ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-45

September 27, 2022

CITY OF CALGARY

Case File Number 004031

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Summary: The Applicant made a request to the City of Calgary (the Public Body) for access to all information pertaining to himself, specifying the kinds of documents he was seeking, and the City departments he believed would have information.

The Public Body responded to the Applicant's request by providing some records, withholding information under sections 17 (unreasonable invasion of privacy), 19 (confidential evaluations), 20 (disclosure harmful to law enforcement), 24(1)(a) (advice from officials), 24(1)(b) (consultations and deliberations) and 27(1) (privileged information) of the Act.

The Applicant requested a review of the Public Body's response. After this review, the Public Body released further information to the Applicant. The Applicant was not satisfied with this result, and requested an inquiry.

The Adjudicator found the Public Body conducted an adequate search for records as required by section 10.

The Adjudicator found that section 17(1) cannot apply to some information withheld under that provision. However, the Adjudicator upheld the Public Body's decision to withhold all information to which section 17(1) can apply.

The Adjudicator found that section 24(1) was properly applied in most, but not all, instances. The Adjudicator ordered the Public Body to re-exercise its discretion whether to withhold the information to which section 24(1) applies.

The Adjudicator upheld the Public Body's application of section 27(1)(a) to information in the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 10, 17, 24, 27, 71, 72

Authorities Cited: AB: Decision F2014-D-01, Orders 96-006, 96-012, 99-013, F2004-026 F2007-013, F2007-014, F2007-021, F2008-012, F2008-016, F2008-031, F2010-007, F2010-036, F2012-08, F2013-13, F2014-16, F2015-22, F2016-57, F2017-58, F2018-14, F2020-22

Cases Cited: *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), *Canada v. Solosky*, [1980] 1 S.C.R. 821, *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *John Doe v. Ontario (Finance)*, 2014 SCC 36, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII)

I. BACKGROUND

[para 1] The Applicant is a former employee of the City of Calgary (the Public Body). He made an access request to the Public Body for all information pertaining to himself and his employment with the Public Body, specifying the kinds of documents he was seeking, and the City departments he believed would have information. The Public Body clarified the Applicant's request by letter dated April 12, 2016. The Public Body further clarified the Applicant's request by letter dated April 21, 2016.

[para 2] The Public Body states that it located 985 pages of records, but some were duplicates. On September 6, 2016, the Public Body provided 810 pages of records to the Applicant, with information withheld citing sections 17 (unreasonable invasion of privacy), 19 (confidential evaluations), 20 (disclosure harmful to law enforcement), 24(1)(a) (advice from officials), 24(1)(b) (consultations and deliberations) and 27(1) (privileged information) of the Act.

[para 3] The Applicant requested a review of the Public Body's response. After this review, the Public Body released an additional 46 pages to the Applicant. The Applicant was not satisfied with this result, and requested an inquiry.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of the withheld portions of the responsive records.

III. ISSUES

[para 5] The issues set out in the Notice dated November 15, 2019, issued by the adjudicator previously assigned to this inquiry, are:

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

2. Does section 17(1) of the Act (disclosure an invasion of personal privacy) apply to the information?

3. Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the information in the records?

4. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

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

6. Did the Public Body properly apply section 24(1)(b) of the Act (consultations and deliberations) to the information in the records?

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

[para 6] The Public Body has confirmed that it is no longer applying sections 19 or 20 to withhold information in the records; I do not need to consider those issues.

[para 7] I will consider issues #5 and #6 together.

IV. DISCUSSION OF ISSUES

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

[para 8] As set out in the Notice of Inquiry, this issue relates to whether the Public Body conducted an adequate search for records.

[para 9] 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 10] 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 11] 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 for records?

[para 12] 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 13] The Public Body provided the following explanation of the scope of its search:

> 21. The following business units conducted searches for records: Law, Human Resources, Information Technology, Corporate Security, and Calgary Transit.
>
> 22. The BURR sent to Law requested a search be conducted for any record referencing the Applicant's name within the Employment/Labour Relations division of the Law Department during the time period of April 1, 2012 to April 7, 2016. Law conducted a search on its two digital systems where electronic records generally stored: 1) Law's shared network drive, and 2) Prolaw (an electronic legal software system that stores and manages legal files.) The keywords used to conduct to electronic search was the Applicant's first name and last name.

> 23. The BURR sent to the Human Resources business unit ("HR") requested that it conduct searches for records: 1) held within Labour Relations referencing the Applicant's name, and 2) notes or emails to or from John Bate and a printout of Peoplesoft (an HR system) job postings that the Applicant applied for. HR conducted the search within the following divisions of HR: Talent Management (which includes recruitment), Labour Relations (including any grievance files), and Business Advisory Services.
>
> 24. HR's standard search involved searching for both electronic and hard copies of records. HR conducted a search on its following systems: 1) HR's shared network drive, 2) PeopleSoft HCM (a human resources management system), and 3) Outlook (for emails.) HR also searched its secure filing cabinets for paper copies of responsive records. The HR Advisor specifically named in the Request also checked his hard drive for responsive records. The keywords used by HR were the Applicant's full name (first name, middle name and last name) and the Applicant's unique City employee identification number.
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> 25. The Initial Analyst tasked Corporate Security with searching the email inboxes, and "H" drive (a personal storage location for saving files for each employee) of those employees specifically identified within the Request. The keywords used to conduct to electronic search of the inboxes was the Applicant's, name, initials, first name and last name. A keyword search of the H drives was not possible, so Corporate Security manually reviewed the contents of the employees' H drive.
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> 26. The Initial Analyst tasked Information Technology ("IT") with searching for video footage from the Sunnyside Transit Station recorded on December 29, 2015 during the specified time frame. The IT Account manager for Calgary Transit advised that IT does not manage or store video footage for transit stations. It is managed by Transit in accordance with Transit's and the Public Body's retention policy.
>
> 27. The Initial Analyst tasked Calgary Transit with searching for: 1) the Applicant's references provided to [DY], 2) any emails to or from its general video inbox (email) referencing the subject name, and 3) video footage from the Sunnyside Transit Station recorded on December 29, 2015 during the specified time frame. Transit ([DY]) searched his Outlook and H drive. Transit also searched external hard drives for responsive video footage.

[para 14] The Public Body states that the searches were conducted by employees in each business unit who were familiar with the records repositories. Where the search indicated a specific employee might have relevant records, that employee was asked to search their records.

[para 15] The Public Body also provided an affidavit sworn by an Access and Privacy Analyst regarding the Public Body's search for records that provides some additional detail regarding the search.

[para 16] The Public Body states that it believes no further records exist for the reason that it searched all repositories that could reasonably hold responsive records.

[para 17] The Public Body notes that it did not locate video footage identified in the Applicant's request, taken at a particular transit station at a specified time. It states (at para. 39):

> Transit's Standard Operating Procedure for Transit video recordings provides that video records used for daily monitoring are governed by classification code CG-26-02 in the Public Body's Classification and Retention Schedule and retained for no more than 2 months after the recording is made. If a specific request is made for the video, it will be saved and retained for a longer period of time. Transit's practice is to overwrite this video 30 days after it was created. The Applicant requested video created on December 29, 2015 but the Public Body did not receive the Applicant's access request until April 7, 2016. As the Public Body did not receive an earlier request for the video, it was overwritten before the Public Body received the Applicant's request.

[para 18] The Notice of Inquiry instructed the Applicant to set out their reasons for believing more records exist than were located and/or to describe as precisely as possible the records/kinds or records they believe should have been located and provided. The Applicant did not provide a submission to this inquiry but rather chose to rely on their request for review and request for inquiry. The only mention of specific records not provided to the Applicant in those documents is a reference to statements made by two Public Body employees, JS and BC.

[para 19] The Public Body has stated that it withheld information of Public Body employees under section 17(1) (discussed in the next section of this Order). Given the thoroughness of the Public Body's search, and content of the records at issue, it seems probable that the Public Body withheld information about the individuals identified in the Applicant's request for review, rather than failing to locate any information.

[para 20] I accept the Public Body's explanation regarding its search for responsive records. The search as described was sufficiently thorough to locate responsive records. The Applicant has not identified any particular records – other than records containing the names specified in his request for review, noted above – he believes ought to have been located, or identified any areas or types of records that ought to have been searched.

[para 21] I find that the Public Body conducted an adequate search for records, as required under section 10.

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

[para 22] The Public Body applied section 17(1) to withhold information of Public Body employees and other third parties.

[para 23] The subsections of section 17 cited by the parties state:

> *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.*
> *…*

(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 third 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,

...

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

[para 24] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 25] 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 26] 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 27] Some of the information withheld under section 17(1) consists of personal information of Public Body employees. Many past Orders of this Office state that the disclosure of the names, contact information and other information about public body employees that relates only to the employees acting in their professional capacities is not an unreasonable invasion of personal privacy under section 17(1) unless that information has a personal dimension in the circumstances (see Orders 2001-013 at paras. 89-90, F2003-002 at para. 62, F2008-028 at para. 53). In other words, in the absence of a personal dimension, information cannot be withheld under section 17(1).

[para 28] While the Applicant has the burden of proving that it would not be an unreasonable invasion of privacy to disclose personal information to which section 17(1) applies, the Public Body has the burden of establishing that the information withheld under section 17(1) is personal information to which that provision can apply (Order F2010-002, at para. 9).

[para 29] The Public Body described the information about Public Body employees withheld under section 17(1) as follows:

> 46. Records pages 3-4, 782-783, 784-785, and 868, contain a description of conversations and/or questions between a Public Body employee investigating incidents involving the Applicant (an "Investigator") and other Public Body employees who were co-workers of the Applicant and who witnessed the incidents being investigated. The information severed includes personal information regarding the conduct and behavior of these public body employees, as well as their name and other information that could identify the individual employee.
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> 47. Records pages 575, 577, and 582 contain the names of Public Body employees who were co-workers with the Applicant and who witnessed and made formal statements regarding incidents involving the Applicant. Record pages 143-144, 145-146, 147, 154-156, 157, 158-159, 160, 175, 583-584, 742-743, 777-778, and 906-908, contain notes of conversations between an Investigator and other Public Body employees who were co-workers of the Applicant and who witnessed the incidents, as well as detailed statements made by these Public Body employees to the Investigator. The information severed in the

> Records described in this paragraph include the co-workers' names and other identifying information about these third parties.
>
> 48. Records pages 190, 327, 478, 599, 782-783, 784-785, 786, 894, 960, and 963 contain references to the Public Body's employees' personal schedules such as planned or potential time off, trips and illness. Records pages 153, 227, 232, 246, 643, and 895 contain employment related information regarding employees of the Public Body, such as the time and date named employees start work, the names and locations of the applicant's former supervisors, and names of employees needing new equipment or certifications. Record pages 568, 782, 784, 786, 924, 928, and 940-941 reference employment related information of employees of the Public Body such as references to investigations and potential discipline involving these employees combined with the employee's name and/or title. The personal information described in this paragraph has been severed.

[para 30] In Order F2014-23, the adjudicator considered the application of section 17(1) to withhold witness statements of officers made during an investigation into a complaint about officer conduct. The adjudicator found that section 17(1) could not apply to most of the information, as it did not have a personal dimension; she said (at paras. 14-15, 19):

> Using record 35 as an example, of the seven paragraphs severed from the record, the fourth, fifth and sixth paragraphs appear to contain only background information that the witnesses became aware of and provided to the investigator by virtue of their roles as employees of the Public Body. A great deal of the information severed from the records consists of narratives of events that lack a personal dimension. Although the names of the witnesses are contained in these paragraphs, in most cases the information is not about them, but relates to their job duties. The witnesses were asked to make statements because they were employees of the Lethbridge Police Service and the Public Body and as such, had knowledge of the events under investigation and the processes followed by the Public Body.
>
> Record 46 contains a series of typed statements attributed to employees. Using this record as an example, I note that the statements recount workplace events and circumstances. The Public Body has severed these statements in their entirety. While severed information contains the names of witnesses and their statements, it lacks a personal dimension. Rather, the information consists of factual accounts of practices and policies at the Public Body. The statements do not appear to convey anything personal about the employees making the statements. It is therefore unclear that record 46 contains personal information.
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> …
>
> Most of the information the Public Body severed under section 17 is not personal information, but is information relating to the operations of the Lethbridge Police Service. Where individuals are referred to in the records, it is as employees acting in a representative capacity. However, as discussed above, it is possible that some of the information may consist of personal opinions, in which case, the fact that an individual holds a particular opinion may be the individual's personal information. As it remains possible that some of the information the Public Body severed under section 17 is personal information, I have decided that I must require the Public Body to make

> decisions as to whether the opinions of employees it has severed from the records have a personal dimension, such that the fact that the employee holds the opinion could be said to be the employee's personal information.

[para 31] The adjudicator in Order F2019-24 followed the analysis above in a similar situation (at paras 20-23):

> The Public Body in the case before me has severed all statements made by third parties, and the names of third parties and entire interviews. While some of the severed information may constitute personal information of third parties, some does not. For example, most of the questions posed by the interviewer do not impart information about third parties. While many of the questions contain information about the Applicant, unless inextricably intertwined with information about a third party, information about an applicant is not information that can be withheld from an applicant under section 17(1). This is because section 1(r), which defines the term "third party" for the purposes of the FOIP Act, establishes that applicants, like public bodies, are not third parties. Only information about a third party may be withheld under section 17(1).
>
> The Public Body has severed information about the Applicant, not only where it appears in questions, but in the answers provided by interviewees. In some cases the information appears to be factual, as in the case where interviewees recount events. In other cases, the interviewees interpret the Applicant's actions, which suggests that the information is an opinion about the Applicant. Under section 1(n)(viii) of the FOIP Act, an opinion about an individual, is not the personal information of the opinion holder, but that of the individual whom the opinion is about.
>
> As I noted in my letter to the Public Body, reproduced above, the fact that an individual recounts events involving other individuals and has knowledge of them, or has formed an opinion, may be personal information about that individual. If the individual who recounts events or forms an opinion about someone else does so in a professional capacity, the fact that the individual recounted events or formed an opinion will not be personal information. However, if the individual recounted events or formed the opinion in the individual's personal capacity, then the information may have a personal dimension and be personal information. If the information is personal information, a public body must then conduct an analysis under section 17(1) to determine whether the information of the individual who provided the facts or opinion should be withheld or disclosed. If it is to be withheld, then the Public Body must comply with its duty under section 6(2) of the FOIP Act and consider whether it is possible to sever the identity of the individual who recounted events or provided an opinion and to provide the information about the applicant to the applicant.
>
> As it appears that the Public Body has severed information under section 17(1) that is not personal information, or is, alternatively, the personal information of only the Applicant, I must direct it to review the information it has severed under section 17(1) and to make new determinations as to whether the information is personal information of a third party or not. If it is not, then the information cannot be severed under section 17(1).

[para 32] In Order F2013-03, the adjudicator set out the distinction between employees acting in their work capacity or in a more personal capacity, as follows (at paras. 44-45):

> Given these principles, I find that section 17(1) does not apply to some of the information that the Public Body withheld, as set out later in this Order. For instance, when the Applicant's former supervisor or the Public Body's human resources coordinator sent or received correspondence, or dealt with the Applicant, they were generally acting in a work-related capacity, without any personal dimension. Conversely, when employees, associates or clients of the Applicant provided their views or opinions about the Applicant, as a result of difficulties they were having when dealing with her, I find that there is a sufficient personal dimension so as to give rise to the possibility that disclosure of their identities, in conjunction with their views and opinions, would be an unreasonable invasion of their personal privacy.
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> When the third parties in question, whether unsolicited or during an interview, provided their views or opinions about the Applicant – who was their supervisor or associate – there is a personal dimension because they did so confidentially, and would presumably have concerns about their job or their relationship with the Applicant, or fear retaliation or some other negative consequence, if the Applicant came to know their comments. Where the disclosure of information is likely to have an adverse effect on an individual, the record of a work-related act potentially has a personal dimension, and may therefore constitute the individual's personal information (Order F2006-030 at paras. 12, 13 and 16; Order F2008-020 at para. 28). Conversely, when the Applicant's supervisors and the human resources coordinator provided their views or opinions about the Applicant and her work performance, they were doing so in a work-related capacity without any personal dimension, as part of their roles and responsibilities were to evaluate, or assist in the evaluation, of the Applicant. Having said this, my comments are not intended to set out a uniform rule. There may be times, depending on the context and the content of the particular record, when a colleague or someone being supervised provides comments strictly in a work-related capacity, and when a supervisor's comments have a personal dimension.

[para 33] In Order F2020-23, the adjudicator considered the application of section 17(1) to statements made by public body employees in the course of a workplace investigation. He said (at paras. 158-161):

> Under section 17(1), the Public Body redacted its employee's answers to the investigator's questions in their entirety, applying section 17(1) in a blanket fashion. It appears that the Public Body considered that the mere fact that a statement was made in the context of an investigation makes the statement, or the fact that a certain person made it, personal information. This is not the case.
>
> The Public Body's employees took part in the investigation as matter of their employment duties. The fact that they made any particular statement is a matter of performance of their duties, and as such is not their personal information. See Order F2009-026 at paras. 10 to 11. This principle also extends to opinions about an applicant that are formed as a result of dealing with the applicant in the course of employment duties, when the opinion is given as matter of employment duties, such as answering the investigator's questions. As stated by the Adjudicator in Order F2009-026 at paras. 14 to 17:
>
> > The employee brought an incident that took place in the course of her employment to the attention of the Public Body's security office. As the records at issue indicate

that the Applicant has knowledge of the incident described in the records at issue, and is aware of the employee's role in the incident, it would not be possible to provide the Applicant with his own personal information, without also providing information about the employee. The question becomes whether the information about the employee is personal information, or information about the employee as a representative of the Public Body.

Not only do I find that the employee's knowledge of the incident arose from her duties as an employee, but I find that reporting the incident to the security office and making a statement about the incident was also part of her duties as an employee. All of her dealings with the Applicant were done as an employee of the Public Body and decisions made in relation to his requests were made with the authority of the Public Body. This finding is supported by the employee's reported statement referring to "enforcing guidelines", which appears in paragraph 1(e) of page 2 of the records at issue.

Under section 1(n) of the Act, cited above, an opinion held about an individual is the personal information of the subject of the opinion. However, the fact that an individual holds an opinion about another individual can be information about the individual who has formed the opinion. In Order F2006-006 the Adjudicator noted:

> A third party's personal views or opinions about the Applicant - *by that reason alone* - are expressly not their personal information under section 1(n)(ix). However, the identification of the person providing the view or opinion may nonetheless result in there being personal information about him or her. Section 1(n)(ix) of the Act does not preclude this conclusion, as that section only means that the content of a view or opinion is not personal information where it is about someone else. In other words, the *substance* of the view or opinion of a third party about the Applicant is not third party personal information, but the *identity* of the person who provided it is third party personal information.

In this case, the opinion formed about the Applicant is based on the employee's experience providing services to the Applicant on behalf of the Public Body, and on a conversation that took place between the Applicant and the employee regarding the Public Body's guidelines. Further, review of the records at issue indicates that this opinion was given to the security office so that the security office could assess the situation and take any steps that office considered necessary. I find that the opinion was also provided by the employee in a representative capacity, as part of her employment duties.
As I find that the information in the records at issue about the employee is about her as a representative of the Public Body, I find that section 17 does not apply to that information.

I agree with the Adjudicator in Order F2009-026.

Accordingly, section 17(1) does not apply in blanket fashion to the answers given to the investigator. As with the Public Body's other redactions under section 17(1), it must be applied to individual pieces of personal information. The result is that much of the information redacted from these pages should be disclosed to the Applicant.

[para 34] The cases cited above show a consistent approach to the application of section 17(1) to information in statements made by public body employees in the course of their job duties. I agree with the above analyses. Whether information about Public Body employees is personal information to which section 17(1) applies depends on whether the information relates only to the employees' work duties or whether there is a personal dimension to the information. An employee providing an opinion on a matter may be doing so in the course of their work duties, which does not have a personal dimension. However, there can be situations in which there is a personal dimension to the opinion or context in which it is given, such that it is properly characterized as personal information of the opinion giver to which section 17(1) can apply.

[para 35] Much of the personal information of Public Body employees appears in the context of statements made to Public Body employees who were conducting investigations into the Applicant's conduct. I will address this information first.

[para 36] The Public Body did not provide specific arguments regarding its application of section 17(1) other than what was cited above. For example, the Public Body did not provide any specific information about the employees who provided statements in the records, or whether they were acting other than in the course of their job duties. From my review of the records, I conclude that when a complaint is made about an employee in the Applicant's position, other employees may be asked to provide a statement regarding the incident, as part of the investigation. This appears to be part of these employees' job duties. Therefore, for the most part, these statements do not contain information to which section 17(1) can apply. There are exceptions however, for statements that have a personal dimension; for example, statements about personal relationships between officers, complaints initiated by an employee that have a personal aspect, or where the employee providing the statement is involved in the incident in such a manner as it has a disciplinary aspect for that employee as well as the Applicant.

[para 37] I also note that the Public Body disclosed some statements in their entirety or with only discrete items of information withheld, while other statements are withheld in their entirety including the names of the employee providing the statements as well as names of other employees who were present or involved in the incident being discussed. In most cases, the reasons for this discrepancy in applying section 17(1) is not clear from the records themselves, nor has it been addressed in the Public Body's submissions.

[para 38] In the following paragraphs I will describe the information that was withheld under section 17(1) in statements by Public Body employees, to which I find that provision cannot apply as there is no personal dimension to the information. In making my determination, I have reviewed the records and considered the context in which they appear, as well as the precedents cited above. In some records, the Public Body has withheld names of some employees but disclosed others, without any apparent reason for the discrepancy. It may be that the Public Body believed that the information had a personal dimension for some employees but not others. However, in most cases neither

the Public Body's submission nor the records themselves indicate why this might be. In a few instances, the personal dimension was clear from the records.

[para 39] Section 17(1) cannot apply to the information on the following pages:

- 143-144, except the sentence in the middle of page 143 that refers to the witness/employee's interpersonal relationships;
- 145
- 147
- 149
- 154-156
- 157
- 158-159
- 161-166
- 575
- 577
- 582-584, except the last paragraph of page 584, which has a personal dimension
- 614
- 742 – only the last paragraph, which was partly withheld
- 776

[para 40] The information withheld in the following pages has a personal dimension for the reasons discussed above, such that section 17(1) can apply:

- 3
- 4
- sentence in the middle of page 143 that refers to the witness/employee's interpersonal relationships (as above)
- 146
- 148
- 160, 175 (while some of this information is the same as what I have found does not have a personal dimension within the terms of section 17(1), the context of this record gives this same information a personal dimension that it does not have in another context).
- 742 – bullet points only; the last paragraph cannot be withheld under section 17(1), as above
- 743
- 777-778
- 906-908

[para 41] Some of the personal information of employees withheld under section 17(1) does not relate to providing statements about incidents. The Public Body has also applied this provision to information about employee scheduling (such as vacation or illness leaves), and comments of a personal nature. Having reviewed the records I agree that

only some of the information is personal information about other Public Body employees to which section 17(1) can apply.

[para 42] Pages 190, 237, 327, 478, 599, 782-783, 784-785, 786, 894, 960, 963 contain personal information (such as scheduling) of other employees such that section 17(1) can apply. Pages 227, 232, 246, 568, 643, 868, 895, 924, 928, 940-941 contain information about other employees' employment status and history such that section 17(1) can apply.

[para 43] The Public Body withheld a sentence on page 153 that relays information about two unnamed employees. The employees are not identifiable from the sentence, nor does the information appear to be personal information. Therefore, section 17(1) does not apply.

[para 44] The Public Body also withheld personal information of third parties other than Public Body employees. It said:

> Other information contained in the Records contains the personal information of third parties who are not employees of the Public Body. Record pages 148, 901-905 and 978-979 contain the name of a third party as well as detailed personal information about the individual, including medical information. Record pages 917-919, 920-921, 925-926, 982, and 936 contain the name and contact information (email address and/or phone number) of a third party. Record page 230 contains sensitive information about an unnamed third party that could potentially identify the individual. Record page 984 contains identifying information of a third party. The personal information described in this paragraph has been severed.

[para 45] Pages 148, 917-919, 920-921, 925, 926, 979, 982, 984 contains personal information of individuals outside the Public Body who interacted with the Applicant. The severed information consists primarily of information that can identify the individual. Page 978 contains additional statements made by an individual; it would be difficult to sever the statements that could identify this individual from those that could not. The same can be said for the information on pages 901-905. The last three sentences of the first paragraph withheld on page 230 contains personal information of a third party who is identifiable from the information even though they are not named. Section 17(1) can apply to all of this information.

[para 46] The information withheld on page 936 consists of a job title, and the name and business contact information of an employee of another public body. This is not information to which section 17(1) can apply.

[para 47] The remaining analysis applies only to the information to which I found section 17(1) can apply.

Application of sections 17(2) – 17(5)

[para 48] 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 49] 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 50] This provision applies to all of the third party personal information withheld under section 17(1).

[para 51] 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.

[para 52] The Applicant has not provided specific arguments regarding the Public Body's application of section 17, or regarding any third party personal information that may be in the records. The Public Body argues that sections 17(5)(e) and (f) weigh against disclosure.

Section 17(5)(a)

[para 53] Section 17(5)(a) weighs in favour of disclosure where the disclosure is desirable to subject the Public Body's activities to public scrutiny. In order for the desirability of public scrutiny to be a relevant factor, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information in order to subject the activities of the public body to public scrutiny. (See Order 97-002, at para. 94; Order F2004-015, at para. 88; Order F2014-16, at para. 34.)

[para 54] In Order F2014-16, the Director of Adjudication discussed appropriate factors to consider in determining whether public scrutiny is desirable. She said (at paras. 35-36):

> In determining whether public scrutiny is desirable, I may consider factors such as:
>
> 1. whether more than one person has suggested public scrutiny is necessary;

2. whether the applicant's concerns are about the actions of more than one person within the public body; and
3. whether the public body has not previously disclosed sufficient information or investigated the matter in question.

(Order 97-002, paras 94 and 95; Order F2004-015, para 88).

It is not necessary to meet all three of the foregoing criteria in order to establish there is a need for public scrutiny. (See *University of Alberta v. Pylypiuk* (cited above) at para 49.) For example, in Order F2006-030, former Commissioner Work said (at para 23) that the first of these factor "is less significant where the activity that has been called into question, though arising from a specific event and known only to those immediately involved, is such that it would be of concern to a broader community had its attention been brought to the matter", commenting that "[i]f an allegation of impropriety that has a credible basis were to be made in this case, this reasoning would apply".

[para 55] In his request for review, the Applicant states that his employment with the Public Body was wrongfully terminated. However, he has not provided any information regarding whether he believes the Public Body erred in his single case, or whether the actions of the Public Body require scrutiny more broadly. Further, while the Applicant referenced a particular statement made by a Public Body employee about the Applicant, this reference indicates that the Applicant already has a copy of that statement. It is not clear to me whether and why it would be desirable to subject the Public Body's activities to public scrutiny, or whether and how the disclosure of the personal information in the records relates to the actions or scrutiny. Given this, I find that section 17(5)(a) is not applicable.

Section 17(5)(c)

[para 56] Section 17(5)(c) weighs in favour of disclosure where the personal information is relevant to a fair determination of the Applicant's rights. Four criteria must be fulfilled for this section to apply:

(a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;

(b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;

(c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. (Order F2008-012 at para. 55, Order F2008-031 at para. 112)

[para 57] Similar to my finding regarding section 17(5)(a), the Applicant has not presented any argument to indicate that the third party personal information in the records is relevant to a fair determination of his rights (section 17(5)(c)). I understand that he

filed a grievance in the past, but there is no indication that this is ongoing. Given this, I find that section 17(5)(c) does not apply.

[para 58] There are no other factors in section 17(5) that appear to apply.

Conclusion regarding section 17(1)

[para 59] The Applicant bears the burden of showing that the personal information should be disclosed. At least one presumption against disclosure applies to the personal information to which I have found section 17(1) applies (section 17(4)(g)) and no factors appear to weigh in favour of disclosure; as such, I do not need to consider the other factors weighing against disclosure. I find that the Public Body is required to continue to withhold the information to which I have found that section 17(1) applies.

[para 60] No other exception has been applied to the information to which I found section 17(1) cannot be applied. I will order the Public Body to disclose this information to the Applicant.

3. Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the information in the records?

[para 61] The Public Body is no longer applying this exception to withhold information.

4. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

[para 62] The Public Body is no longer applying this exception to withhold information.

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

[para 63] I will consider this issue together with issue #6.

6. Did the Public Body properly apply section 24(1)(b) of the Act (consultations and deliberations) to the information in the records?

[para 64] The Public Body applied section 24(1)(a) and (b) to information in several pages in the records at issue. These sections state:

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

(i) officers or employees of a public body

(ii) a member of the Executive Council, or

(iii) the staff of a member of the Executive Council,

...

[para 65] 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 66] Therefore, the burden of proof lies with the Public Body to prove that section 24(1) of the Act applies to the records at issue.

[para 67] A "consultation" occurs when the views of one or more officers or employees are sought as to the appropriateness of particular proposals or suggested actions; a "deliberation" is a discussion or consideration, by persons described in section 24(1)(b), of the reasons for and/or against an action (Orders 96-006 at p. 10; Order 99-013 at para. 48, F2007-021, at para. 66).

[para 68] The test for sections 24(1)(a) and (b), as stated in past Orders, is that the advice, recommendations etc. (section 24(1)(a)) and/or the consultations and deliberations (section 24(1)(b)) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action. (See Order 96-006, at p. 9)

[para 69] In Order F2013-13, the adjudicator stated that the third arm of the above test was overly restrictive with respect to section 24(1)(a). She restated that part of the test as "created for the benefit of someone who can take or implement the action" (at paragraph 123).

[para 70] In addition to the requirements in those tests, sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held on a particular topic (and not the *substance* of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

[para 71] Bare recitation of facts or summaries of information also cannot be withheld under sections 24(1)(a) or (b) unless the facts are interwoven with the advice, proposals,

recommendations etc. such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48).

[para 72] As well, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at para. 31).

[para 73] The Public Body also argues that the tests enunciated in past Orders of this Office are overly restrictive. It cites the Supreme Court of Canada case, *John Doe v. Ontario (Finance)*, 2014 SCC 36, in which the Supreme Court overturned a finding of the Ontario Information and Privacy Commissioner on the Ontario legislation's equivalent of section 24(1)(a). The Court found that it was unreasonable for the Ontario Commissioner to require evidence that advice had been communicated in order for the provision to be properly applied. Rather, the provision can also apply to drafts of advice (see paras. 50-51).

[para 74] I addressed this argument from this Public Body in Order F2018-14 (at paras. 65-67):

> Section 24(1) of the FOIP Act is broader than the equivalent exception in Ontario's Act, insofar as section 24(1) is not limited to advice and recommendations; it also includes proposals, analyses and policy options. Evidence that advice had actually been communicated is not a requirement for the application of section 24(1)(a). In fact, in Order F2013-13, the adjudicator specifically found that requiring that advice be made to the decision-maker is overly restrictive. She said (at para. 123, emphasis in original):
>
> > 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. This purpose would not be achieved if information otherwise falling under section 24(1)(a) were automatically producible prior to the decision maker actually receiving it, or in cases where a public body elected to follow another course and the advice did not ultimately reach the decision maker. 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) regardless of whether the individual or individuals ultimately responsible for making a decision receives it. The third arm of the test should therefore be restated as "created for the benefit of someone who can take or implement the action" to better accord with the language and purpose of section 24(1)(a), and I will review the information to which the Public Body has applied section 24(1)(a) with that in mind.
>
> The adjudicator's analysis above, from a 2013 Order of this Office, is consistent with the Supreme Court's finding in *John Doe*. (It was also presented to the Supreme Court as part of the factum of this Office as intervener in the *John Doe* case.)
>
> The Public Body noted the change to the third part of the test for section 24(1)(a) at paragraph 104 of its initial submission. It is therefore unclear why the Public Body continues to argue that the test for applying section 24(1)(a) remains overly restrictive,

> citing *John Doe*. If the Public Body believes the test to be overly restrictive for reasons other than those discussed in *John Doe*, it hasn't said so.

[para 75] In its initial submission to this inquiry the Public Body again noted the change to the third part of the test for section 24(1)(a) used by this Office (cited at para. 70 above), at paragraph 80 of its submission. It remains unclear to me why the Public Body continues to argue that the test applied by this Office is overly restrictive on these grounds. Given this, and as the Public Body has made arguments based on the tests I have cited above, I will review the information withheld under sections 24(1)(a) and (b) in accordance with these tests.

[para 76] The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (which I will refer to as "advice etc.", section 24(1)(a)); and consultations or deliberations between specified individuals (section 24(1)(b)).

[para 77] A request for factual information does not fall within the scope of section 24(1) if it does not otherwise reveal the substance of advice, recommendations etc. (see Orders F2016-57, at para, 30; F2020-22, at para. 101).

Application of sections 24(1)(a) to the records

[para 78] The Public Body has applied section 24(1)(a) to information in several pages of records. It argues:

> 87. Information in the Records to which Section 24(1)(a) was applied as indicated in the Index of Records includes advice and recommendations sought from and provided by Public Body employees regarding the investigation of incidents and complaints involving the Applicant as well as determining and assessing discipline against the Applicant. This information is contained in email communications between City employees; primarily between employees in the Public Body's Human Resources Department and employees working in the Transit Department. In some cases the Records contain emails between Transit employees involved with these issues.
>
> 88. The communications seeking advice were made to the appropriate Public Body employees whose role it was to provide such advice. For example, advice was frequently sought by Transit employees from Human Resources staff or to other Transit staff whose job functions were to help address the matters involving the Applicant. These employees appropriately provided advice and recommendations as part of their job responsibilities.
>
> 89. Moreover, the advice and recommendations provided by the Public Body's employees were directed towards taking an action. Specifically, the advice and recommendations were for the purpose of providing guidance and recommended actions regarding interviews, investigation, communications with, and discipline involving the Applicant. Finally, the advice and recommendations were provided to individuals within Transit who were in a position to act on the advice and were directly involved in the investigation and disciplinary procedures involving the Applicant.

[para 79] In most cases, the Public Body applied section 24(1)(a) to discrete items of information in the records. I find that this provision was properly applied in most instances.

[para 80] Pages 112-114 are described in the index of records as a memo with recommendations. However, this memo relates to a grievance filed by the Applicant, per the collective agreement between the Applicant's union and the Public Body. I have located a later version of the collective agreement between the Applicant's union and the Public Body, on the union's website. The grievance process is set out therein, and includes as the first step of a grievance made under the section cited in the memo, that it will be submitted to an exempt manager. The memo at pages 112-114 is addressed to a manager of the Public Body. The content of the memo, while including 'recommendations', appears to be the Public Body's position on the grievance as the employer.

[para 81] In my view, the memo comprising pages 112-114 is a submission to a decision-maker, much like the Public Body's submissions to this inquiry. Neither can be properly characterized as containing advice within the terms of section 24. The Public Body is a party to a grievance process, making a submission to support its position. The decision-maker is coming to a conclusion not on the advice of the Public Body, but on the merit of the submissions made. The fact that the decision-maker in the first step of the grievance process is also an employee of the Public Body does not change the character of the process. In my view, section 24(1) does not apply to this information.

[para 82] The remaining information withheld under section 24(1)(a) is properly characterized as advice on possible courses of action, for the most part. In some cases, I think that section 24(1)(b) is the better provision to apply, insofar as several employees appear to be consulting on the advice to be given. That the Public Body applied section 24(1)(a) rather than (b) in these few instances does not undermine its application of section 24(1) more generally. As the Public Body's justification for the application of section 24(1) set out in its submissions support its application to these pages, I can and do uphold it (see Orders F2004-026, F2008-016, F2020-22).

Application of sections 24(1)(b) to the records

[para 83] The Public Body has applied section 24(1)(b) to documents it describes as drafts. The Public Body states:

> 95. Some of the information to which the Public Body applied Section 24(1)(b) as indicated on the Index of Records represent email exchanges between the Public Body's employees discussing how to address various issues regarding the Applicant, particularly regarding the investigation of incidents involving the Applicant and associated actions to take regarding these incidents. These consultations and deliberations between the Public Body's employees involve issues that they had to address, either at the time of the consultation or in the future. Moreover, these issues are matters that the Public Body employees would reasonably be expected to discuss, and have a responsibility to discuss

> by virtue of their employment duties and responsibilities. Finally, these consultations were directed towards taking an action as to how the Public Body would respond to, or address these incidents.
>
> 96. Other information to which the Public Body applied Section 24(1)(b) as indicated on the Index of Records are draft documents such as letters, memos, and interview questions related to issues involving the Applicant. Many of these draft documents contain handwritten notes and/or underlined and highlighted changes to the draft. The Public Body has withheld these draft documents, as releasing the document would reveal the consultations and deliberations of employees of the Public Body who commented on, or provided suggestions regarding these draft documents. Releasing the draft documents would also enable the Applicant in many cases to compare the draft documents with the final document, thus revealing the substance of the consultations and deliberations made in the course of producing the final document.

[para 84] The Public Body has applied section 24(1)(b) to withhold these draft documents in their entirety. The Public Body states that these drafts often include handwritten notes, tracked changes etc. that reveal the changes that were suggested, considered, or recommended. The Public Body argues that disclosing the draft documents would allow the Applicant to compare the drafts with the final versions disclosed to him, which would reveal the substances of the suggested or considered changes.

[para 85] I agree that section 24(1) applies to information in draft documents where comments, suggestions and advice were sought on the content of the draft. The advice, comments and suggestions may have been explicitly sought (for example, in an email to which the draft is attached) or be clear in the notations made on the draft.

[para 86] However, in some cases, the Public Body has described documents as being drafts, when there is no indication in the records that they are, in fact, drafts. In these cases, it is not clear from the surrounding records that they are drafts circulated for comment.

[para 87] Pages 24 and 25 are described in the Public Body's index of records as draft letters to the Applicant. However, there is no indication on these records that they are drafts. They appear to be complete and final letters. The surrounding records appear to be taken from the Applicant's personnel file, and include certificates for completed training courses, his appointment to his position, performance appraisals, and other letters that were disclosed to him. Some of the disclosed letters have a signature while others do not.

[para 88] The letters on pages 24 and 25 do not contain a signature, but the same is true for the letter comprising pages 22-23, which was disclosed to the Applicant and not identified as a draft. It is possible that the Public Body routinely retains unsigned letters as final copies, rather than requiring the signatory to sign an additional copy for the official file. In such a case, the lack of signature does not necessarily indicate the document is a draft. Unlike other pages of the records at issue, there is nothing on these pages or surrounding records that indicate that comments or advice were sought on their content before the letter was signed and sent to the Applicant. It is not sufficient for the

Public Body to merely state in a submission that a document is a draft, without providing support for that claim where it is not apparent on the face of the record.

[para 89] If these 'drafts' are identical to the letters ultimately sent to the Applicant save for a missing signature, then I do not see how disclosing these 'drafts' would reveal any advice or recommendations sought or given. The Public Body has argued that the Applicant could compare the draft to the final version to deduce the advice or consultations undertaken with respect to those letters. However, the letters on pages 24-25 appear to be final (with the exception of a missing signature). If this is the case, the Applicant would not be able to deduce any advice or consultations, as argued by the Public Body.

[para 90] Similarly, page 97 is a letter addressed to a third party that is incomplete only insofar as the author requested that it be formatted on letterhead (per the email on the previous page, which was disclosed). There is no indication from the records themselves that the letter was a draft or in any way amended before it was signed and sent. In that case, there is no advice or consultation to reveal.

[para 91] The Public Body's only rationale for applying section 24(1) to the information in these records is that they are drafts. The Public Body does not argue that the content itself – even in a finalized format – reveals advice or consultations. Nor is there any indication that these documents are the subject of any consultations. In contrast, another version of page 97 is located in the records at issue; that version contains notations and amendments and was clearly the subject of a consultation between employees before it was finalized. I agree that section 24(1) applies to that page.

[para 92] The Public Body bears the onus of showing that it properly applied section 24(1). Given the Public Body's rationale for applying section 24(1) to pages 24, 25 and 97, I will order the Public Body to determine whether these letters are indeed drafts, and whether information in these pages is the same as information in the letters ultimately sent to the Applicant and third party such that disclosing pages 24, 25 and 97 cannot reveal advice or consultations. The Public Body must disclose any information in these pages that has already been disclosed to the recipients of the letters.

[para 93] Pages 609-612 are described in the index of records as a draft grievance presentation. However, the email on page 608, to which this presentation was attached, indicates it is a final version of a past presentation. There is nothing on pages 609-612 that would indicate it is a draft document. There is information crossed out in the footer of these pages; however that information relates to the location in the Public Body's electronic system where the document is saved. This location information indicates that the document was sent or moved to a location related to the Public Body's FOIP area. Such location information does not change the content of the presentation. Nor can a public body characterize a finalized document as 'draft' for the sole reason that the location data has changed. Because the records themselves indicate this is not a draft as described in the Public Body's submission, I find that section 24(1) cannot apply to these pages.

[para 94] Given the content of pages 609-612 – specifically that they contain recommendations – I considered whether section 24(1) could apply to any information even if the document is not a draft. However, this document is similar in substance to the document comprising pages 112-114, to which I found section 24(1)(a) cannot apply. For the same reasons, I find that section 24(1) cannot apply to the document on pages 609-612.

Exercise of discretion – section 24(1)

[para 95] Section 24(1) is a discretionary exception. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.

[para 96] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

[para 97] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded (at para. 104):

> In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*.

[para 98] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII) (*EPS*), the Court provided detailed instructions for public bodies exercising discretion to withhold information under the Act. This decision was issued after the Public Body provided its submissions to this inquiry. However, it might be helpful for the Public Body to review the discussion.

[para 99] The Court said (at para. 416)

> What *Ontario Public Safety and Security* requires is the weighing of considerations "for and against disclosure, including the public interest in disclosure:" at para 46. The relevant interests supported by non-disclosure and disclosure must be identified, and the effects of the particular proposed disclosure must be assessed. Disclosure or non-

> disclosure may support, enhance, or promote some interests but not support, enhance, or promote other interests. Not only the "quantitative" effects of disclosure or non-disclosure need be assessed (how much good or ill would be caused) but the relative importance of interests should be assessed (significant promotion of a lesser interest may be outweighed by moderate promotion of a more important interest). There may be no issue of "harm" in the sense of damage caused by disclosure or non-disclosure, although disclosure or non-disclosure may have greater or lesser benefits. A reason for not disclosing, for example, would be that the benefit for an important interest would exceed any benefit for other interests. That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

[para 100] It further explained the weighing of factors at paragraph 419:

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

[para 101] Lastly, the Court described burden of showing that discretion was properly exercised (at para. 421):

> I accept that a public body is "in the best position" to identify its interests at stake, and to identify how disclosure would "potentially affect the operations of the public body" or third parties that work with the public body: EPS Brief at para 199. But that does not mean that its decision is necessarily reasonable, only that it has access to the best evidence (there's a difference between having all the evidence and making an appropriate decision on the evidence). The Adjudicator was right that the burden of showing the appropriate exercise of discretion lies on the public body. It is obligated to show that it has properly refrained from disclosure. Its reasons are subject to review by the IPC. The public body's exercise of discretion must be established; the exercise of discretion is not presumptively valid. The public body must establish proper non-disclosure. The IPC does not have the burden of showing improper non-disclosure.

[para 102] The Public Body's explanation of its exercise of discretion is described in the Analyst's affidavit as follows:

> 59. In applying the exceptions to disclosure set out in the Act, I considered:
>
> a. the general purpose of balancing the public's rights of access with the need for the public body to protect specific interests;
> b. whether there is a compelling public interest in having the information in the public domain and concluded there wasn't one;
> c. that the Public Body had provided a considerable number of records to the Applicant; and
> d. previous decisions from the OIPC and Court decisions.

> 60. My general practice is to review all records and carefully apply the exceptions to disclosure set out in the Act.
>
> 61. I determined that disclosing the information would result in harm to the Public Body and public interest and would not be in accordance with the principles of the Act.

[para 103] The Public Body considered appropriate factors in exercising discretion; however, in my view it did not consider *all* relevant factors. For example, the Public Body indicated that it considered whether there is a public interest in disclosure, but it did not mention whether it considered the Applicant's interest in disclosure. The Court in *EPS* discussed the importance of weighing the risks and benefits of disclosure against withholding the information. The Public Body's explanation of its exercise of discretion does not include any such discussion.

[para 104] Further, some of the information to which section 24(1) applies seems to be innocuous information such that it seems unlikely to cause harm if disclosed, as alleged by the Analyst in their affidavit. Discretion to withhold information must be applied on a record-by-record basis.

[para 105] I will order the Public Body to re-exercise its discretion to withhold information under section 24(1), following the guidance above.

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

[para 106] The Public Body applied section 27(1)(a) to information on pages 74-81, 86, 274-277, and 280. The Public Body claims solicitor-client privilege over this information.

[para 107] Section 27(1)(a) 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 108] 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 109] 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.

Solicitor-client privilege

[para 110] 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 111] 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 112] 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 113] 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 114] Where a public body elects not to provide a copy of the records over which solicitor-client or litigation privilege is claimed, the public body must provide sufficient information about the records, in compliance with the civil standards set out in the *Rules of Court* (Alta Reg 124/2010, ss. 5.6-5.8). These standards were clarified in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*). *ShawCor* states that a party claiming privilege must, for each record, state the particular privilege claimed and provide a brief description that indicates how the record fits within that privilege (at para. 36 of *ShawCor*).

[para 115] In *EPS*, cited above, the Court found that the adjudicator in Order F2017-58 correctly identified the standard as follows: evidence supporting a claim of privilege must be sufficiently clear and convincing so as to satisfy the burden of proof on a balance of probabilities (at para. 82 of *EPS*).

[para 116] In *EPS* the Court further states that the role of this Office in inquiries involving claims of privilege under section 27(1)(a) of the Act is to review claims and assertions of privilege. The Court commented on the limitations of this review, given that the Office does not have authority to compel production of information over which solicitor-client privilege is claimed. It states that "… the IPC cannot "properly determine" whether solicitor-client privilege exists: *2018 CPS (CA)* at para 3. The scope of the IPC's review of claims of solicitor-client privilege is inherently limited. The IPC is not entitled to review the relevant records themselves" (at para. 85).

[para 117] It describes the role of this Office in reviewing a claim of privilege as follows (at paras. 103-105):

> The clear direction from the Supreme Court is that compliance with provincial civil litigation standards for solicitor-client privilege claims suffices to support the exception from disclosure under *FOIPPA*. The IPC's statutory mandate must be interpreted in light of the Supreme Court's directions. The IPC has an obligation to review and a public body has an obligation to prove the exception on the balance of probabilities. But if the public body claims solicitor-client privilege in accordance with provincial civil litigation standards, the exception is thereby established on the balance of probabilities. It is likely that the privilege is made out, in the absence of evidence to the contrary…
>
> Does this approach mean that the IPC must simply accept a public body's claims of privilege? Is the IPC left with just "trust me" or with "taking the word" of public bodies? Does this approach involve a sort of improper delegation of the IPC's authority to public bodies or their counsel?
>
> In part, the response is that the IPC is not left with just "trust me." The IPC has the detail respecting a privilege claim that would suffice for a court. If the *CNRL v ShawCor* standards are not followed, the IPC (like a court) would be justified in

> demanding more information. And again, if there is evidence that the privilege claim is not founded, the IPC could require further information.

[para 118] I understand the Court to mean that my role in reviewing the Public Body's claim of privilege is to ensure that the Public Body's assertion of privilege meets the requirements set out in *ShawCor*, and that the information provided in support of that assertion is consistent with the relevant tests for the cited privilege.

[para 119] The Public Body's initial submission states:

> 111. The Solicitor-Client Privilege Records consist of:
>
> - Email communications between the Public Body's internal lawyer and client department which provide legal advice regarding potential discipline involving the Applicant, including questions and issues discussed between the lawyer and client department;
> - Email communications between Public Body employees discussing the legal advice provided by the Public Body's lawyer and addressing questions posed by the Public Body's lawyer as part of a continuum of legal advice; and
> - The Public Body's lawyer's internal notes regarding legal issues.

[para 120] The Public Body also provided an affidavit sworn by an Access and Privacy Analyst, which states that all of the records over which privilege is claimed were "created in the course of requesting or providing legal advice, and are records that would reveal such a request or legal advice which was sought by the Public Body and provided by internal legal counsel, or are part of the continuum of communications related to the seeking or giving of legal advice: (at para. 5).

[para 121] A schedule of records withheld as privileged is attached to the affidavit, which includes a brief description of each of the five records identified:

- one record is described as email communications between a Public Body lawyer and clients (other Public Body employees), providing advice or otherwise relating to the advice;
- one record is described as the Public Body lawyer's handwritten notes that reveal the issues considered by the lawyer in providing advice;
- three records are described as email communications between the clients (Public Body employees) that include questions and responses of the employees in response to a request for additional information from the Public Body lawyer;

[para 122] As cited by the Public Body, the Court in *Alberta (Municipal Affairs) v Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274 found (at paras. 17-18):

> There are emails in "chains" that are not directly between lawyer and client, or lawyer and lawyer, but have been sent by and received from members of the client group or

> department. Communications in this category request and give information, make inquiries, answer questions and otherwise relate topically to those in which legal counsel are directly involved.
>
> Those emails form part of a discrete body of communications that includes clearly privileged material. I must take a holistic approach to this question. In these instances, they are "part of a continuum in which legal advice is given": ***Calgary (Police Service)*** at para 6. What all of them have in common is that they essentially "transmit or comment" on the work products that, I find, are privileged: ***Bank of Montreal v Tortora***, 2010 BCSC 1430 at paras 11-12, 14 BCLR (5th) 386.

[para 123] I also have the benefit of reviewing the large number of records over which privilege was not claimed, which provide additional context for the records not provided to me.

[para 124] The records at issue relate to the Applicant's employment with the Public Body and his termination from that employment. My review of the records provided to me lead me to accept, on a balance of probabilities, that it was reasonable for Public Body employees to seek legal advice from counsel on matters to which the records relate.

[para 125] I also agree that where legal advice is discussed between Public Body employees whose work duties are such that they would be involved in the matter, and where employees discuss how to answer questions posed by counsel in order to obtain or clarify the advice, this falls within the continuum of communications such that solicitor-privilege will apply.

[para 126] The affidavit evidence stating that the records were intended to be confidential, and that the Public Body has maintained the confidentiality of these records, is sufficient to meet that element of the *Solosky* test (see *Governors of the University of Alberta v Alberta (Information and Privacy Commissioner)*, 2022 ABQB 316, at para. 41).

[para 127] The evidence provided by the Public Body meets the requirements set out in *ShawCor* and is consistent with the test for finding solicitor-client privilege applies. I find that the Public Body has established its claim of privilege.

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

[para 128] 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*, cited above).

[para 129] This approach was discussed with approval in *EPS*, cited above.

[para 130] As I have found that the Public Body properly claimed solicitor-client privilege, its exercise of discretion to withhold that information can be presumed to be appropriate.

V. ORDER

[para 131] I make this Order under section 72 of the Act.

[para 132] I find that the Public Body conducted an adequate search for records as required by section 10.

[para 133] I find that section 17(1) cannot apply to some information withheld under that provision. I order the Public Body to disclose the information to which that provision does not apply, as set out in paragraphs 39-46 of this Order.

[para 134] I find that the Public Body properly withheld personal information to which section 17(1) applies.

[para 135] I find that section 24(1) applies to some information withheld under that provision. I order the Public Body to review pages 24, 25 and 97 of the records and respond again to the Applicant as set out in paragraphs 87-92 of this Order.

[para 136] I order the Public Body to disclose the information to which I found section 24(1) provision does not apply, as set out in paragraphs 81 and 93-94 of this Order.

[para 137] I order the Public Body to re-exercise its discretion to withhold the information to which section 24(1) applies, following the guidance provided in paragraphs 95-105 of this Order.

[para 138] I uphold the Public Body's application of section 27(1)(a) to information in the records.

[para 139] 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.

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Amanda Swanek
Adjudicator