheld on this basis. This includes:

- from "Package B", the second and third of three items listed at page 3 of the Initial Report;
- all of the information about the Applicant provided by private individuals in "Package C", with the exception of that in Tabs 2 to 5 and of the material pertaining to psychological testing of the Applicant (which is dealt with separately below);
- pages 15, 27, 32, 33, 38, 66, 69, and the note about the Applicant on page 84, of Folder 2 (the "correspondence" folder);
- all of the information about the Applicant provided by private individuals in File Folders 3 to 5 (except Tab 1 of Folder 3), in File Folders 6 to 8, in the parts of File Folder 9 that contain reference material pertaining to the former spouse and children, in File Folder 10 (transcripts of audiotapes), and in audiotapes no. 5 and the part of audiotape 6 that was provided by the Applicant's former spouse.[37]

[37] As discussed earlier, minor items of the Applicant's personal information provided by *un*identifiable private individuals are interspersed throughout the parts of these records that are to be withheld. Although disclosure would not reveal the personal information of these people, for most of these items of information, it would not be reasonable to require the Psychologist to review the records to identify them and provide them to the Applicant. Therefore, they may also be withheld.

With respect to audiotape 6, although part of this tape was, according to the Psychologist's submission, personal information of the Applicant provided by him, a copy of that part has, according to the Psychologist's uncontradicted submission (which I accept) already been provided to him, and thus I regard this part of his access request as having been fulfilled.

[para 99] I find the Organization properly applied section 24(2)(d) (will result in information no longer being provided) to the parts of the records consisting of information provided about the Applicant by other identifiable private individuals whose identity could not be removed. (All this information must also be withheld on a mandatory basis under section 24(3)(b), and thus is included in the list in para 98 above.)

[para 100] With respect to the psychological testing materials, parts of these testing materials are not the personal information of the Applicant, and do not need to be provided for this reason. As well, I find the Organization properly applied section 24(2)(b) (confidential information of a commercial nature) to the portions of the testing materials administered to the Applicant that reveal the questions, or other information the disclosure of which would compromise the commercial value of the tests. The interpretations of the test results by another psychologist (Tabs 6 and 7 of "Package C") were also properly withheld under section 24(2)(d), (and potentially, could also properly be withheld under section 24(2)(c).

[para 101] Five items or categories of responsive information are outstanding. These are:

- those parts of the Applicant's answers, scores and results for the psychological tests that could not compromise the utility of the tests (and to which section 24(2)(d) does not apply);
- some of the Applicant's personal information contained in the "correspondence" folder (as itemized at para 46);
- the body of a letter referred to in paragraph 8 of the Psychologist's initial submission as "the July 23, 2001 letter from Alberta Justice";
- Tab 1 in Folder 3; and
- Tabs 2 to 5 in "Package C" (except the marked part of Tab 4, which is not information about the Applicant, but which may be provided at the Psychologist's option as it appears the Applicant himself provided this information).

[para 102] All these outstanding items of information fall within section 24(2)(c) (information collected for an investigation or legal proceeding). Thus they could potentially be withheld under this section if the discretion to withhold them were exercised properly. However, as I have said in the body of this order, I have insufficient information to decide if the Psychologist's exercise of discretion under section 24(2)(c) was proper. I therefore direct the Psychologist to re-exercise her discretion under this provision, relative to these materials, on the basis of the proper considerations. This includes a consideration of the purpose of the Act generally as well as of this particular provision, and whether withholding these outstanding classes of materials would further these purposes. If she decides to continue to withhold the materials, I further direct her to provide me, within 50 days, a statement of the basis for her exercise of discretion, and I retain jurisdiction to decide if it was proper.

[para 103] If the Psychologist decides, instead, that she does not wish to withhold the outstanding materials or some of them by reference to section 24(2)(c), further steps will have to be taken, as set out below.

[para 104] For the psychological testing materials, it will be necessary to determine which parts of these materials are to be withheld on the basis their disclosure would compromise the future commercial value of the tests, and which should be disclosed because they do not have this effect. As discussed earlier, I am not persuaded that the Applicant's answers and scores that do not reveal the questions would have such an effect. However, I do not have the expertise to decide which portions of the Applicant's test data would reveal the questions. Therefore, should it become necessary, I will order the Psychologist to undertake this exercise, and to indicate to me how she proposes to deal with the records. Should she wish to withhold any of the answers and scores, she should indicate which, and how their disclosure would reveal the questions and thereby compromise the commercial value of the testing material. I will, further, reserve my jurisdiction in this matter to review how this has been done, and to make a further order, if necessary, as to how the records are to be treated. As well, unless she has already done so, I will direct the Psychologist to first provide the Applicant with a fee estimate. It will be necessary for her to undertake the exercise just described only if the Applicant indicates a willingness to pay this fee. (I also reserve jurisdiction to determine if the fee estimate is reasonable.) If the Applicant is willing to pay the fee, I will order the Psychologist to complete this task within 50 days from the date she advises me of her intention not to continue to withhold these records under section 24(2)(c).

[para 105] For the "correspondence" folder, the portions that would be disclosable (if the Psychologist were to re-exercise her discretion under section 24(2)(c) so as to disclose the responsive parts of this file) were those itemized at para 46 above.

[para 106] Again depending on the way the Psychologist exercises her discretion under 24(2)(c), Tabs 2 and 5 in "Package C" and Tab 1 in Folder 3 should, if they are disclosed, be disclosed in their entirety. The signature may optionally be deleted from Tab 3, as can the (marked) parts of Tab 4 that are not the Applicant's personal information. With regard to the letter from Alberta Justice, the Psychologist may, at her option, delete the name of the person who signed it.

[para 107] I reserve my jurisdiction to deal with a document (a report by a medical doctor, discussed at para 66) that was referred to by the Psychologist in her submission, but that I did not locate among the materials that were provided to me. If it exists but the Psychologist persists in her view that she should not disclose it, she is to submit it to me so that I may make a decision about it.

Christina Gauk, Ph.D.
Director of Adjudication

Appendix: Table of Contents

Issue D: Does section 24(2)(b) (confidential information of a commercial nature) apply to certain requested records or parts thereof?

Late raising of discretionary exemptions
Substantive application of section 24(2)(b)

Issue E: Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to certain requested records or parts thereof?

Issue F: Did the Organization properly apply section 24(2)(d) (will result in information no longer being provided) to certain requested records or parts thereof?

V. ORDER