ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-20

April 6, 2022

ENERGY

Case File Number 023863

Office URL: www.oipc.ab.ca

Summary: On July 3, 2020 the Applicants (a group of individuals and ranches) made a request for records from Alberta Energy (the Public Body). The Request was for the following:

> Alberta Energy's records that discuss the rescission or change of the coal policy (1976 Coal Policy) or exceptions to the coal policy, including: any briefing materials (briefing notes, internal memos, reviews, reports), and correspondence (emails, letters). To be clear, we are also requesting third party records;
>
> Time period: January 1, 2020 to June 1, 2020

The Public Body extended the time for responding to the access request on three occasions. On the third occasion, it requested the Commissioner's permission to extend the time for responding until October 14, 2021 on the basis that it would have to process 6539 records and would need to consult with third parties. The Commissioner gave the Public Body permission to extend the time for responding.

On October 13, 2021, the Public Body submitted another request for permission to extend the time for responding to the Commissioner. The Commissioner decided not to permit a further extension.

The Applicant elected to seek judicial review of the Commissioner's decision to grant the Public Body permission to extend the time for responding. The Court found the Commissioner's decision to permit the Public Body to extend reasonable and denied judicial review.

The Public Body provided an initial response of 30 records to the Applicant. It severed information from them under sections 21, 22, 24, and 25. It also withheld information from these records on the basis that it was nonresponsive.

The Applicant requested review by the Commissioner of the Public Body's severing decisions and its failure to respond in relation to the remaining records.

The Adjudicator ordered the head of the Public Body to respond to the Applicant. The Adjudicator found that the information the Public Body had withheld from the Applicant as nonresponsive, was responsive. The Adjudicator found that none of the exceptions to disclosure on which the Public Body had relied to withhold information applied. The Adjudicator ordered the Public Body to give the Applicant access to the information it had severed from the records.

In its submissions for the inquiry, the Public Body indicated that there were 2100 remaining records to process, a third of the figure it provided to the Commissioner when it requested permission to extend the time for responding. The Adjudicator ordered the Public Body to provide an affidavit to the Applicant and the Commissioner explaining the discrepancy if its complete response ultimately contained fewer records than 6539.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25, ss. 6, 10, 11, 14, 16, 17, 21, 22, 24, 25, 30, 72

Authorities Cited: AB: Orders 96-006, 96-022, 97-020, 2001-016, F2007-029; F2008-028, F2014-35, F2015-29, F2018-10, F2020-08

Cases Cited: *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 SCR 561; *Blades v Alberta (Information and Privacy Commissioner)*, 2021 ABQB 725 (CanLII)); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII); *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23; *Park Place Seniors Living Inc v Alberta Health Services,* 2017 ABQB 575 (CanLII)

1. BACKGROUND

[para 1] On July 3, 2020 the Applicants made a request for records from Alberta Energy (the Public Body). The Request was for the following:

> Alberta Energy's records that discuss the rescission or change of the coal policy (1976 Coal Policy) or exceptions to the coal policy, including: any briefing materials (briefing notes, internal memos, reviews, reports), and correspondence (emails, letters). To be clear, we are also requesting third party records;
>
> Time period: January 1, 2020 to June 1, 2020

[para 2] The Public Body extended the time for responding to the access request on three occasions. On the third occasion, it requested the Commissioner's permission to extend the time for responding until October 14, 2021.

[para 3] The Applicant elected to seek judicial review of the Commissioner's decision to grant the Public Body permission to extend the time for responding. The Court found the Commissioner's decision to permit the extension to be reasonable and denied judicial review for that reason.

[para 4] On October 13, 2021, the Public Body submitted another request for permission to extend the time for responding to the Commissioner. The Commissioner decided not to permit a further extension.

[para 5] The Public Body provided an initial response of 30 records to the Applicant. It severed information from the records in the response under sections 21, 22, 24, and 25. It also withheld information from these records on the basis that it was nonresponsive.

[para 6] The Applicant requested review by the Commissioner of the Public Body's severing decisions and its failure to provide the remaining records.

[para 7] The Commissioner agreed to conduct an inquiry and delegated her authority to conduct it to me.

[para 8] In its rebuttal submissions, the Public Body indicated that it had provided a second release of records: It stated:

> The Public Body relies largely on its initial submission and respectfully requests time to process the remaining 2100+ pages due to the large volume, complex subject matter requiring multiple public body consultations and third party notifications, and challenging nature of ensuring a consistent severing approach as there are eight other currently active requests regarding this same subject matter.

[para 9] The Applicant replied to this statement, stating:

> I wish to bring to the attention of the Office of the Information and Privacy Commissioner that the public body has significantly reduced its records from 6,539 to 2,100. Alberta Energy repeatedly emphasized that the amount of records responding to my clients' request was 6,539. This is the first such time the public body has reduced that number, by less than 1/3 of the original estimate.

II. ISSUES

ISSUE A: Did the Public Body meet its duty to the Applicant as provided by section 11 of the Act (time limit for responding)?

ISSUE B: Did the Public Body properly apply 21(1)(a) of the Act (disclosure harmful to intergovernmental relations?

ISSUE C: Did the Public Body properly apply section 22 (cabinet and treasury board confidences)?

ISSUE D: Did the Public Body properly apply section 24 (advice from officials)?

ISSUE E: Did the Public Body properly apply section 25 (disclosure harmful to economic and other interests of a public body)?

ISSUE F: Did the Public Body properly withhold information as nonresponsive?

III. DISCUSSION OF ISSUES

ISSUE A: Did the Public Body meet its duty to the Applicant as provided by section 11 of the Act (time limit for responding)?

[para 10] Section 11(1) of the Act establishes the time frame for responding to an access request. It states:

> *11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless*
>
> *(a) that time limit is extended under section 14, or*
>
> *(b) the request has been transferred under section 15 to another public body.*
>
> *(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.*

[para 11] Section 14 of the FOIP Act authorizes a public body to respond to an access request within a time frame greater than 30 days in specific circumstances. It states:

> *14(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if*
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> *(a) the applicant does not give enough detail to enable the public body to identify a requested record,*
>
> *(b) a large number of records are requested or must be searched and responding within the period set out in section 11 would unreasonably interfere with the operations of the public body,*

> *(c) more time is needed to consult with a third party or another public body before deciding whether to grant access to a record, or*
>
> *(d) a third party asks for a review under section 65(2) or 77(3).*
>
> *(2) The head of a public body may, with the Commissioner's permission, extend the time for responding to a request if multiple concurrent requests have been made by the same applicant or multiple concurrent requests have been made by 2 or more applicants who work for the same organization or who work in association with each other.*
>
> *(3) Despite subsection (1), where the head of a public body is considering giving access to a record to which section 30 applies, the head of the public body may extend the time for responding to the request for the period of time necessary to enable the head to comply with the requirements of section 31.*
>
> *(4) If the time for responding to a request is extended under subsection (1), (2) or (3), the head of the public body must tell the applicant*
>
> *a) the reason for the extension,*
>
> *b) when a response can be expected, and*
>
> *that the applicant may make a complaint to the Commissioner or to an adjudicator, as the case may be, about the extension*

[para 12] The FOIP Act requires a public body to respond to an applicant within 30 days of receiving an access request, unless the public body extends the time for responding under section 14. Section 14 sets out an exhaustive list of reasons for which a public body may extend the time for responding to an access request. If a public body decides to extend the time for a period longer than 30 days, the public body must first obtain the Commissioner's permission. Once it receives the Commissioner's permission, the public body may then extend. However, it must inform the complainant when it will respond and that the applicant may make a complaint to the Commissioner regarding the extension. At the conclusion of an inquiry regarding the extension, in which both the requestor and the public body provide submissions and evidence, the Commissioner may reduce the extension taken by the Public Body under section 72(3)(b). In this way, the FOIP Act may be viewed as creating an "alternative remedy" to judicial review, within the terms of *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 SCR 561.

[para 13] In its letter extending the time for responding to the access request, the Public Body stated:

> In the letter dated December 9, 2020, we advised you that the response due date for your request was extended to January 18, 2021. An additional extension of 270 days has been granted by the Information and Privacy Commissioner under section 14(1)(b) of the FOIP Act [large volume of records].

> We will make every reasonable effort to respond to your request by October 14, 2021. You may ask for a review under Part 5 of the FOIP Act by the Information and Privacy Commissioner (Commissioner). To request a review, you must submit a completed Request for Review form within 60 days from the date of this letter to the Commissioner at Suite 410, 9925 – 109 Street, Edmonton, Alberta, T5K 2J8. The form is available under 'Resources' on the Commissioner's website, www.oipc.ab.ca, or you can call 1-888-878-4044 to request a copy.

[para 14] I note that the Public Body advised the Applicant generally that it could request review by the Commissioner under Part 5 of the Act in the letter extending the response deadline until October 14, 2021; however, the Act requires a public body to inform an applicant that the applicant *may make a complaint about the extension* the public body has decided to take. In my view, section 14(4) requires the applicant to be told expressly about the right to make a complaint about a public body's decision to extend. As noted above, an inquiry into a complaint about an extension will take into account the requestor's position regarding the extension. It will also require a public body to submit evidence to support the length of the extension. In this way, the legislation may be seen to alleviate the unfairness to an applicant that may result from a public body receiving permission to extend the time for responding unilaterally.

[para 15] The wording chosen by the Public Body in its letter does not necessarily meet the requirements of section 14(4). For the purpose of deciding the issue of whether the Public Body complied with section 11, this point is moot, as the Public Body has acknowledged that it did not respond to the applicant within the time it allotted for responding. However, I draw to the Public Body's attention that the current wording of its extension letter may not adequately track the language of section 14(4), as its current wording does not inform applicants about the right to make a complaint about the Public Body's decision to extend.

[para 16] The Public Body's extension for completing its response expired on October 14, 2021. The Public Body did not respond to the Applicant completely and the Applicant continued to wait to receive the records. In its rebuttal submissions, the Public Body indicated that there were only 2100 records that it had not yet provided. In contrast, in its initial submission, it stated:

> On December 9, 2020, the Public Body took a further extension under section 14(1)(b) due to the 6000+ records located in response to the Applicant's request; the new deadline was set to January 18, 2021.

[para 17] The Public Body closed its initial submissions, stating:

> The Public Body wishes to inform the OIPC it is taking steps to address the remaining releases on this file which includes prioritizing this file and having the assigned Senior FOIP Advisor work almost exclusively on this file wherever possible. The Public Body respectfully requests time to process the remaining 2700+ pages due to the large volume, complex subject matter requiring multiple public body consultations and third party notifications, and challenging nature of ensuring a consistent severing approach as there are eight other currently active requests regarding this same subject matter. [My emphasis]

> The Public Body expects an Order directing a completed response to this request by a specific date. The Public Body respectfully requests that the above information be taken into consideration when selecting that date.

[para 18] The Public Body's initial submissions indicate that the Public Body located over 6000 responsive records. Moreover, the Public Body informed the Commissioner that there were 6539 records when it obtained permission to extend the time for responding to establish that the terms of section 14(1)(b) were met. In its application for permission to extend, it stated:

> There were 6539 pages of records retrieved in response to the request, constituting a large volume of records to be processed prior to access being given. [My emphasis] A quick review of the records identified at least five third parties to be contacted to provide representations on their business information.

The foregoing statement in support of the Public Body's permission application suggests that the Public Body had located 6539 pages of records and that the person who completed the application had reviewed them and determined it was necessary to consult third parties. It is unknown whether the Public Body would have received permission to extend the time for responding, had it informed the Commissioner that it would process less than 2200 pages as it indicates in its reply submissions, rather than 6539 pages of records. It is also unknown whether the Commissioner would have confirmed the length of the extension the Public Body decided to take, had the extension been the subject of an inquiry.

[para 19] As discussed above, the Applicant sought judicial review of the Commissioner's decision to extend (*Blades v Alberta (Information and Privacy Commissioner)*, 2021 ABQB 725 (CanLII)). I note that the Public Body participated in the judicial review application. The Court summarized the Public Body's submissions to the Court, as follows:

> Alberta Energy responds that the factors under s. 14 are exhaustive and provide a complete code in terms of the reasons that may be considered by the Commissioner to grant an extension. The Commissioner has no authority to consider other factors in making such a decision. Further, her interpretation of s. 14, which favours expediency at this stage of the process, should be afforded deference given the Commissioner's expertise and familiarity with the administrative context.
>
> Alberta Energy submits that the reasons for the Decision demonstrate that after being satisfied that the enumerated grounds for an extension had been proven by Alberta Energy, only then was an extension granted. Alberta Energy notes that its request for a lengthier extension was denied by the Commissioner which further supports the reasonableness of the Decision. [my emphasis]

[para 20] The Court noted the following in concluding that the Commissioner's decision was reasonable:

> Alberta Energy also submitted that at least five third party businesses and four public bodies needed to be consulted, with respect to their records in the possession of Alberta Energy. The Commissioner found that additional time was required to prepare consultation packages and third party notice packages, given the number of records involved in the consultations, and the number of consultations, and the nature and complexity of the consultations. [My emphasis] In short, time

> needed for third party consultations was another statutory factor which was considered by the Commissioner and which provides support for the reasonableness of the Decision.
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> […]
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> The Commissioner was attuned to the purposes of the *Act* and the importance of timely disclosure to applicants, as demonstrated when the Commissioner denied the 612 day extension requested by Alberta Energy. The Commissioner referred to the threshold of 500 records as a bench mark when determining whether the number of records in this case, being 6539, constituted a large number of records. The Commissioner acknowledged the average extension time it usually granted, consistent with that amount of records. The Commissioner also considered additional time that was needed to issue third party notices and complete possible public body consultations. The Commissioner, in granting the extension, properly relied upon only those enumerated factors that could be considered under s. 14. [My emphasis]
>
> I acknowledge that the Commissioner encouraged, though did not require, Alberta Energy to prepare a schedule and disclose the records in tranches. Any requirement that Alberta Energy must respond in tranches to the request could likely only be made after the Commissioner spent additional time and resources more closely examining the over 6500 pages of records. The Commissioner was entitled, as a matter of proportionality, to refuse to expend more time and energy reviewing the records to see whether it was appropriate to require Alberta Energy to respond to the request in stages. I do not find that the encouragement of the Commissioner that Alberta Energy disclose in a particular way makes the Decision unreasonable.

[para 21] The Public Body informed the Court that it had "proven" to the Commissioner that it had required time to process 6539 records. This would suggest that it provided evidence to the Commissioner of the existence of section 6539 records. However, in its submissions for the inquiry, it has referred to "6000+" records, "2700+" records and most recently, "2100" remaining records, which combined with the 80 pages or records it has now released, would mean that the Public Body located 2180 pages of responsive records.

[para 22] The Public Body did not explain why its various submissions refer to very different numbers of records. Possibly, the 6539 figure represented an overestimate of the number of records it would have to process to respond to the access request. Another possibility is that the Public Body determined that two thirds of the records were nonresponsive. In either scenario, the Public Body should have contacted the Applicant to inform it of the change in the number of records. Past orders of this office have held that the duty to assist under section 10 requires a public body to communicate in a timely fashion what is being done to process an access request. Orders 96-022, 2001-016, F2007-029 make this point. Finding fewer records than expected or reducing the number of responsive records are both instances of steps taken to process a request that should be communicated to the Applicant in a timely manner in order to meet the duty under section 10 to respond openly, accurately, and completely.

[para 23] As noted above, the Public Body asked that I consider that it requires time to carry out consultations with public bodies and third parties when I issue the Order. I note that the Public Body received permission to extend the time for responding to the access request in part so that it could carry out consultations. There is no evidence before

me that it has actually carried out any consultations, as its submissions do not refer to having done so.

[para 24] The FOIP Act does not create a duty to "consult" third parties or public bodies. A public body *may* consult if it first extends the time for responding in compliance with section 14. However, if a public body chooses to consult outside the time for responding under section 11 without first receiving the Commissioner's permission to extend the time in order to consult, the public body will be in contravention of section 11. There is no authority for a public body to extend the time for responding except in accordance with section 14.

[para 25] Section 30 of the FOIP Act requires a public body to give notice to a third party only if the head of a public body is considering giving access to information that is potentially subject to sections 16 or 17. Section 30 does not authorize or require "consultation" with third parties in the sense of having a back and forth dialogue; only that third parties be given notice and informed of the public body's decision regarding section 16 or 17. Further, if a public body has decided that the information in question will not be disclosed, or, alternatively, that no argument can be made to support withholding the information, the public body may dispense with notice. (See Order F2020-08). I am unable to say, on the evidence before me, that there would be any need for the Public Body to send out notices.

[para 26] The FOIP Act does not authorize or require the Public Body to consult with third parties or public bodies now that it has exceeded the time for responding. I will expressly require it to complete its response to the Applicant within 50 days of receiving the order. Any consultation it engages in must be completed within that 50-day period.

[para 27] Finally, I note that the Public Body states:

> Within their rebuttal submission, the Applicant argues that the Public Body has provided "absolutely no evidence [t]hat it is having difficulty in meeting its disclosure obligations or [t]hat it was unable to meet its obligation under the statutory timelines." However, the difficulties and challenges in processing FOIP requests within the legislated timeframes across the Government of Alberta (GOA) have already been well documented, most notably within the recent OIPC Annual Report. For example, the OIPC Commissioner notes "Despite the valiant and dedicated efforts of FOIP staff, it appears impossible to keep up with demands given system design and resourcing."
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> Detailed evidence regarding the difficulties the Public Body encountered during the processing of this file was disclosed to the OIPC when applying for both time extensions. Furthermore, the Applicant was aware of some of the reasons contributing to the delays in the processing of this file as they have a copy of the Public Body's first Request for Time Extension from the OIPC, as seen by the documents they attached in their DropBox of their initial submission. As noted in its initial submission, the Public Body continues to make this request a priority and is actively processing this request when it is not responding to this Inquiry. The 2nd release was provided to the Applicant on March 4, 2022. The Public Body expects to be able to respond to the Applicant with the 3rd release in the near future.

[para 28] In Order F2018-10, I rejected the argument that a FOIP Office's lack of experienced staff supported giving a public body more time to respond to an access request than permitted by the FOIP Act. I noted:

> Despite the Public Body's consultation process, it appears from the FOIP Coordinator's affidavit that the Public Body's consultation processes are not the primary cause of the failure to respond to the Applicant's access request. The Public Body attributes the failure to the lack of staffing and the high volume of records involved in access requests that have been made to it. It notes that "re-prioritizing" the access request that is the subject of this inquiry has led it, or will lead it, to take longer to process access requests it received before this one.
>
> I am unable to accept the Public Body's arguments regarding the delay in responding to the access request or to accept its suggestion that it respond by August 2018 to ensure that it responds to prior access requests in a timely manner. Section 11 imposes a duty on the *head* of a public body to make reasonable efforts to respond to an access request. As the head is the Minister of Health, it would be impractical for her to process access requests personally. For this reason, section 85 of the FOIP Act permits the head to delegate her duties, powers or functions under the FOIP Act to any person. However, if the head does not delegate her duty, the duty remains with her. Moreover, if the duty is not met by the delegate, the Minister will not have complied with the duty imposed by the FOIP Act.
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> The Public Body's arguments and proposed response time appear to rely on the notion that it is the FOIP branch of the Public Body that has the duty to respond to the Applicant, rather than the head. If that were the case, then the arguments regarding staffing levels and the complexity of records […] would be more persuasive. However, as noted above, it is the *head* of the Public Body who has the duty to make reasonable efforts to respond to the Applicant. She may meet this duty by delegating her duties to "any person" and is not limited to delegating the duty to an employee of a FOIP office. If the FOIP office is unable to meet the head's duties under section 11, then the head will fail in her duty under section 11 if she delegates the duty to an employee of the FOIP Office without ensuring the duty can be met. In contrast, if the FOIP office is sufficiently staffed with persons having adequate authority and knowledge to make timely access decisions, then the head will be more likely to meet her duty under section 11 by delegating the duty to an employee of the office.
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> The foregoing analysis holds true for the other access requests, for which the Public Body indicates the head may not meet, or has not met, her duty under section 11 to respond to applicants if she were to "reprioritize" the access request before me.
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> The Public Body indicates that its FOIP Coordinator and three recently hired FOIP advisors must review 130,000 records in order to process the access requests currently before them. I agree with the Public Body that it would not be reasonable to expect the Public Body's FOIP office, with its current staffing and experience levels, to process that number of records within the timeframe imposed by sections 11 or 74(1) of the FOIP Act. However, that it would be unreasonable to expect the FOIP office to be able to respond to the Applicant's access request means only that it may be unreasonable for the head of the Public Body to delegate the duties imposed by section 11 and 74(1) to the FOIP office. If delegating the duty to the FOIP office is not likely to bring about compliance with section 11 of the FOIP Act, than it would be unreasonable for the head of the Public Body to delegate this duty to the FOIP office.

[para 29] In the foregoing order, I found that the duty to respond to an applicant belongs to the head of the Public Body. If the head delegates the head's responsibilities under the FOIP Act to a unit that is unable to carry out these responsibilities due to insufficient staffing or inefficient organization, then the head will fail to meet the head's statutory obligations. The Commissioner made a similar point, when she said: "Despite

the valiant and dedicated efforts of FOIP staff, it appears impossible to keep up with demands given system design and resourcing." In the foregoing statement, the Commissioner attributed delays in responding to the manner in which FOIP Units are designed and staffed as opposed to the efforts of employees of those Units.

[para 30] While the Public Body has requested more time to respond to the Applicant, the FOIP Act does not contemplate my issuing such an order. Rather, I must order the head of the Public Body to meet her duty to respond to the Applicant as required by section 11, as she has not yet done so.

[para 31] In addition, if the Public Body ultimately includes less than 6539 pages of records in response to the access request, I require it to provide an affidavit to the Applicant and this office that explains the discrepancies between the number of records it cited in its request for permission to extend and the number it ultimately included in its response.

ISSUE B: Did the Public Body properly apply 21(1)(a) of the Act (disclosure harmful to intergovernmental relations?

[para 32] Section 21 authorizes a public body to withhold information that could reasonably be expected to harm the governmental relations of the Government of Alberta if it is disclosed. This provision states:

> *21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> > *(a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:*
> >
> > > *(i) the Government of Canada or a province or territory of Canada,*
> > >
> > > *(ii) a local government body,*
> > >
> > > *(iii) an aboriginal organization that exercises government functions, including*
> > >
> > > > *(A) the council of a band as defined in the Indian Act (Canada), and*
> > > >
> > > > *(B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada,*
> > >
> > > *(iv) the government of a foreign state, or*
> > >
> > > *(v) an international organization of states,*

or

(b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.

(2) The head of a public body may disclose information referred to in subsection (1)(a) only with the consent of the Minister in consultation with the Executive Council.

(3) The head of a public body may disclose information referred to in subsection (1)(b) only with the consent of the government, local government body or organization that supplies the information, or its agency.

(4) This section does not apply to information that has been in existence in a record for 15 years or more.

[para 33] Section 21 applies to protect intergovernmental relations of the Government of Alberta with the governments it lists in clause 21(1)(a). If disclosure of information could reasonably be expected to harm the Government of Alberta's relationship with an aboriginal body that exercises government functions, then section 21(1)(a)(iii) authorizes withholding the information from a requestor.

[para 34] In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Court stated:

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

> allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[para 35] From the foregoing, I conclude that it is not enough for the Public Body to raise the possibility that harm would result to intergovernmental relations; rather, the Public Body must explain why there is a reasonable likelihood that its intergovernmental relations with any aboriginal bodies set out in section 21(1)(a)(iii) will be harmed by disclosure of the information. It need not prove that harm will result; only there is a reasonable likelihood of probable harm.

[para 36] The Public Body applied section 21(1)(a)(ii) and (iii) to withhold information from a project charter. It states:

> Section 21(1)(a)(ii) and (iii) was applied to information that discusses issue of consultation with First Nations and Metis within the North Saskatchewan Regional Plan and South Saskatchewan Regional Plan. If this information were disclosed, it has the potential to harm and jeopardize current and future relationships with First Nations and Metis. Disclosing this information reasonably be expected to create confusion about the threshold that will need to be met in order to determine whether, and how, aboriginal consultation will occur. Alberta's approach to consultation is outlined in policy (The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013 and The Government of Alberta's Policy on Consultation with Metis Settlements on Land and Natural Resource Management, 2015), as informed by legal advice. The suggestion of the withheld content is incorrect and if released, risks undermining GOA's compliance with the aforementioned policy. GOA repeatedly and clearly states that determinations on whether to consult are based on the policies. In addition, these communities may take exception to being viewed and described as a potential risk to resource development in these areas. It could also create expectations as to whether consultation with First Nations and Metis groups will or will not occur and as a result, could potentially lead to litigation by impacted groups, which government would then have to defend. This is especially problematic because it is in the best interest of all parties that strong relationships be maintained.

[para 37] The Public Body argues that the information it severed from the Project Charter may lead First Nations and Métis within the North Saskatchewan and South Saskatchewan Regional Plans to be confused as to when the *Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management 2013* and *The Government of Alberta's Policy on Consultation with Metis Settlements on Land and Natural Resource Management, 2015* (the Plans) apply and when they do not. The Public Body reasons that this confusion may then result in litigation, to the detriment of First Nations, Métis, and the Government of Alberta.

[para 38] The Public Body's theory that harm will result to its intergovernmental relationships rests on the idea that Métis and First Nations governing bodies to whom the Plans are attended to apply will rely on the information to which it applied section 21(1)(a), instead of on the Plans, in litigation. Assuming, for the sake of discussion, that the general references in the records to First Nations and Métis in the records are records to specific indigenous bodies exercise governing functions, the Public Body has not submitted evidence to establish the likelihood that First Nations and Métis within the North Saskatchewan and South Saskatchewan Regional Plans are reasonably likely to interpret the Project Charter in this way or give weight to it in this fashion. The text of the

severed information itself does not support finding that Métis and First Nations governing bodies would be likely to rely on it in the manner which the Public Body envisions.

[para 39] The Public Body has not explained how the Plans could be viewed as applicable in the context envisioned by the Project Charter such that parties entitled to consultation under the Plans would assume that the Project Charter provides more or different rights to consultation than the parties would otherwise have.

[para 40] I find that the Public Body has not established a reasonable expectation that harm to intergovernmental relations could result from disclosure of the information to which it applied section 21(1)(a). As a result, I must direct it to give the Applicant access to this information.

ISSUE C: Did the Public Body properly apply section 22 of the Act (cabinet and treasury board confidences)?

[para 41] Section 22 of the FOIP Act authorizes a public body to withhold cabinet confidences. It states:

> *22(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.*
>
> *(2) Subsection (1) does not apply to*
>
> *(a) information in a record that has been in existence for 15 years or more,*
>
> *(b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or*
>
> *(c) information in a record the purpose of which is to present background facts to the Executive Council or any of its committees or to the Treasury Board or any of its committees for consideration in making a decision if*
>
> *(i) the decision has been made public,*
> *(ii) the decision has been implemented, or*
> *(iii) 5 years or more have passed since the decision was made or considered.*

[para 42] In Order F2008-028, the Adjudicator considered section 22 and said:

> Where the Public Body applied section 22 to records requested by the Applicant, it did so because it believed that the information would reveal the substance of deliberations of the Executive Council - i.e., Cabinet. To fall within section 22(1) on this basis, a record must be generated for or received by Cabinet members or officials while taking part in the collective process of making government decisions or formulating government policy (Order 97-010 at para. 52).
>
> The Public Body states that it "consulted with Executive Council on the records [to which it applied section 22(1)] and confirmed that the records at issue were provided to Cabinet". I am prepared to accept this assertion, even where the record itself does not indicate that members of Cabinet or its officials were the recipients of it, or that the record was prepared for them. For example, some documents appear to have been prepared for, or to have arisen out of, meetings of a caucus. Although Cabinet members are members of the government caucus, they are not the only members. A caucus is not a committee of the Executive Council. The reason that I nonetheless accept the Public Body's assertion that the records in question were sent to or prepared for Cabinet is that it is possible for documents prepared by or for, or given to, the government caucus to have also been provided to Cabinet for its information or consideration.
>
> Even where a record was submitted to Cabinet, section 22(1) only permits the withholding of information that would reveal the substance of deliberations by it. The term "substance" has its normal dictionary meaning of the essence, the material or essential art of a thing; "deliberation" means the act of weighing and examining the reasons for and/or against a contemplated action or course of conduct, or a choice of acts or means (Order 97-010 at para. 28). Section 22(1) does not extend to the withholding of information such as the names of persons who prepared the material, or the dates, or the topics of the deliberations, unless this information would in itself reveal the substance of the deliberations (Order F2004-026 at para. 33). I would add to this business contact information, as it does not normally reveal any substantive content.

[para 43] The Adjudicator in Order F2008-028 considered section 22 to permit the withholding of information that would reveal the substance of deliberations by cabinet. He found that evidence establishing only that records were provided to cabinet was insufficient to ground the application of section 22. However, if it could be established that the information in question is advice intended for Cabinet, or some other information that reveals what was considered by Cabinet in making a decision, for example, the requirement that information reveal the substance of Cabinet deliberations would be met, and section 22 would apply.

[para 44] The Public Body states:

> Page 6-7: Section 22(1) was partially applied to the headers of the emails dated January 23, 2020 at 9:41 am and January 20, 2020 at 9:50 am. The headers name the topic of a presentation that was presented to the Resources and Sustainable Development Cabinet Policy Committee on February 5, 2020 and then to Cabinet on February 11, 2020. Disclosure of this information would reveal the substance of Cabinet deliberations and as such, must be withheld from disclosure under section 22(1). In addition, it was confirmed with the relevant program area that this information was prepared for Cabinet.
>
> Page 8: Section 22(1) was partially applied to the middle of the page as it provides a description of content within a Power Point slide that was presented to the Resources and Sustainable Development Cabinet Policy Committee on February 5, 2020 and then to Cabinet on February 11, 2020. Disclosure of this information would reveal the substance of Cabinet deliberations as such, must be withheld from disclosure under section 22(1). In addition, it was confirmed with the relevant program area that this information was prepared for Cabinet.

[para 45] I am unable to find that the information to which the Public Body applied section 22 would reveal the substance of deliberations by Cabinet. Even accepting that the severed information may refer to general topics that may have been discussed by Cabinet at some point, the information does not reveal anything of the substance of such deliberations.

[para 46] As I find that the Public Body has not established that section 22 applies, I must direct the Public Body to disclose the information to which it applied section 22 to the Applicant.

ISSUE D: Did the Public Body properly apply section 24 of the Act (advice from officials)?

[para 47] The Public Body severed some information from a document entitled "Project Charter". Section 24 states, in part:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body,*
>
> *(ii) a member of the Executive Council, or*
>
> *(iii) the staff of a member of the Executive Council,*
>
> *(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations,*
>
> *[…]*
> *(g) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision, […]*
>
> *[…]*
>
> *(2) This section does not apply to information that*
>
> *[…]*

> *(f) is an instruction or guideline issued to the officers or employees of a public body, or*
>
> *(g) is a substantive rule or statement of policy that has been adopted by a public body for the purpose of interpreting an Act or regulation or administering a program or activity of the public body.*
>
> *[…]*

[para 48] In Order F2015-29, the Director of Adjudication interpreted sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said:

> The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. So long as the information described in section 24(1)(a) is developed by a public body, or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a).
>
> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 49] I agree with the analysis of the Director of Adjudication as to the purpose and interpretation of section 24(1)(a) and agree that this provision applies to information intended to assist a decision maker to make a decision. Section 24(1)(a) protects the policy development process, but not the final decision regarding the policy.

[para 50] The Public Body argues:

> With regard to the first stage noted above, the information withheld from disclosure under section 24(1) was determined as qualifying as advice, one of the classes of information to which this exemption applies. Its qualification as advice was determined through the application of the three-part test developed by the Information and Privacy Commissioner in Order 96-006. Specifically the information was 1) sought or expected, 2) directed towards taking an action, and 3) made to someone who can implement the action.
>
> With regard to the second stage noted above, disclosure of the information withheld under section 24(1) would reveal the detailed advice prepared for decision makers regarding the review of the coal categories. The information provides insight into the review of the coal categories and its anticipated recommendations and implications for resource development. In addition, it would reveal the GOA's strategy and plans with current and potential lease holders.

> With regard to the third and final stage noted above, disclosure of the information withheld under section 24(1) could negatively affect the deliberative process in the future. Disclosure of this information would reveal advice, analysis and recommendations prepared for decision makers. Disclosing this information, given the current sensitivity surrounding the subject matter, can reasonably be expected to impede the flow of advice and information essential for current deliberation and future decisions regarding resource development. In some cases, background facts have been withheld under section 24(1) because this information was determined to have been interspersed within the options, plans, proposals and recommendations that comprise the matters deliberated on. Disclosure of even portions of the paragraphs would reveal the substance of deliberations. In summary, the purpose of this information was not to present background facts but rather present full and robust recommendations for consideration in the decision-making process.
>
> In addition, disclosure of this information would reveal advice and discussions that could potentially reveal GOA strategy, deliberations and potential policy options with regard to resource development, which in turn could be used against Alberta by competitor jurisdictions and impede the attraction of investment in multiple sectors.

[para 51] In Order 96-006, an order on which the Public Body relies, former Commissioner Clark said the following:

> Accordingly, in determining whether section 23(1)(a) [now 24(1)(a)] will be applicable to information, the advice, proposals, recommendations, analyses or policy options ("advice") must meet the following criteria.
>
> > The advice should:
> >
> > 1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
> >
> > 2. be directed toward taking an action,
> >
> > 3. be made to someone who can take or implement the action.

Former Commissioner Clark considered that the information enumerated in section 24(1)(a) – advice, proposals, recommendations, analyses or policy options" – needed to be sought or expected, directed toward taking an action and made to someone who can take or implement the action, before section 24(1)(a) could be said to apply to it. Former Commissioner Clark did not eliminate the need for information to be classifiable as "advice, proposals, recommendations, analyses or policy options"; rather, the test he adopted was intended to establish when such information could be said to be "developed by or for a public body", which is also a requirement of section 24(1)(a).

[para 52] The Public Body asserts that the information it severed was "sought or expected", "directed toward taking an action" and "made to someone who can take the action" and would reveal "advice, analysis and recommendations prepared for decision makers." The Public Body describes the information as revealing "advice, analysis and recommendations prepared for decision makers and argues that it could reasonably be expected to impede the flow of advice and information essential for current deliberation and future decisions regarding resource development if it is disclosed.

[para 53] The Public Body did not explain who was to make the decisions or how the information could be used to make decisions regarding resource development. The severed information does not indicate that it contains advice in relation to a course of action that a decision maker is considering. The "advice" contemplated in section 24 is to be with respect to what decision is to be made by the decision makers, rather than the development of steps that employees must follow in carrying out project tasks.

[para 54] The Public Body characterizes the information it severed as information meeting the terms of both sections 24(1)(a) and (c) simultaneously. I am unable to identify information falling within the terms of either provision. The information itself indicates that it is part of a planning tool for the Public Body to meet its objective of updating the coal policy. The severed information sets out what the Public Body wanted to achieve and how it intended to achieve it. The severed information does not advise; it informs the reader what will happen and what must be done.

[para 55] I turn now to the Public Body's arguments under section 24(1) addressing specific records.

Record 17

[para 56] The Public Body states the following regarding record 17.

> Section 24(1)(a) was applied on this page to the information which advises decision makers of the proposed outcomes for the Coal Category Review and its implications for future resource development policy. This project was not completed as it was initially envisioned and as a result, decision makers did not have the opportunity to deliberate on this advice. In addition, the information withheld under section 24(1)(a) consists of proposals, recommendations, analysis and policy options that provide insight into the possible direction of the GOA with regard to resource development as well as actions that must be taken if this direction had been approved. Disclosure of this information could be misconstrued as being official government policy. Disclosing this information, given the current sensitivity surrounding the subject matter, can reasonably be expected to impede the flow of advice and information essential for current deliberation and future decisions regarding resource development. Disclosure of the incomplete work and preliminary advice and the resulting confusion it would create can reasonably be expected to put a chill on future free and open advice to decision makers. This would have the effect of potentially providing incomplete advice to decision makers and result in deficient public policy. It is submitted therefore that the information was withheld for a proper and relevant purpose.

[para 57] If the information the Public Body characterizes as "advice" in its submissions is "proposed outcomes", there is no suggestion that the decision makers, whoever they might be, would be debating the "proposed outcomes", rather than following instructions to make decisions that would try to achieve them, such as might fall within section 24(2)((f) or (g).

[para 58] The information severed under section 24(1) appears in a document entitled: Public Coal Policy – Coal Categories Review Project Charter (the Project Charter). The title was not redacted, so I reproduce it in this order. I take notice that a Project Charter is a document that authorizes a project and delineates its scope. In any event, the project charter in this case indicates that this is its purpose. A project charter

will set out the deliverables of the project, the accountabilities of those participating in the project, and set out the steps necessary to achieve the deliverables, which may include setting out risks and strategies to be followed to mitigate the risks. The Project Charter in the records was signed and authorized by the project sponsors on October 29, 2019, according to record 13. The Public Body did not withhold the approval from the Applicant and so I will reproduce it in this order. The approval states:

> **Statement of Approval**
> The project charter guides the review of the Coal Categories located in Alberta's Eastern Slopes. It describes a consistent process for reviewing the Coal Categories, the resources required, and timelines for the project.
>
> This project charter is approved by the project sponsors […]

[para 59] In addition, the Public Body did not sever the following statement from record 17 and so I will reproduce it here:

> **Proposed Review Process**
> The review process will carry out the following tasks […]

[para 60] The foregoing statement appears before the content the Public Body severed from the records. It provides context for the information that follows. From this statement, I conclude that the information that follows will be descriptions of tasks that the Public Body's staff will carry out.

[para 61] The Public Body severed the first task from record 17 and the remaining tasks from record 18.

[para 62] While the Public Body argues that the tasks to which record 17 refers were intended to advise decision makers and consists of proposals, recommendations, analysis and policy options developed for decision makers, the records do not support this interpretation. The information severed from record 17 describes the tasks that it had been decided would be carried out as part of the review process. I find that the information does not advise a decision maker or contain options for a decision maker, as the information already reflects a decision on behalf of the project's sponsors to follow the process set out in the records

[para 63] The Project Charter in this case reflects the decision of the Public Body's project sponsors. The Project Charter delineates the scope of the Coal Policy Review and sets out the steps to be taken in order to achieve its goal of updating the coal categories. In essence, the Project Charter is a plan that project sponsors decided that staff would follow when conducting the Coal Policy Review in order to achieve the objectives of the review. There is no information in the Project Charter that suggests there was any need for further consideration or approval regarding the plan. Moreover, the project sponsors signed the Project Charter.

Record 18

[para 64] The Public Body argues the following:

> Page 18: Section 24(1)(a) was applied to the information which advises decision makers of the intended analysis and recommendations that would be provided through the Coal Category Review. This project was not completed as it was initially envisioned, and as a result, decision makers did not have the opportunity to deliberate on this advice. In addition, the information withheld under section 24(1)(a) consists of proposals, recommendations, analysis and policy options that provide insight into the possible direction of the GOA with regard to resource development as well as actions that must be taken if this direction had been approved. Disclosure of this information could be misconstrued as being official government policy. Disclosing this information, given the current sensitivity surrounding the subject matter, can reasonably be expected to impede the flow of advice and information essential for current deliberation and future decisions regarding resource development. Disclosure of the incomplete work and preliminary advice and the resulting confusion it would create can reasonably be expected to put a chill on future free and open advice to decision makers. This would have the effect of potentially providing incomplete advice to decision makers and result in deficient public policy.

[para 65] The Public Body argues that record 18 would reveal the intended analysis and recommendations to be provided through the Coal Category Review. Record 18 does not contain advice or recommendations; rather, it explains the steps that were to be taken in the review. As noted above, the project sponsors signed the Project Charter, The information regarding steps that will be taken in the Coal Category Review, is not advice, but a decision as to the steps to be taken by staff in carrying out the Review. There is nothing in the severed information that would support finding that section 24(1)(a) or (c) applies to it.

[para 66] While the Public Body argues that the severed information would be the subject of deliberations, the information in the records does not support finding that it was to be used in deliberations.

Records 19 – 20

[para 67] The Public Body argues:

> Page 19-20: Section 24(1)(a) was applied to the information which advises decision makers of the deliverables and timeline of the project will be as well as the likely recommendations. This project was not completed as it was initially envisioned, and as a result, decision makers did not have the opportunity t deliberate on this advice. In addition, the information withheld under section 24(1)(a) consists of proposals, recommendations, analysis and policy options that provide insight into the possible direction of the GOA with regard to resource development as well as actions that must be taken if this direction had been approved. Disclosure of this information could be misconstrued as being official government policy. Disclosing this information, given the current sensitivity surrounding the subject matter, can reasonably be expected to impede the flow of advice and information essential for current deliberations and future decisions regarding resource development. Disclosure of the incomplete work and preliminary advice and the resulting confusion it would create can reasonably be expected to put a chill on future free and open advice to decision makers. This would have the effect of potentially providing incomplete advice to decision makers and result in deficient public policy.

[para 68] I agree with the Public Body that these records reveal information about the timelines and deliverables of the project. While the Public Body states the Review was not completed, this would not transform the information in the records into advice. The record establishes the timelines and deliverables at the time the Project Charter was approved. Such information does not fall within the terms of sections 24(1)(a) or (c).

Records 21 – 22

[para 69] The Public Body argues:

> Page 21-22: Section 24(1)(a) was applied to the information that advises decision makers of the potential risks relating to the Coal Category Review project and the subsequent actions that could be taken should they arise. This project was not completed as initially envisioned and as a result, decision makers did not have the opportunity to deliberate on this advice In addition, the information withheld under section 24(1)(a) consists of proposals, recommendations, analysis and policy options that provide insight into the possible direction of the GOA with regard to resource development as well as actions that must be taken if this direction had been approved. Disclosure of this information could be misconstrued as being official government policy. Disclosing this information, given the current sensitivity surrounding the subject matter, can reasonably be expected to impede the flow of advice and information essential for current deliberation and future decisions regarding resource development. Disclosure of the incomplete work and preliminary advice and the resulting confusion it would create can reasonably be expected to put a chill on future free and open advice to decision makers. This would have the effect of potentially providing incomplete advice to decision makers and result in deficient public policy.

[para 70] The Public Body characterizes the information in records 21 – 22 as advising of potential risks, and subsequent actions that could be taken. I agree that the information can be described this way grammatically; however, this characterization does not bring the information within the terms of section 24(1)(a). To be advice within the terms of section 24(1)(a), as the Public Body acknowledges, the information must be prepared to guide a representative of a public body to make a decision. There is no evidence before me to support finding that a decision maker would make a decision regarding the information on records 21 – 22 and the content of the records does not support finding that there was a decision to make. The information in records 21 – 22 reflects the decision of the Public Body's sponsors to conduct the review of the Coal Categories in a particular way. While the Public Body states that the project was not completed, this does not change the fact that the information in the records reflects a decision. As the Director of Adjudication noted in Order F2015-29, section 24(1)(a) protects the deliberative process, but not the final decision.

Records 25 - 26

[para 71] The Public Body argues:

> Pages 25-26: Section 24(1)(a) was applied to the information that advises decision makers of the specific timeline of the decision and when a decision is being requested. This project was not completed as initially envisioned and as a result, decision makers did not have the opportunity to deliberate on this advice. In addition, the information provides insight into the possible direction of the GOA with regard to resource development and actions that must be taken if this direction were approved. Disclosure of this information could be misconstrued as being official government

> policy. Disclosing this information, given the current sensitivity surrounding the subject matter, can reasonably be expected to impede the flow of advice and information essential for current deliberation and future decisions regarding resource development. Disclosure of the incomplete work and preliminary advice and the resulting confusion it would create can reasonably be expected to put a chill on future free and open advice to decision makers. This would have the effect of potentially providing incomplete advice to decision makers and result in deficient public policy.

The information in records 25 – 26 appears under the heading "Deliverables and Milestones". The Public Body disclosed this heading to the Applicant and so I reproduce it here.

[para 72] The severed information consists of the planned deliverables and milestones of the Public Body's Coal Categories Review Project. The information was created to establish the timing of key events in the review. The information is not advice, but establishes when specific tasks must be performed in order for the project to succeed.

Conclusion in relation to section 24(1)(a) and (c)

[para 73] The Public Body does not explain how the information, in the context in which it appears, could be considered "advice, proposals, recommendations, analyses or policy options" within the terms of section 24(1)(a) or "positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations" within the terms of section 24(1)(c). The Public Body did not provide evidence to support its contention that the information in the records would be used to make decisions by someone with authority to do so, for the purposes of section 24(1)(a) or evidence that would support finding that the same information would be used for the purpose of contractual or other negotiations, as section 24(1)(c) requires.

[para 74] The Public Body argues in relation to section 24(1)(c):

> Page 17-22, 25-26: Section 24(1)(c) was concurrently applied to the information as it advises decision makers of potential strategies, plans and approaches to increase investment from third parties in the development of Alberta's natural resources. Within the records is information that includes strategies, plans, and approaches to increase investment within the development of Alberta's natural resources. To disclose these strategies, plans and approache[s] could potentially harm negotiations among and with investors interested in coal exploration and extraction. In addition, it could jeopardize current and future leases related to resource development within the areas under review by contributing to further regulatory uncertainty.

[para 75] Section 24(1)(c) applies to information developed for use in negotiations. I agree with the Public Body's characterization of the information it severed as "plans"; however, I find that the information does not fall within the terms of section 24(1)(c) as the plans were not made to prepare for negotiations, but to review the Coal Categories in the Coal Policy. Prior to the approval of the Project Charter, the information in the Project Charter could have been withheld as a "proposed plan" within the terms of section 24(1)(h) of the FOIP Act; however, once the plan was approved, it was no longer a proposed plan, but "directions or guidelines to officers or staff of the Public Body" within the terms of section 24(2)(f). The Project Charter is clear that it was intended to be

followed by staff in order for the Public Body to reach its objectives in reviewing the Coal Categories. There is nothing in the records to support finding that the information severed by the Public Body under section 24(1)(c) is a plan for use in negotiations with investors interested in coal exploration and extraction, as the Public Body argues.

ISSUE E: Did the Public Body properly apply section 25 of the Act (disclosure harmful to economic and other interests of a public body)?

[para 76] Section 25 authorizes a public body to withhold information from an applicant if disclosure of the information would be harmful to the economic or other interests of a public body. It states, in part:

> *25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:*
>
> *[…]*
>
> *(c) information the disclosure of which could reasonably be expected to*
>
> *(i) result in financial loss to,*
>
> *(ii) prejudice the competitive position of, or*
>
> *(iii) interfere with contractual or other negotiations of,*
>
> *the Government of Alberta or a public body;*
>
> *[…]*

[para 77] Section 25(1) recognizes that there is a public interest in withholding information that could reasonably be expected to harm the economic interests of the Government of Alberta or a public body, or the Government of Alberta's ability to manage the economy, if disclosed. Sections 25(1)(a) – (d) contain a non-exhaustive list of the kinds of information, the disclosure of which could be reasonably expected to harm the economic interests of the Government of Alberta or a public body, or the Government of Alberta's ability to manage the economy.

[para 78] A public body seeking to withhold information under section 25 must establish a direct link between the disclosure of information and a reasonable expectation of harm to the Government of Alberta's or its own economic interests.

[para 79] The Public Body argues:

> Section 25 is a discretionary exemption that the head of a public body may enact in order to protect the economic interests of a public body of the GOA. The information that can be withheld

under this exemption includes information the disclosure of which could reasonably be expected to result in financial loss, prejudice the competitive position of, or interfere with contractual or other negotiations of the GOA or a public body. This exemption recognizes that public bodies, individually or collectively, may hold significant amounts of financial and economic information that is critical to the management of the provincial economy. Section 25 ensures that, where harm would result from the disclosure of certain information, the public body may withhold that information. The FOIP Guidelines and Practices (2009) notes a three-part test in determining 'harm' with regard to section 25:

1) There must be a reasonable expectation of probable harm;
2) The harm must constitute damage or detriment and not mere inconvenience; and
3) There must be a casual connection between disclosure and the anticipated harm.

Section 25(1)(c)(i) allows for the refusal to disclose information that could reasonably be expected to result in financial loss to the GOA or a public body; this includes loss of reputation, loss of good will, or loss of revenue. The public body must have reasonable grounds to believe that disclosure of the information could result in direct monetary loss.

Section 25(1)(c)(iii) may be applied to information where disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the GOA or a public body.

Pages 17-22, 25 and 26: Section 25(1)(c)(i) was applied to information on these pages as its disclosure could reasonably be expected to harm the economic interest of the Public Body and the GOA by confusing investors about Alberta's ultimate intentions regarding resource development. In addition, it could reasonably be expected to undermine good will towards the Public Body from individuals critical of resource development.

Further, disclosure could contribute to financial loss to the GOA by potentially discouraging companies from investing in GOA resource development as it reveals that some stakeholders are not supportive of responsible resource development investment in the Province. As further supported by Order F2005-030 [paragraph 90 and its corresponding footnote], there is a clear and specific relationship between the disclosure of this information and potential financial loss to the GOA. In addition, consistent with F2010-036 [paragraph 120], if disclosure would result in a potential future divergence of financial investment to a public body from a third party, then the application of section 25(1)(c)(i) is justified.

Section 25(1)(c)(iii): Pages 17-22, 25 and 26: Section 25(1)(c)(iii) was concurrently applied to information on these pages as its disclosure could have an impact on current and future leases issued by Alberta Energy to third parties related to resource development by contributing to regulatory and market uncertainty. This demonstrates a reasonable and specific expectation of harm to current and future resource development negotiations between the GOA and third parties should this information be disclosed

[para 80] Section 25(1)(c)(iii) applies to information that may reasonably be expected to harm to the Government of Alberta's negotiations should the information be disclosed. A public body bears the burden of establishing, with evidence, that there is a reasonable likelihood of probably harm to its negotiations if the information is disclosed. In some cases, the evidence of the records will be sufficient; if not, the Public Body must support its claims with extrinsic evidence.

[para 81] The Public Body argues that investors will be confused about the Government of Alberta's intentions regarding the development of resources should the information it severed be disclosed. It is unclear how investors would be confused by the

severed content of the records. It is public knowledge that the Public Body rescinded, then reinstated, the Coal Policy. Moreover, the Public Body has issued formal public statements that may be viewed at "https://www.alberta.ca/coal-policy-guidelines.aspx" and the Minister of the Public Body signed Ministerial Order 02/2022, under the *Responsible Energy Development Act* SA 2012, c R-17.3 (REDA), which states, in part:

> AND WHEREAS, the Government of Alberta has confirmed that the restrictions in place in respect of the exploration for and development of coal within categories of lands as described in the 1976 A Coal Development Policy for Alberta (the 1976 Coal Policy) remain in effect.
>
> AND WHEREAS, all existing legislation related to coal exploration and development remains in place and is unchanged.

The reinstatement of the coal policy, the Ministerial Order and the REDA reflect the current position of the Government of Alberta regarding coal development. It is unclear from the Public Body's arguments why a member of the public or industry would consider the process developed in 2019 – 2020 for the purpose of reviewing the coal policy would supersede the Ministerial Order or the REDA in 2022. It is also unclear how this misunderstanding would then affect negotiations with the Government of Alberta.

[para 82] The Public Body's theories that harm will result from disclosure appear to turn on the notion that members of the public will overemphasize or misunderstand the content of the records, and therefore be confused about the current intentions of the Government of Alberta in relation to coal.

[para 83] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, the Supreme Court of Canada rejected the potential for misinterpretation of information as a legitimate reason for refusing access. Cromwell J., speaking for the majority, stated:

> Moreover, M's submission that the release of some of the information could give an inaccurate perception of the product's safety cannot be accepted. Courts have often — and rightly — been skeptical about claims that the public misunderstanding of disclosed information will inflict harm. Refusing to disclose information for fear of public misunderstanding undermines the fundamental purpose of access to information legislation; the public should have access to information so that they can evaluate it for themselves.

[para 84] In Order F2014-35, I rejected the argument that the possibility that information could be misinterpreted could support the application of section 25. I said:

> Park Place's primary concern and objection to disclosure is that its audited financial returns may be open to misinterpretation and possible manipulation to its detriment if it does not provide clarification of the figures in the audited financial returns. It also pointed to some information that it considered to be open to manipulation or misinterpretation. That a party may misinterpret or manipulate information is not a harm recognized by section 25. If a party assigns meaning to information that is not supported by the information, or presents information to the public inaccurately, then any resulting harm or interference is not derived from the nature of the information, but the actions of the party reading and interpreting the information.

In *Park Place Seniors Living Inc v Alberta Health Services*, 2017 ABQB 575 (CanLII) Graesser J. upheld Order F2014-35.

[para 85] Section 25 applies only to information the disclosure of which could reasonably be expected to result in one of the harms recognized by this provision, regardless of the intentions or perceptions of the applicant or the public. It is for this reason that I consider the intentions or perceptions of an applicant or the public to be external factors.

[para 86] The Public Body's theory turns on the idea that members of the public will view the Public Body's plans and procedures for revising the coal categories in January 2020, as determinative of the Public Body's plans in 2022 and beyond. The Public Body does not explain how the information it has withheld could lead to this result if it is interpreted accurately.

[para 87] The Public Body also argues that disclosure of the information could contribute to financial loss to the GOA by potentially discouraging companies from investing in GOA resource development as it reveals that some stakeholders are not supportive of responsible resource development investment in the Province. The Public Body does not explain why companies would not invest in resource development in Alberta after discovering that some stakeholders do not support responsible development investment. I am unable to speculate how this outcome could be expected to result from disclosure of the information in the records.

[para 88] Finally, the Public Body argues that individuals who oppose resource development will lose the good will they have for the Government of Alberta as a result of disclosure of the information to which it applied section 25. The Public Body does not explain how it believes this outcome could reasonably be expected to result from disclosure of the information in the records. It is also unclear how such an outcome could be expected to result in a harm contemplated by section 25.

[para 89] As discussed above, a public body must establish that disclosure of information will be reasonably likely to result in probable harm – in the case of section 25, financial harm to the Public Body or the Government of Alberta. The Public Body has not provided any evidence to support its assertions that the harms it projects would be likely to result from disclosure.

ISSUE F: Did the Public Body properly withhold information from the Applicant as nonresponsive?

[para 90] Records that an applicant has not requested are "nonresponsive records". In Order 97-020, former Commissioner Clark found that determining whether records are responsive is an important component to responding to an access request. He said:

> In Ontario Order P-880, the Office of the Information and Privacy Commissioner of Ontario had the following to say about "responsiveness":

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.
>
> "Responsiveness" must mean anything that is reasonably related to an applicant's request for access. In determining "responsiveness", a public body is determining what information or records are relevant to the request. It follows that any information or records that do not reasonably relate to an applicant's request for access will be "non-responsive" to the applicant's request.

[para 91] Former Commissioner Clark determined that sections 6 and 12 of the FOIP Act provide the legislative authority for determining that records or portions of records are non-responsive. He determined that information that is reasonably related to an access request is responsive.

[para 92] A public body need not include recorded information in a response if the information is not what the applicant asked for. The duties to assist and respond are engaged only in regard to records that reasonably relate to the access request.

[para 93] As set out in the background, above, the Applicant requested the following:

> Alberta Energy's records that discuss the rescission or change of the coal policy (1976 Coal Policy) or exceptions to the coal policy, including: any briefing materials (briefing notes, internal memos, reviews, reports), and correspondence (emails, letters). To be clear, we are also requesting third party records.
>
> Time period: January 1, 2020 to June 1, 2020

[para 94] The Public Body argues the following regarding the information it located, but did not provide to the Applicant on the basis that it was nonresponsive:

> Information is considered responsive if it reasonably related to the scope of the request (OIPC order 97-020 [paragraph 33]). Non-responsive information was identified on pages 1-11 as it did not pertain to the Applicant's request scope. During the processing of the request, subject matter experts from the relevant program area were consulted and further confirmed the information removed as non-responsive was not related to "the rescission or change of the coal policy (1976 Coal Policy) or exceptions to the coal policy".

[para 95] The Applicant argues:

> Non-responsive redactions should never cut apart entire sentences or paragraphs. Entire sentences and paragraphs are necessary to contextualize what is being given access to.
>
> For example, if one sentence in an email discusses the Coal Policy, the remainder of the paragraph is necessary to contextualize that one sentence. Cutting away entire paragraphs on the basis of 'Non Responsive' removes context necessary to understand the material that is responsive.

> At most, 'Non Responsive' redactions should only occur to content that is completely out of context of the records that are responsive.

[para 96] I agree with the Applicant that information that lends context to, or sheds light on, obviously responsive information is also responsive, particularly when that information forms part of the same sentence, paragraph, or record.

[para 97] I turn now to the information the Public Body argues is nonresponsive.

Records 1 - 5

[para 98] Records 1 – 5 contain an email, a briefing note and an issues paper. The Public Body severed most information from these records as nonresponsive, but did consider some of the information responsive where changes to the Coal Policy or review of the Coal Policy were expressly discussed.

[para 99] From my review of these records, I am satisfied that the information the Public Body withheld from the Applicant as nonresponsive reasonably relates to the Applicant's access request, as it explains why changes to the Coal Policy were being discussed. The severed information contains the background and reasons for the discussion of changes to the Coal Policy, which also appears in these documents and which the Public Body considered to be responsive.

Records 6 – 11

[para 100] The Public Body argues that portions of these records are nonresponsive; however, I find that the severed information provides context for the parts of the record the Public Body considers responsive. Moreover, record 7 contains discussion of the rationale for changing the coal policy. While it also contains discussion of other issues, the context indicates that amending the coal policy was related to those issues.

[para 101] The severed information also provides information as to the positions of the Public Body's representatives who were involved in discussions of changes to the Coal Policy, the timing of the discussions, and the reasons the Coal Policy was under review.

[para 102] I acknowledge that the Public Body has told me that subject matter experts from its program areas considered the information to be nonresponsive; however, it is unclear from the Public Body's submissions why the subject matter experts considered some portions of the records responsive, while other portions of the same records, which may be viewed as providing context for the responsive portions, were considered nonresponsive. It may be that the Public Body's subject matter experts adopted an overly narrow view of the access request, such that they considered that only statements directly referencing the coal policy to be responsive. As the evidence of the subject matter experts was not submitted in the inquiry, and as the content of the records establishes that the information withheld as nonresponsive is reasonably related to the access request, I am

unable to base my conclusions on the opinions of the Public Body's subject matter experts.

[para 103] To conclude, I find that the information withheld from the Applicant as nonresponsive, reasonably relates to the access request and is responsive. As a result, I must direct the Public Body to include these records in its response to the Applicant.

IV. ORDER

[para 104] I make this Order under section 72 of the Act.

[para 105] I order the head of the Public Body to respond to the Applicant in relation to the records that have not yet been included in a response to the Applicant's access request.

[para 106] If the Public Body ultimately includes less than 6539 records in its response to the Applicant, I require it to provide an affidavit explaining the discrepancy in the number of records in its response and the number of records it used in its request for permission to extend, to me and to the Applicant.

[para 107] I order the Public Body to give the Applicant access to the information it severed from the records.

[para 108] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

Teresa Cunningham
Adjudicator
/bah