ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-27

May 26, 2022

TOWN OF BEAVERLODGE

Case File Number 007231

Office URL: www.oipc.ab.ca

Summary: An individual made a request to Town of Beaverlodge (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for specific records relating to the Beaverlodge Airport.

The Public Body provided responsive records but some information was withheld under sections 16(1), 17(1), 18(1), 24(1), 25(1) and 27(1).

The Applicant requested an inquiry into the Public Body's search for records, and its decision to withhold information.

The Adjudicator found that the Public Body conducted an adequate search for records.

The Adjudicator found that section 16(1) does not apply, and ordered the Public Body to disclose the relevant information to the Applicant.

The Adjudicator determined that some information withheld under section 17(1) is information to which that provision does not apply. The Adjudicator found that the remaining information to which that provision was applied was properly withheld.

The Adjudicator found that section 18(1) does not apply, and ordered the Public Body to disclose the relevant information to the Applicant.

The Adjudicator found that section 25 does not apply, and ordered the Public Body to disclose the relevant information to the Applicant.

The Adjudicator upheld the Public Body's claim of privilege under section 27(1)(a). Given this finding, the Adjudicator did not need to consider the Public Body's application of section 24 to the same information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 16, 17, 24, 25, 27, 71, 72

Authorities Cited: AB: 96-022, 97-003, 97-006, 2001-016, F2003-012, F2003-015, F2004-029, F2007-007, F2007-014, F2007-029, F2007-032, F2008-028, F2009-001, F2010-007, F2010-036, F2012-08, F2013-51, F2015-22, F2019-17, F2020-13, F2020-36, F2021-38, H2002-001, H2005-003, **Ont**: MO-2070

Cases Cited: *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), *Canada v. Solosky*, [1980] 1 S.C.R. 821, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, *University of Calgary v. Alberta (Information and Privacy Commissioner)*, 2019 ABQB 950 *University of Alberta v. Alberta (Information and Privacy Commissioner),* 2010 ABQB 89

I. BACKGROUND

[para 1] An individual made an access request dated August 17, 2017, to the Town of Beaverlodge (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for:

> Full disclosure of all emails texts documents pertaining to sale of Beaverlodge Airport & [development] of motosport park
>
> Termination of [hangar] lease with [the Applicant] at BL airport
>
> No trespassing documents & dangerous person report

[para 2] The Public Body's response to the Applicant indicates it located 141 responsive records, providing some to the Applicant and withholding information under sections 17(1), 24(1), 25(1), and 27(1).

[para 3] The Applicant requested a review of the Public Body's response. The Commissioner authorized an investigation to settle the matter. This did not resolve the issues between the parties and the Commissioner agreed to conduct an inquiry.

[para 4] In their request for inquiry, the Applicant noted that they did not receive information regarding the termination of their hangar lease agreement with the Public

Body, or documents supporting the Public Body's decision to issue a 'no trespassing' letter to the Applicant.

[para 5] Shortly after the review by this Office, the Public Body made a new decision regarding information in Document 86. It applied section 18(1) to some of the information previously withheld under section 17(1). This new decision was not communicated to this Office until the Public Body's initial submission. By letter dated April 14, 2022, I informed the parties that because the Public Body's decision to apply section 18(1) was made prior to this inquiry and was properly communicated to the Applicant, and as the Public Body has made submissions on this point, I was prepared to add the issue to the inquiry should the Applicant be interested in pursuing it. The Applicant responded that they were interested.

[para 6] The Public Body withheld one item of information appearing in two records at issue under section 16(1). From the information before me, it appears that the Public Body did not inform the Applicant of this decision. The Public Body's records and index of records both indicate that section 16(1) was applied. By letter dated April 1, 2022, I added this issue to the inquiry.

II. RECORDS AT ISSUE

[para 7] The records at issue consist of the portion of the 141 records that have not been provided to the Applicant. Most of the records are comprised of five or fewer pages; some records are comprised of as many as a few dozen pages.

III. ISSUES

[para 8] The issues for this inquiry were set out in the Notice of Inquiry, dated January 14, 2022, as follows:

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

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

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

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

5. Did the Public Body properly apply sections 27(1) (privileged information) to information in the records?

The following issues were added to the inquiry:

Does section 16(1) of the Act (disclosure harmful to business interests) apply to the information in the records?

Does section 18(1)(a) of the Act (disclosure harmful to individual safety) apply to the information in the records?

IV. DISCUSSION OF ISSUES

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

[para 9] The Notice of Inquiry states that this issue relates to whether the Public Body conducted an adequate search for responsive records.

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

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

[para 11] A public body's duty to assist an applicant under section 10(1) of the Act includes the obligation to conduct an adequate search (Order 2001-016 at para. 13; Order F2007-029 at para. 50). The Public Body has the burden of proving that it conducted an adequate search (Order 97-003 at para. 25; Order F2007-007 at para. 17). An adequate search has two components in that every reasonable effort must be made to search for the actual records requested, and the applicant must be informed in a timely fashion about what has been done to search for the requested records (Order 96-022 at para. 14; Order 2001-016 at para. 13; Order F2007-029 at para. 50).

[para 12] The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the applicant (see Order 97-006, at para. 7).

Did the Public Body conduct an adequate search?

[para 13] In Order F2007-029, the former Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

> In general, evidence as to the adequacy of a search should cover the following points:
>
> - The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> - The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.

- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced (at para. 66)

[para 14] The Public Body states that prior to the Applicant's request, it had received a very similar request from another applicant. It states that between this earlier request and the follow-up searches conducted in response to the Applicant's request, its search for records was comprehensive. The Public Body's initial submission sets out the steps taken to locate responsive records (at para. 14). It states that it:

> a. Conducted two searches of its paper files respecting the Beaverlodge Airport and the hangar at the Beaverlodge Airport. The first search was with respect to the Former Request. The second search was with respect to the FOIP Request with specific attention to paper files dated between 2008 to January 1, 2012 and September 1, 2016 to August 2017, though paper files between January 1, 2012 to September 1, 2016 would have also been reviewed to confirm that nothing additional could be located that may have been missed in the search for the Former Request.
>
> b. With respect to the Former Request, instructed its IT company, Hearthstone Consulting & Development Ltd. to conduct a remote search of the Public Body's electronic system for any email correspondence or electronic files with key word search terms including: airport, First Five, the names of the members of the First Five (including [the Applicant]), and hangar.
>
> c. With respect to the FOIP Request, conducted its own internal search of the Public Body's electronic system for any email correspondence or electronic files with key word search terms including: airport, First Five, [the Applicant's name] and hangar. The electronic search was conducted internally at this time as the Public Body had experience with searches as a result of the Former Request. The search parameters of the internal search were no different than had an external search been conducted.

[para 15] The Public Body also provided an affidavit sworn by its Deputy Chief Administrative Officer (Deputy CAO). The Deputy CAO clarified that the search for paper records focused on the dates between 2008-2012 and 2016-2017 because these dates were not captured in the prior request. The Deputy CAO confirms that paper files dated between 2012 and 2016 were reviewed "to confirm that nothing additional could be located that may have been missed in the search conducted for the Former Request" (affidavit, at para. 15).

[para 16] In her affidavit, the Deputy CAO states that she conducted the search for records in response to the prior request and the Applicant's request, along with three other Public Body employees. Those other Public Body employees are no longer employed by the Public Body; therefore, the Deputy CAO is the only person involved in the two searches who can attest to them.

[para 17] The Public Body provided a detailed explanation of the overlap between the prior access request and the Applicant's request, supporting its decision to rely on its prior search as a starting point for its search for records responsive to the Applicant's request.

[para 18] In their request for review, the Applicant states that the records provided by the Public Body did not include records relating to the termination of their hangar lease agreement, or the Public Body's decision to issue a 'no trespassing' letter to them. The Applicant repeated this concern in their request for inquiry.

[para 19] In their initial submission, the Applicant provided me with copies of a trespass notice issued to the Applicant by the Public Body on September 12, 2014, and a notice terminating the Applicant's lease with the Public Body in relation to a hangar at the Beaverlodge Airport, also dated September 12, 2014. From the Applicant's submission, I understand that they are seeking information regarding the Public Body's decisions to issue a trespass notice, and terminate the Applicant's lease.

[para 20] The Public Body's submission states that the first search conducted in response to the prior access request

> included a request for all emails, correspondence and documents pertaining to members of the First Five, including the Applicant. Such a search captured the Applicant's request for information regarding the termination of his hangar lease at the airport and information regarding "no trespassing documents & dangerous person report" since such documents would have pertained to him as a member of the First Five. For reference, First Five was a group comprised of various persons, including the Applicant, which leased a hangar at Beaverlodge Airport from the Public Body.

[para 21] The informational component of a public body's duty to conduct an adequate search for records was discussed in *University of Alberta v. Alberta (Information and Privacy Commissioner),* 2010 ABQB 89. The Court found (at paras. 41-45):

> The University argues that it provided a full, complete and accurate response, and that it was unreasonable to find that it failed in the information component of the duty to assist. In particular, the University says that the Adjudicator unreasonably required it to explain why it believes no further responsive records exist and failed to describe the steps it took to identify the location of responsive records.
>
> The University's submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, ***Lethbridge Regional Police Commission,*** F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):
>
> > In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps

> taken to identify and locate all records and possible repositories of them, and **why the Public Body believes that no more responsive records exist than what has been found or produced**.
>
> (Emphasis added)

> Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University's rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords would not lead to responsive records, its reasons for concluding that no more responsive records existed.
>
> The University argues that the Adjudicator's reasoning is circular because she unreasonably expanded the search by ignoring the proper scope of the Request and the University's reasonable steps to ascertain the likely location of records, and then asks the University to explain why it did not search further. That argument is itself circular, presupposing that the University's search parameters were reasonable.
>
> In my view, the Adjudicator's conclusion that the University either expand its search or explain why such a search would not produce responsive records was reasonable in the circumstances and based on the evidence.

[para 22] The Order cited in this decision, Order F2009-001, concludes (at para. 26):

> While it may not be necessary in every case for a public body to give an applicant all of the foregoing information in order to meet its obligation of telling the applicant what was done to search for responsive records, a public body should provide greater detail about the search that it conducted when the applicant, as here, specifically asked it for a confirmation of whether particular records did or did not exist.

[para 23] More recently, the Director of Adjudication said in Order F2020-13 (at para. 79):

> In some earlier orders of this office, the Adjudicator held that the fact a very thorough search had been conducted and records were not found was itself an adequate explanation for the belief that no further records exist. While I agree with the logic of this in the appropriate case, in circumstances such as the present, where the Applicant is able to demonstrate with certainty for some of the records she describes that the public body was once in possession of them, or that this is reasonably likely, I believe the duty under section 10 includes giving an explanation as to what happened to them or likely happened to them that would account for their no longer being in the public body's possession

[para 24] As stated in previous Orders, a public body is not required to explain its search for records in every case. An explanation may be required where a public body has failed to locate a *particular* record that an applicant has provided reasons to expect exists.

[para 25] An explanation may also be required is where there are logical reasons for expecting records exist, yet none are located. In such a case, a public body should provide

an applicant with some explanation of the scope of its search, and it should also provide its best explanation as to why no records were located. In some cases, a satisfactory explanation may not be available; however, the public body should make an effort to provide the best explanation it can in the circumstances.

[para 26] By letter dated April 14, 2022, I asked the Public Body to provide additional information about its search for records relating to the trespass notice and decision to terminate the Applicant's lease, and/or an explanation as to why such records were not located.

[para 27] In its response, the Public Body reiterated that the Deputy CAO who swore the affidavit is the only individual involved in the search for responsive records who continues to be employed by the Public Body. It provided an additional affidavit from the Deputy CAO, wherein she clarified that she began her employment with the Public Body in 2015. As the trespass notice and lease termination documents are dated September 2014, the Deputy CAO states that she did not see these documents until they were provided by the Applicant in this proceeding.

[para 28] The Deputy CAO states that the former CAO of the Public Body executed the trespass notice and lease termination documents. That individual is no longer employed by the Public Body. The Deputy CAO further states that "no other individuals employed by the Public Body as of September 12, 2014 [the date of the documents] remain employed by the Public Body" (additional affidavit, at para. 6).

[para 29] The Public Body states that given the above, it cannot provide any additional explanation as to why records relating to the decision to issue a trespass notice and terminate the Applicant's lease were not located.

[para 30] I accept the Public Body's explanation. The search conducted by the Public Body, as described in its submissions, appears thorough. The Applicant's access request post-dates the trespass notice and lease termination by three years; this may be part of the reason responsive records could not be located.

[para 31] In any event, that the Public Body did not find records related to the trespass notice and lease termination does not indicate that the Public Body failed to conduct an adequate search. I understand the Applicant's reason for believing that further records ought to exist. However, the issue here is not whether records ought to exist, but whether the Public Body conducted an adequate search for the records (see Orders F2003-012, H2005-003).

[para 32] I find that the steps taken by the Public Body to locate responsive records fulfilled its duty under section 10. Given the circumstances, I also accept the Public Body's reasons for not being able to provide a more satisfying explanation regarding records relating to the trespass notice and lease termination.

[para 33] I find that the Public Body conducted an adequate search for records, fulfilling its duty to assist the Applicant.

Does section 16(1) of the Act (disclosure harmful to business interests) apply to the information in the records?

[para 34] The Public Body applied section 16(1) to an item of information appearing in Documents 100 and 103.

[para 35] Section 16(1) of the Act states:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*
>
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party,*
>
> *(b) that is supplied, explicitly or implicitly, in confidence, and*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
>
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
>
> *(iii) result in undue financial loss or gain to any person or organization, or*
>
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[para 36] The information withheld under section 16(1) in Documents 100 and 103 consist of a GST number of a law firm. The Public Body states that it takes no position on the application of section 16(1) to that information.

[para 37] In Order F2019-17, I accepted that as a GST number is a tax number assigned to a business by the Canada Revenue Agency, it could be characterized as commercial information (at para. 58).

[para 38] However, as stated in that Order (at paras. 133-134):

> The Canada Revenue Agency (CRA) website states that
>
> > A supplier must include the GST/HST account number on receipts, invoices, contracts, or other business papers it gives out when it supplies taxable goods or services of $30 or more.

> Given this, whether or not the parties believed this information to be supplied in confidence, the GST number is not the type of information that can be supplied in confidence because businesses are required to provide this information to customers on receipts and invoices. There is no indication from the CRA website that GST numbers should be protected or considered confidential. Information cannot be supplied in confidence to a public body where it is provided in a non-confidential manner elsewhere.

[para 39] Nothing before me indicates that the analysis above wouldn't also apply in this case. I find that it does, and that the law firm's GST number is not information to which section 16(1) can apply.

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

[para 40] The Public Body withheld discrete items of information under section 17(1) on Documents 19, 27 52, 61, 63, 66, 83, 86, 95, 96, 99, 102, 111, and 133. Most of the information consists of names and contact information. Additional information was withheld in Documents 66 and 99.

[para 41] Section 17 states in part:

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

[para 42] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 43] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 44] Section 1(n) defines personal information under the Act:

> *1 In this Act,*
>
> *...*
>
> *(n) "personal information" means recorded information about an identifiable individual, including*
>
> *(i) the individual's name, home or business address or home or business telephone number,*
>
> *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
>
> *(iii) the individual's age, sex, marital status or family status,*

> *(iv) an identifying number, symbol or other particular assigned to the individual,*
>
> *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
>
> *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
>
> *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
>
> *(viii) anyone else's opinions about the individual, and*
>
> *(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 45] Previous orders from this Office have found that section 17 does not apply to personal information that reveals only that the individual was acting in a formal, representative, professional, official, public or employment capacity, unless that information also has a personal dimension (Order F2008-028, para. 54).

[para 46] Where this provision was applied to business contact information (such as work phone numbers of public body employees or business employees), it is not information to which section 17(1) can apply.

[para 47] The Public Body has mostly disclosed contact information for public body employees; however, in a few instances, the Public Body withheld contact information of employees under section 17(1). For example, in Documents 19, 52, 61, 83, 86, 102, 111, email addresses or cell phone numbers are withheld, even though they appear to relate to public body employees, and they appear in the context of the employees performing their work duties. From the context of the records, it appears that these email addresses or cell numbers are the individuals' personal contact information; many emails indicate that public body employees were emailed at both their work addresses and personal addresses. The Public Body has withheld only the contact information that appear to be personal. The Public Body has confirmed this in its initial submission.

[para 48] As well, the Public Body has withheld contact information of some individuals who appear to be acting in a professional capacity for third party businesses or associations (in Documents 96, 111, 133). In its initial submission, the Public Body states that it applied section 17(1) only to personal contact information.

[para 49] Past Orders have found that a home or personal phone number or email address may constitute business contact information such that section 17(1) does not apply, if the contact information is regularly used for work purposes. In Order F2008-028, the adjudicator said (at paras. 60-61):

> Given the foregoing, I find that disclosure of many of the telephone numbers, mailing addresses and e-mail addresses that the Public Body withheld would not be an unreasonable invasion of the personal privacy of third parties. This is where I know or

> it appears that the third party was acting in a representative, work-related or non-personal capacity and the telephone number, mailing address or e-mail address is one that the third party has chosen to use in the context of carrying out those activities. I point out that a home number, cell number or personal e-mail address (i.e., one not assigned by the public body or organization for which an individual works) may also constitute business contact information if an individual uses it in the course of his or her business, professional or representative activities. In this inquiry, where individuals include a cell number at the bottom of a business-related e-mail or other communication (as on pages 510 and 511), or where individuals send or receive business-related e-mails using what may be a personal e-mail address (as on pages 343 and 345, as well as throughout the records in relation to a communications consultant), I find that disclosure of the telephone number or e-mail address would not be an unreasonable invasion of personal privacy. Section 17 therefore does not apply.
>
> There may sometimes be circumstances where disclosure of a home number or personal e-mail address that was used in a business context would be an unreasonable invasion of personal privacy and therefore should not be disclosed. For instance, on page 328, a home number is included along with a business number and cell number, leading me to presume that the home number is being included for the limited purpose of allowing a specific other person to contact the individual at a number other than the usual business or cell number. I therefore find that section 17 applies.

[para 50] More recent Orders of this Office have accepted that where public body employees use their personal contact information for occasional work use, section 17(1) can apply to that contact information. Order F2020-36 states (at para. 63):

> The fact that public body employees offer to be reached via a personal number or email in a particular situation does not make that number or email business contact information. In the cases described above, it seems clear that the personal contact information was not being offered for long-term or ongoing business contact purposes. I find that section 17(1) can apply to this information; this finding is consistent with past Orders (see Orders F2020-03 at para. 42, F2020-16 at para. 23).

[para 51] I agree with the above analyses, that a personal phone number, email address, or home address can become business contact information if it is used routinely for that purpose, such that section 17(1) does not apply. However, where personal contact information is provided for ad hoc communications, it remains personal information to which section 17(1) can apply. This is true of private sector employees as well as public body employees.

[para 52] In most cases, the Public Body has withheld personal contact information where it is being used as an alternative method of contact (as opposed to routinely for work purposes). However, there are some instances in which section 17(1) cannot apply.

[para 53] In one instance, the Public Body has withheld the name of a public body employee along with their personal email address, in Document 95. While the email address is personal, the email relates to the individual's work duties. Therefore, section 17(1) can apply to the email address, but not the individual's name.

[para 54] The Public Body has also withheld the name of an individual to whom an email is sent, in Document 83. The name is disclosed in the header of the email, indicating that the copy of the email at Document 83 is from this individual's email account. This, along with the content of the email, indicates that the individual is a public body employee acting in their professional capacity. Nothing in the record indicates that there is a personal dimension to this information. As such, section 17(1) cannot apply to the name withheld in Document 83.

[para 55] The contact information for individuals at Document 133 appears on a government grant application form. The individuals, whose names have been disclosed, are acting in a representative capacity, on behalf of an association. Given the context of the record, it appears that the contact information provided by the individuals is the usual contact information used in their capacity as association representatives. Therefore, section 17(1) cannot apply.

[para 56] Names, signatures, and contact information of third party individuals acting only in a personal capacity have been withheld under section 17(1). Most of the names appear in correspondence with a public body. That is all personal information of those individuals to which section 17(1) can apply.

[para 57] Record 66 contains an email from a third party individual. The Public Body has withheld the individual's name and email address, as well as two other paragraphs in the email, under section 17(1). I agree that the first paragraph could identify the individual who sent the email, such that section 17(1) can apply. However, the second paragraph withheld under section 17(1) does not seem to contain any identifying information. In its initial submission, the Public Body states that it takes no position with respect to the application of section 17(1) to the second paragraph. Based on this and my review of the record, I find that the second paragraph withheld in Document 66 is not information to which section 17(1) can apply.

[para 58] Additional information of a third party individual was withheld in Document 86; I agree that this is information to which section 17(1) can apply.

[para 59] Additional information of a third party individual was withheld in Document 99, which is comprised of a letter from the individual to the Public Body. The Public Body has withheld the name and contact information of the individual, as well as three additional sections in the main body of the letter. I agree that this additional information could identify the individual, such that section 17(1) can apply.

[para 60] Lastly, the Public Body has withheld the Applicant's own name and contact information under section 17(1) in Document 27. The Applicant's information appears with the names and contact information of several other third parties, in various places in the record; the remainder of the record has been disclosed. Section 17(1) does not apply to an applicant's own personal information, unless it is intertwined with other information the public body is permitted or required to withhold and that other information cannot be severed. That is not the case for Document 27, and the Public

Body cannot withhold the Applicant's name or contact information under section 17(1). The names and contact information of the other individuals is information to which section 17(1) can apply.

[para 61] The remaining discussion in this section of the Order relates only to the information to which I have found that section 17(1) can apply.

Application of sections 17(2) – 17(5)

[para 62] Sections 17(2) and (3) refer to circumstances in which disclosure of personal information is not an unreasonable invasion of privacy. None of the parties have argued that any provisions of sections 17(2) or (3) are relevant and, from the face of the records, none appear to apply.

[para 63] Section 17(4) lists circumstances in which disclosure is presumed to be an unreasonable invasion of privacy. The Public Body has argued section 17(4)(g) applies to all of the information withheld under section 17(1). This provision states:

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

[para 64] This provision applies to all of the personal information to which section 17(1) may apply.

[para 65] Section 17(5) is a non-exhaustive list of factors to consider in determining whether disclosing personal information would be an unreasonable invasion of privacy. The Public Body states that none of the factors set out in this section apply so as to weigh in favour of disclosing the personal information.

[para 66] Under section 71 of the act, the Applicant bears the burden of showing that the personal information to which section 17(1) applies should be disclosed. The Applicant did not provide arguments specific to the Public Body's application of section 17(1) or third party personal information in the records. Nothing in the materials provided by the Applicant relates to personal information of third parties in the records, or to circumstances that would weigh in favour of disclosing the personal information (for example, that disclosure is necessary for public scrutiny, per section 17(5)(a)).

[para 67] Given the above, there are no factors weighing in favour of disclosing information to which section 17(1) applies. As at least one presumption applies to weigh against disclosure, I find that the Public Body is required to continue to withhold that

information. I do not need to consider whether the other factors discussed in the Public Body's submissions apply.

[para 68] This finding does not apply to the information to which I found section 17(1) cannot apply.

Does section 18(1)(a) of the Act (disclosure harmful to individual safety) apply to the information in the records?

[para 69] In its initial submission, the Public Body states that it has applied section 18(1) to information in Document 86 that was previously withheld under section 17(1). This information relates to the Applicant. The Public Body provided a new copy of Document 86 to the Applicant in July 2018, documenting this new decision. A copy of this record was also provided with the Public Body's initial submission.

[para 70] It is clear from the Public Body's submission that it is applying section 18(1)(a); this provision states:

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

[para 71] In Order H2002-001, former Commissioner Work considered what must be established in order for section 11(1)(a)(ii) of the *Health Information Act*, which is similar to section 18 of the FOIP Act, to be applicable. He reviewed previous Orders of this Office addressing what is necessary to establish a reasonable expectation of harm under section 18 of the FOIP Act and adopted the following approach:

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

[para 72] This analysis has been followed with respect to section 18(1)(a) of the FOIP Act. In Order F2013-51, the Director of Adjudication reviewed past Orders of this Office regarding the application of section 18. She summed up those orders as follows (at paras 20-21):

> These cases establish that section 18 of the FOIP Act applies to harm that would result from disclosure of information in the records at issue, but not to harm that would result from factors unrelated to disclosure of information in the records at issue. Further, a public body applying section 18 of the FOIP Act must provide evidence to support its position that harm may reasonably be expected to result from the disclosure of information (as must a custodian applying section 11(1)(a) of the HIA).

> Following the approach adopted by the former Commissioner in Order 96-004, and in subsequent cases considering either section 18 of the FOIP Act or section 11 of the HIA, the onus is on the Public Body to provide evidence regarding a threat or harm to the mental or physical health or safety of individuals, to establish that disclosure of the information and the threat are connected, and to prove that there is a reasonable expectation that the threat or harm will take place if the information is disclosed.

[para 73] In Order F2004-029, the adjudicator also stated that "being difficult, challenging, or troublesome, having intense feelings about injustice, being persistent, and to some extent, using offensive language, do not necessarily bring section 18 into play" (at para. 23).

[para 74] The Supreme Court of Canada has clearly enunciated the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 18(1)(a)). In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Court stated:

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

[para 75] The Supreme Court of Canada has made it clear that there is one evidentiary standard to be used wherever the phrase "could reasonably be expected to" appears in

access-to-information legislation. There must be a reasonable expectation of probable harm, and the Public Body must provide sufficient evidence to show that the likelihood of any of the above scenarios is "considerably above" a mere possibility.

[para 76] In its initial submission, the Public Body states (at para. 57):

> The redacted information is contained in an email from an identifiable individual and contains details respecting threats that were made. The contents of the redacted information detail the history of the threat to safety. Disclosing this information could reasonably be expected to create an additional threat to those who may be attributed to the contents of the document. There is concern that if the words disclosed were attributed to someone, there is a reasonable risk of harm to that individual.

[para 77] By letter dated April 13, 2022, I asked the Public Body to provide additional arguments regarding its application of section 18(1)(a). I said:

> The Public Body's submission does not sufficiently address how the disclosure of the information in record 86 meets the test for section 18(1)(a) as set out in past Orders. The Public Body should provide additional arguments in its rebuttal submission; it should ensure it addresses how disclosing the withheld information meets the test for section 18(1)(a) given the information that has already been disclosed in record 86 (i.e. the identity of the email author and nature of the withheld information).

[para 78] In response to this letter, the Public Body said only (rebuttal submission, at para. 6):

> The Public Body acknowledges that the Applicant has requested the OIPC to review the Public Body's application of section 18 to Document 86. The Public Body has no further submissions to make with respect to the application of section 18.

[para 79] In the updated copy of Document 86, the Public Body disclosed information to the Applicant revealing that safety concerns had been raised in relation to the Applicant, as well as the name of the person who raised the concerns. The disclosed information shows that the concerns related to threats from the Applicant. The Public Body withheld most of the main paragraph in the body of an email sent to the Public Body from the individual who raised the concerns. The withheld information provides additional detail regarding the concerns raised.

[para 80] Given that the name of the email author has been disclosed, along with the fact that the withheld information relates to safety concerns raised by the author and that the concerns relate to threats from the Applicant, it is unclear how the details of the safety concerns could reasonably be expected to threaten anyone's safety or health if they were disclosed. The Public Body did not provide additional information in response to my questions about its application of section 18(1) to certain information in this record. A review of the withheld information also does not indicate any reason to expect that the health or safety of any person could be harmed by disclosing this information. As such, I have insufficient support to find that section 18(1) applies to this information. I will order the Public Body to disclose this information to the Applicant.

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

[para 81] The Public Body applied section 24(1) to the same records over which it claimed privilege under section 27(1)(a). For the reasons discussed in the relevant section of this Order, I find that section 27(1)(a) applies to those records. Therefore, I do not need to decide if section 24(1) also applies.

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

[para 82] The Public Body applied section 25(1) to bank account information found on a copy of a cheque from another public body (at Document 8).

[para 83] Section 25(1) states:

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

[para 84] The test discussed at paragraphs 74-75 of this Order, to be used wherever the phrase "could reasonably be expected to" is found in the FOIP Act, applies to section 25 as well.

[para 85] The Public Body argues (initial submission, at paras. 35-37, footnotes omitted):

> 20. The OIPC has previously agreed that information including such things as a public body's credit card numbers, bank authorization codes, internal accounting codes, internal cost centre numbers, general ledger codes, account information and bank account numbers may be withheld under section 25(1) of the *Act*.
>
> 21. The redacted portion of Document 8 is the bank account and branch information at ATB Financial for the County of Grande Prairie No. 1. This is the financial information of a public body that, if disclosed, could reasonably be expected to be harmful to that public body.
>
> 22. The banking information is clearly the financial information of the County of Grande Prairie No. 1. There is a potential that such financial information could be utilized to obtain access to the public body's financial accounts. The disclosure of this information could reasonably be expected to result in financial loss to the public body. For instance, void cheques are often provided for the purposes of direct deposits and withdrawals. Such information is treated as confidential, is not publically available, and this information should not be disclosed to the public.

[para 86] In Order F2019-17, I followed Order MO-2070 of the Ontario Information and Privacy Commissioner's Office, which found that cheques are a common method of payment that generally does not carry any expectations of confidentiality. I noted further that this reasoning was followed in Alberta Order F2007-032 (at para. 56).

[para 87] In Order F2003-015, former Commissioner Work accepted that section 25(1)(c) applied to a public body's account and credit information with a courier company. He found that such information needs to be kept confidential "to avoid other persons charging courier services on its account" (at para. 61).

[para 88] In Order F2021-38, the adjudicator accepted that credit card numbers, bank account numbers and internal financial codes could be used to harm the Public Body financially if the information were to become public.

[para 89] I agree that credit card numbers and other account numbers could cause harm if disclosed. However, the nature of a cheque is that it is provided by a payer to a payee without an expectation of confidentiality. It may be that chequing account numbers found at the bottom of cheques are distinguishable from other bank account numbers for this reason; in other words, it may be that section 25(1)(c) can apply to other bank account numbers, but not to chequing account numbers where they appear on copies of cheques that have been provided to another party.

[para 90] Given the context in which the account numbers appear, I find that section 25(1) cannot apply.

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

[para 91] The Public Body applied section 27(1)(a) to information in Documents 40, 56, 58, 91, 92, 100, 101, 103, 108, 116, and 122. The Public Body provided me with copies of these records.

[para 92] Section 27(1)(a) of the Act states:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*

[para 93] Section 71(1) of the Act states:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 94] Therefore, the burden of proof lies with the Public Body to prove that section 27(1)(a) of the Act applies to the records at issue.

Section 27(1)(a) – Solicitor-client privilege

[para 95] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821. The Court said:

> … privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[para 96] The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 97] Solicitor-client privilege can also extend past the immediate communication between a solicitor and client. In *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), the Alberta Court of Appeal stated (at para 26):

> The appellant also argues that even if some of the documents contain legal advice and so are privileged, there is no evidence that all of the documents do so. For example, the appellant argues that minutes of meetings, emails and miscellaneous correspondence between Justice Canada lawyers and the Department of Indian and Northern Affairs may not contain any actual advice, or requests for advice, at all. The solicitor-client privilege is not, however, that narrow. As the court stated in *Balabel v. Air India*, [1988] Ch 317, [1988] 2 All E.R. 246 at p. 254 (C.A.):
>
> > Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not

> follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> The miscellaneous documents in question meet the test of documents which do not actually contain legal advice but which are made in confidence as part of the necessary exchange of information between the solicitor and client for the ultimate objective of the provision of legal advice.

[para 98] In Order F2015-22, the adjudicator summarized the above, concluding that "communications between a solicitor and a client that are part of the necessary exchange of information between them so that legal advice may be provided, but which do not actually contain legal advice, may fall within the scope of solicitor-client privilege" (at para. 76). I believe this is a well-established extension of the privilege.

[para 99] The Public Body also argued that lawyers' bill of account are presumptively privileged. In *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA), the Ontario Court of Appeal addressed the presumption of privilege with respect to bills of account as follows (at para 12):

> … In determining whether disclosure of the amount paid could compromise the communications protected by the privilege, we adopt the approach in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* (2003), 2003 BCCA 278 (CanLII), 226 D.L.R. (4th) 20 at 43-44 (B.C.C.A.). If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege. Whether it is ultimately disclosed by the IPC will, of course, depend on the operation of the entire Act.

[para 100] More recently in *University of Calgary v. Alberta (Information and Privacy Commissioner)*, 2019 ABQB 950, the Court confirmed that a lawyer's bill of account is presumptively privileged, and the onus is on the requestor to rebut the presumption.

[para 101] The Public Body states (initial submission, at para. 49):

> It is submitted that the records to which section 27(1)(a) has been applied by the Public Body (as noted in the Index of Records provided to the OIPC):
>
> a. consist of communications between the Public Body and its legal counsel;
>
> b. entail communications pursuant to which the Public Body is providing relevant background information and seeking legal advice or the Public Body's legal counsel is providing legal advice; and
>
> c. are intended to be and have been treated as confidential.

[para 102] The Public Body also provided an affidavit sworn by its Deputy Chief Administrative Officer, confirming that the information to which privilege has been claimed continues to be treated as confidential.

[para 103] The Public Body's initial submission specifically addresses records over which privilege has been claimed that do not explicitly contain the seeking or giving of legal advice, stating (initial submission, at para. 50):

> To the extent that any records do not specifically contain legal advice or do not include an explicit reference to a request for legal advice, those communications are part of the necessary exchange of information between the Public Body and its legal counsel so that legal advice may be provided. These communications also reveal the identity of the person providing advice. Moreover, as noted above, the "legal advice" is not confined to telling the client the law; it includes what should be done in the relevant context.

[para 104] Having reviewed the records, I can confirm that Documents 40, 56, 91, 92, 101, 108, 116 and 122 contain communications between the Public Body and its lawyers relating to the giving or seeking of legal advice and/or is a continuum of such communications.

[para 105] Record 58 is described in the Public Body's initial submission as a communication between the Public Body's former Chief Administrative Officer and former Mayor, discussing legal advice that had been provided to the Public Body. It is clear from the record that these parties are in a position to make recommendations and decisions about the legal advice received. I agree that this information falls within the continuum of communications such that privilege applies.

[para 106] The Public Body states it claimed privilege over portions of legal invoices in Documents 100 and 103. In these records, the Public Body has disclosed disbursements and fees, but withheld information that details the services provided. I agree that the withheld information is privileged.

[para 107] I find that the Public Body properly applied section 27(1)(a) to the information in the records.

Section 27(1)(a) – Exercise of discretion

[para 108] Past Orders of this Office have found that once solicitor-client privilege has been established, withholding the information is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036, and F2012-08 citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

V. ORDER

[para 109] I make this Order under section 72 of the Act.

[para 110] I find that the Public Body conducted an adequate search for records.

[para 111] I find that section 16(1) does not apply to the information withheld in Documents 100 and 103 under that provision. I order the Public Body to provide this information to the Applicant.

[para 112] I find that section 17(1) does not apply to the information described at paragraphs 53-55, 57, and 60. As no other exception was applied to this information, I order the Public Body to disclose this information to the Applicant.

[para 113] I find that the Public Body properly withheld personal information to which section 17(1) applies.

[para 114] I find that section 18(1) does not apply to the information withheld under that provision in Document 86. I order the Public Body to disclose this information to the Applicant.

[para 115] I find that section 25(1) does not apply to the information withheld under that provision in Document 8. I order the Public Body to disclose this information to the Applicant.

[para 116] I find that section 27(1)(a) applies to the information withheld under that provision. Given this finding, I do not need to consider the Public Body's application of section 24 to the same information.

[para 117] I further order the Public Body to notify me and the Applicant in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

_____

Amanda Swanek
Adjudicator