

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2020-03**

February 28, 2020

**ALBERTA JUSTICE AND SOLICITOR GENERAL**

Case File Number 003116

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** An individual made a request to Alberta Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records relating to the 2013 floods and more specifically, information relating to the berms that were constructed.

The Public Body located responsive records but withheld them in their entirety, citing sections 4(1), 16(1), 17(1), 21(1), 24(1), 25(1) and 27(1).

The Applicant requested an inquiry into the Public Body's response. The inquiry was divided into parts. The first part of the inquiry resulted in Order F2018-27, which addressed the Public Body's claim of solicitor-client privilege under section 27(1)(a) of the Act to some of the responsive records, which were not provided to the Adjudicator for the inquiry.

This Order addresses the Public Body's application of sections 4(1)(a), 17(1), and 24(1) to the records at issue.

The Adjudicator determined that the Public Body properly applied sections 4(1)(a), and 24(1)(a) and (b) to information in the records at issue.

The Adjudicator found that some of the information withheld under section 17(1) was not personal information, and that some information (such as hourly rates of contractors) is information to which section 16(1) might apply, rather than section 17(1).

The Adjudicator found that the remaining information withheld under section 17(1) was properly withheld.

The Public Body's application of section 16(1) to information in the records will be determined in a subsequent part of the inquiry, should the Applicant wish to pursue that issue.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 16, 17, 24, 71, 72.

**Authorities Cited: AB:** Decision F2014-D-01, Orders 96-006, 96-012, 2001-013, F2003-002, F2004-026, F2004-030, F2007-007, F2007-013, F2008-028, F2010-031, F2010-036, F2012-06, F2012-10, F2012-14, F2013-13, F2013-53, F2018-27, F2018-75

**Cases Cited:** *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (CanLII), 2003 ABQB 252, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII)

## I. BACKGROUND

[para 1] On August 27, 2015, the Applicant made a request to Alberta Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records relating to the 2013 floods and more specifically, information relating to the berms that were constructed.

[para 2] The Public Body located responsive records but withheld them in their entirety, citing sections 4(1), 16(1), 17(1), 21(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 Applicant requested an inquiry.

[para 4] Many of the records to which sections 16(1), 17(1), 21(1), 24(1) and 27(1)(b) and (c) were applied are records over which the Public Body had claimed solicitor-client privilege. These records were not provided to this Office for the inquiry. The inquiry was therefore been divided into parts: the first part – resulting in Order F2018-27 – addressed the Public Body's claim of solicitor-client privilege over records that were not provided to me for the inquiry. In that Order, I found that the Public Body failed to meet its burden to show that it properly claimed solicitor-client privilege over the records at issue. I made the following order:

I find that the Public Body did not meet its burden to show that it properly claimed solicitor-client privilege over the information in the records listed at Schedule 1 of its

March 16, 2018 submission. As the Public Body has also applied sections 16(1), 17(1), 21(1), 24(1) and 27(1)(b) and (c) to information in those records, I retain jurisdiction to review the Public Body's application of those sections in the next part of this inquiry. In order that I may do so, the Public Body is to provide me with a copy of the unredacted records at issue with the redactions highlighted, or otherwise noted, and the relevant section numbers of the Act identified on the records.

[para 5] In its letter complying with this Order, the Public Body conceded that it had claimed solicitor-client privilege over some records in error. It explained how the error had been made, as well as steps it had taken to avoid similar errors in the future.

[para 6] The Public Body maintained that some of the information in the records had been properly characterized as privileged. However, in the circumstances, the Public Body decided to waive that privilege. The Public Body provided me with an unredacted copy of the records at issue. It also made new decisions regarding access, without relying on section 27(1)(a) of the Act.

[para 7] As part of making new decisions regarding access, the Public Body conducted third party consultations as required under section 30 of the Act, as well as consultations with other public bodies (undertaken in mid-late 2018). Due to a misunderstanding between the Public Body's FOIP area and other program areas, the Public Body had to undertake yet another review of the records at issue, make new decisions, and conduct additional third party consultations (May to November 2019). The Public Body's new decisions regarding access to information resulted in it providing a large number pages to the Applicant in whole or in part.

[para 8] Given the time taken to make these new decisions and undertake the required third party consultations, it is understandable that the Applicant has expressed frustration with this process and the time taken to receive information he requested. That said, the Public Body has ultimately disclosed all but 150 pages of records to the Applicant, in whole or in part. Many of the records disclosed in part have minimal amount of information withheld under various exceptions (primarily sections 16(1) and 17(1)).

[para 9] While it took quite some time to get to this point, I can commend the Public Body for ultimately conducting a thorough review of the records at issue. It seems clear from the records recently released by the Public Body to the Applicant that the Public Body made its decisions with an emphasis on disclosure. The exceptions most commonly applied in the records are sections 16 and 17, which are mandatory exceptions to access – a public body must withhold information to which those exceptions apply. The Public Body has withheld only a small amount of information under discretionary exceptions to access. Further, having had the opportunity to review all of the records at issue, I agree with the Public Body that some of the information in the records met the test for privilege. It is not insignificant that the Public Body elected to waive privilege.

[para 10] The Public Body's subsequent review of records may not be timely, but they were thorough and likely quite time-intensive.

[para 11] With respect to the Public Body's application of section 16(1) to information in the records, the burden of showing that exception was properly applied lies on the third party to whom the information relates (set out in section 71(3)). Given the changes in the Public Body's decisions regarding access in this case, third parties were not invited to participate in this part of the inquiry. Therefore, the relevant parties have not had an opportunity to meet the burden placed on them under section 71(3) of the Act to show that section 16(1) applies to their information.

[para 12] The Applicant's submissions show that he is primarily interested in information relating to water levels around the time of the flood. As I indicated to the Applicant in a letter (dated December 3, 2019), the information withheld under section 16(1) does not relate to water levels.

[para 13] As such, rather than extending the time to complete this inquiry even further, and given the Applicant's primary interest in information about water levels (as opposed to information such as hourly rates of contractors), I decided to deal with the issues that can be resolved without inviting additional parties (sections 4, 17(1) and 24(1)).

[para 14] Should the Applicant wish to continue an inquiry into the remaining information withheld under section 16(1), he can request a further inquiry per the directions set out in the final section of this Order.

## **II. RECORDS AT ISSUE**

[para 15] The records at issue consist of the portion of the 1644 pages of records that have not been provided to the Applicant, with the exception of the information withheld under section 16(1).

## **III. ISSUES**

[para 16] The issues as set out in the Notice of Inquiry, dated June 8, 2018, are as follows:

1. Are the record(s) excluded from the application of the Act by section 4(1)(a)?
2. Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the information in the record?
3. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?
4. Did the Public Body properly apply section 21(1) of the Act (disclosure harmful to intergovernmental relations) to the information in the records?
5. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?

6. Did the Public Body properly apply sections 27(1)(b) and (c) of the Act (information prepared by or for the listed persons or in correspondence between the listed persons, in relation to a matter involving the provision of legal services) to the information in the records?

para 17] In the course of this inquiry, the Public Body withdrew its application of sections 21(1), 24(1)(c), 25(1), 27(1)(b) and (c). As noted, section 16(1) will not be decided in this part of the inquiry.

#### **IV. DISCUSSION OF ISSUES**

##### **1. Are the record(s) excluded from the application of the Act by section 4(1)(a)?**

[para 18] The Public Body has withheld pages 1491-1509 citing section 4(1)(a). If this provision applies to the records at issue, I do not have jurisdiction to review the Public Body's decision to withhold them.

[para 19] Section 4(1)(a) of the Act states:

*4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*

*(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*

[para 20] This provision applies to information taken or copied from a court file (Order F2004-030 at para. 20 and F2007-007 at para. 25); it also applies to information copied from a court file to create a new document, such as a court docket (*Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (CanLII), 2003 ABQB 252). However, these orders state that records emanating from the Public Body itself or from some source other than the court file are within the scope of the Act, even though duplicates of the records may also exist in the court file (Order F2010-031).

[para 21] The Public Body states that pages 1491-1509 are comprised of an exhibit to an affidavit sworn and filed in court in October 2013. The Public Body further states that a copy of this exhibit is available from the courts.

[para 22] I accept the Public Body's explanation that these pages are copies from a court record. Nothing on these pages indicate that they have been amended or altered such that they would be new records (e.g. notations added by the Public Body that do not

appear on the filed copy of records – see Order F2018-75, at para. 73). Therefore, the FOIP Act does not apply to pages 1491-1509 and I do not have jurisdiction to review how the Public Body responds with respect to those pages.

**2. Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the information in the record?**

[para 23] The Public Body’s initial submission to this inquiry states that it applied section 16(1) to “finer financial details of several third party business contracts with the Public Body such as hourly rates of employees, specific disbursement billing structure and charge-out rates of their equipment” (at para. 11). The Public Body states that it consulted with the relevant third parties and confirmed that this information was provided in confidence, and that disclosing this information would result in one of the harms set out in section 16(1)(c) (specifically harm to their competitive position under section 16(1)(c)(i)).

[para 24] Having reviewed the records, I confirm that the Public Body’s description of the information withheld under section 16(1) as hourly and charge-out rates is accurate, with the exception of pages 1625-1637. In its last submission to this inquiry, the Public Body also confirmed that it missed this information when conducting its third party consultations. This information consists of attachments to an email that was disclosed to the Applicant (at pages 1622-1623), relating to a Notice for Demand of Arbitration.

[para 25] With respect to the financial information withheld elsewhere in the records, there are a few instances where the hourly rate of a contractor appears to have been withheld under section 17(1) rather than 16(1), based on the Public Body’s index of records. However, the Public Body’s submissions regarding section 17(1) do not address this type of information whereas its submissions on section 16(1) do; as such, the exception noted in the index may be an error. Business rates charged by an organization (whether a large organization with many employees or a single individual contractor) is different from an employee’s salary or hourly wage. The former is information about the business; the latter is information about the individual. The relevant information in the records at issue is more akin to the business charge-out rate than an employee’s hourly wage or salary.

[para 26] In any event, Section 16(1) is a mandatory exception: if it applies, the Public Body must withhold that information. Therefore, even if the Public Body did not mean to apply section 16(1) to all of the hourly rates of contractors, I must apply it. This relates to the financial/hourly rate information withheld on pages 331, 346, 359, 373, 385, 388, 629, 727.

[para 27] The burden of proof regarding information withheld under section 16(1) is set out in section 71(3) of the Act applies. It reads as follows:

*71(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,*

*(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and*

*(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.*

[para 28] Section 16(1) does not apply to personal information, so the third parties to whom the withheld information relates have the burden, under section 71(3)(b), of establishing that the Applicant has no right of access to the records by virtue of section 16(1).

[para 29] As stated in the background section of this Order, I have decided to set aside the Public Body's application of section 16(1), including the hourly rates of contractors to which section 17(1) may have been applied, for determination at a later time, should the Applicant still wish to pursue it. This also applies to the information withheld at pages 1625-1637. The decision was made in order to avoid further delays caused by inviting the third parties to make submissions, and because the information withheld under section 16(1) is not the information the Applicant has stated that he is seeking.

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

[para 30] The Public Body applied section 17(1) to some pages in their entirety, such as resumes or curriculum vitae of third parties, and transcripts of interviews of third parties. Much of the information withheld under section 17(1) consists of discrete items of information, such as names and contact information.

[para 31] 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 32] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 33] 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 34] 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 35] The records at issue and index of records show that section 17(1) was applied to financial information of contractors (such as hourly rates). As discussed in the previous section of this Order, section 16(1) is the appropriate exception to apply to that information.

[para 36] Some third party names (and contact information) relate to other individuals affected by the floods. This information is their personal information. In a few instances, the Public Body also applied section 17(1) to dates of statements made by some of these individuals. The Public Body determined that due to the small population of the Town of High River, the dates of statements might reveal the identity of the individual who made the statement. I accept the Public Body’s decision on this point, that section 17(1) could apply to this information.

[para 37] Names of third parties are personal information under the FOIP Act. However, the disclosure of the names, contact information and job titles of individuals acting in their professional capacities is not an unreasonable invasion of personal privacy under section 17(1) (see Orders 2001-013 at para. 88, F2003-002 at para. 62, F2008-028 at para. 53) unless that information has a personal dimension in the circumstances. In other words, in the absence of a personal dimension, information cannot be withheld under section 17(1).

[para 38] The Public Body has disclosed information relating to employees performing work duties in most instances. However, some of the information withheld under section

17(1) consists of names and/or contact information of individuals who appeared to be acting in a work capacity.

[para 39] The Public Body withheld the names of authors of reports where the authors are identified as students of a particular program. In most circumstances, the name of an individual who authored a report would appear in a work-related context. In this case, as the authors are students, I agree that this is personal information to which section 17(1) can apply.

[para 40] The Public Body has clarified that the names and phone numbers withheld on page 1309 relate to volunteers and not contractors of the Public Body. The Public Body states that it conducted an online search of the relevant phone numbers and they do not appear to relate to an organization or individual acting in a work capacity. Therefore the Public Body determined that these are personal phone numbers of volunteers. The Public Body also noted that the volunteers were performing services on a temporary and short term basis.

[para 41] Based on a review of the records, it appears that volunteers performed emergency work in responding to a flood. Volunteers are included in the definition of “employee” in the FOIP Act (section 1(e)). However, that does not necessarily mean that contact information provided by volunteers is ‘business contact’ information. Given the context in which the contact information appears, I agree it is reasonable to conclude that it is personal contact information provided for emergency purposes. As such, section 17(1) can apply.

[para 42] The Public Body has made a similar argument with respect to contact information of public body employees that appears to be personal contact information rather than the employees’ business contact information. The Public Body has noted that the urgent nature of the flood response led to some individuals being willing to be contacted via their personal phone numbers/email addresses. I agree that this situation does not mean that the contact information loses its personal dimension; section 17(1) can apply to this information.

[para 43] In a few instances, the Public Body has applied section 17(1) to personal comments made by public body employees or contractors. I agree that section 17(1) can apply to this information.

[para 44] All of the information withheld under section 17(1) relating to employees, contractors and volunteers has a personal dimension such that section 17(1) can apply (with the exception of hourly rates, to be addressed under section 16(1)).

[para 45] The Public Body has also withheld under section 17(1) the addresses of homes affected by the flood, as well as some additional information such as photos. Where the records name the homeowner, the names are personal information to which section 17(1) can apply (for example, where the records note the “parties present”, the named individuals appear to be the homeowner – see pages 521-522 and a few other

instances). Where the records contain interior photographs of the homes, I agree that this is information showing personal aspects of the home and there is a personal dimension such that section 17(1) can apply. These photographs appear on pages 977, 978, 979, and 996-998 (and possibly elsewhere).

[para 46] It is less clear that the address of the home or exterior photos are information to which section 17(1) can apply.

[para 47] The Public Body states that while the information in the relevant records appears to relate to an object (house) rather than an individual, the extent of damage and financial loss relating to the damage is information “about” the homeowners.

[para 48] Photographs that show only the exterior portions of the home do not appear to have the same personal aspects as interior photos. Similarly, the information about the damage to the homes is technical information about the structure of the homes as buildings. For example, the disclosed portion of the records shows the moisture content and resulting strength of beams in the houses, saturation levels, building materials, age of the house, recommended fixes (e.g. whether flooring, walls, insulation ought to be removed).

[para 49] Past Orders have discussed when information about an object or property can also be *about* an individual. In Order F2012-14, the adjudicator reviewed case law from several jurisdictions, concluding (at paras. 48-49):

What I glean from the foregoing relevant commentary is that a legal land description is not itself personal information: see *Leon’s Furniture Ltd. v. Alberta (Information and Privacy Commissioner)* and Ontario Order MO-2053. However, a legal land description may serve as an identifier that will reveal what does constitute personal information: see the various Orders cited within Ontario Order MO-2053, which concludes that “the common thread in all these orders is that the information reveals something of a personal nature about an individual or individuals”. The distinction between what is and is not personal information is demonstrated in Ontario Order PO-2900: the fact that an individual – who can be identifiable by virtue of information about property – drilled a well is his or her personal information, but information about the well itself is not his or her personal information.

Consistent with the foregoing commentary are principles articulated by earlier Orders of the Office. When determining whether information is about an identifiable individual, one must look at the information in the context of the record as a whole, and consider whether the information, even without personal identifiers, is nonetheless about an identifiable individual on the basis that it can be combined with other information from other sources to render the individual identifiable [Order F2006-014 at para. 31, citing Ontario Order MO-2199 (2007) at para. 23]. Information will be about an identifiable individual where there is a serious possibility that an individual could be identified through the use of that information, alone or in combination with other available information [Order F2008-025 at footnote 1, citing *Gordon v. Canada (Minister of Health)*, 2008 FC 258 (CanLII), 2008 FC 258 at para. 34].

[para 50] Order F2013-53 also referenced the above analysis, concluding (at paras. 47-48):

In many cases the determination as to whether information is “personal information” is dependent on the context in which it appears. A statement that a property owner does not remove snow from the sidewalk adjacent his or her property seems to be a statement about the actions (or lack of action) of the property owner, rather than a statement about the property. Similarly, a statement about an owner’s landscaping or gardening practices seems to be a statement about that owner’s use of her property. In comparison, a statement about the lot grading of a property or a statement about the amount of snow on a sidewalk, appear to be statements about property (although it may relate to the property owner).

Another distinction that has been made in past orders between information related to an individual and personal information about the individual is whether there is a “personal dimension” to the information. The adjudicator in Order F2010-011 commented that information about an individual’s business may be personal information about that individual in circumstances that give a “personal dimension” to that information, such as allegations of wrongdoing. Similarly, information about employees acting in the course of their job duties is normally not considered information *about* those individuals; however, there may be circumstances that give that information a “personal dimension”, such as disciplinary issues or performance evaluations (see Orders F2004-026 and P2012-09).

[para 51] I understand why the Public Body characterized the information about the damage to homes as personal information, given the financial ramifications of the damage to the homeowners. Respectfully, I disagree with this characterization. The information undoubtedly *relates to* the homeowner in a broad sense and I agree that the information about the homes impacts the owners. But the information in the records (excepting the names and interior photographs) is about the homes as buildings or structures. To refer back to Order F2012-14 (cited above), the information about the homes is more akin to information about a well, rather than information about an individual who drilled the well. I find that this information is about an object (the buildings) and does not have the requisite personal dimension to also be about an individual.

[para 52] I find that the addresses of houses listed on pages 42-45, 47-48, 70-88, 485-488, 490-491, 513-531, 975, 976, 977, 979-981, 989-994, 995-999, 1000, 1008-1012 is not personal information; I make the same finding regarding the exterior photographs that appear in these pages.

[para 53] The remaining information discussed above is personal information to which section 17(1) can apply. I turn to the factors weighing in favour of or against disclosure of that information.

[para 54] Neither party has argued that any factors in sections 17(2) or (3) apply to the relevant information and none appear to apply.

[para 55] Section 17(4) lists circumstances in which disclosure of personal information is presumed to be an unreasonable invasion of privacy. The Public Body has argued that sections 17(4)(d), (f) and (g) apply. These 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*

...

*(d) the personal information relates to employment or educational history,*

...

*(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluation,*

*(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,*

[para 56] I agree that section 17(4)(g) applies to all of the personal information in the records. Section 17(4)(d) also applies to the information in the resumes, curriculum vitae and the student author names.

[para 57] The Public Body also argued that sections 17(5)(e), (f), (g) and (h) weigh against disclosure.

[para 58] The Applicant had not made specific arguments regarding the Public Body's application of section 17(1) or the disclosure of third party personal information in the records at issue. In his initial submission to this part of the inquiry, he states (at page 3):

Certainly, any personally identifiable information could be effectively removed (to ostensibly protect the culpable) and shed light on what happened to our properties and community and whether or not we are owed compensation.

[para 59] The Applicant's arguments with respect to third party information largely relate to other "third party" public bodies; he states in his rebuttal submission that "it is equally unacceptable for the GOA to play the 3<sup>rd</sup> party card for the Town of High River and vice versa" (at page 2).

[para 60] The Applicant is interested in information relating to the water levels in High River in 2013. Specifically, he states that he is "trying to ascertain if the Town of High

River and the Alberta Government (AEMA) caused exacerbated damages to our homes following the floods of 2013” (rebuttal submission at page 1). He further states:

I am looking for information that will accurately and reliably determine if the water levels rose after June 27, 2013 and if so by how much. Also, any information regarding the quality of water levels themselves. We understand that the sewer lines were not capped and levels of pollutants artificially increased. I do not care for any other extraneous information -you have already sent me more than enough of that.

[para 61] The Applicant’s arguments may generally relate to the need for public scrutiny of a public body (section 17(5)(a), or possibly a fair determination of the Applicant’s rights (section 17(5)(c)). He states:

Withholding crucial information that will not only benefit many in restoring that faith I trust but will pave the way for compensation this is rightfully I legally owed to those in the Sunrise and Hampton communities is an outrage and a disgrace (rebuttal at page 2)

[para 62] With respect to section 17(5)(a), the disclosure of the third party personal information must be desirable for public scrutiny. In this case, even if there is an activity of the Public Body (or another public body) to be publicly scrutinized, the personal information withheld in the records does not seem to be sufficiently relevant such that its disclosure is desirable for the purpose of public scrutiny.

[para 63] With respect to section 17(5)(c), it is not clear that there is a determination of the Applicant’s rights at play. It is also not clear how the personal information in the records would be relevant to any determination of the Applicant’s rights.

[para 64] At least one presumption against disclosure applies to all of the personal information in the records, and no factors appear to weigh in favour of disclosure. Therefore, I find that the presumption against disclosure in section 17(1) has not been rebutted and I find that the Public Body properly withheld third party personal information under section 17(1).

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

[para 65] The Public Body applied section 24(1)(a), (b) and (c) to information on pages 454-455, 628, 1355-1357 and 1359-1360 of 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,*  
*(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations,*  
...

[para 66] In previous orders, the former Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a) 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 67] In Order F2013-13, the adjudicator stated that the third arm of the above test should be restated as "created for the benefit of someone who can take or implement the action" (at paragraph 123).

[para 68] In Order F2012-06, the adjudicator stated, citing former Commissioner Clark's interpretation of "consultations and deliberations", that

It is not enough that records record discussions or communications between employees of a public body; rather, a consultation takes place only when the individuals listed in section 24(1)(b) are asked for their views regarding a potential course of action, and a deliberation occurs when those individuals discuss a decision that they are responsible for, and are in the process of, making.  
(At para. 115)

[para 69] In Order F2012-10, the adjudicator clarified the scope of section 24(1)(b):

A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision. (At para. 37)

[para 70] Further, 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, proposal, recommendations etc. such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48). As well, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at paras. 31 and 37).

[para 72] The above constraints also apply where section 24(1)(c) is cited for withholding information (Orders 96-012 at para. 37, Decision F2014-D-01).

[para 73] Given these limits on the application of section 24(1), even where it applies to information on a page, it is often the case that portions of a page will be disclosed with discrete items of information withheld (i.e. more often than not, entire pages cannot be withheld under this provision). Public bodies must therefore conduct a line-by-line review of each page in order to apply section 24(1) appropriately.

[para 74] Prior to the Public Body's latest decisions regarding the records (made between May and November 2019), it applied section 24(1) to many pages in their entirety. In its most recent releases of records, it is clear that the Public Body undertook the appropriate line-by-line review in applying section 24(1).

[para 75] 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)); or consultations or deliberations between specified individuals (section 24(1)(b)).

[para 76] Pages 454-455 consist of an attachment to an email found on page 453 (disclosed to the Applicant with third party names redacted). The email describes the attachment as a draft briefing note created for a Minister by counsel and sent to other team members for comment. The background information in the draft briefing note has been disclosed to the Applicant, with the exception of third party names. The information withheld on the bottom half of page 454 and top portion of page 455 reveals the recommendation and reasons given for the recommendation (i.e. analysis). This information clearly falls within section 24(1)(b).

[para 77] Page 628 is comprised of an email chain between public body employees discussing a then ongoing or anticipated legal proceeding (litigation privilege is no longer being claimed by the Public Body). The body of one email was withheld under section 24(1), with personal information of one of the employees withheld under section 17(1). The body of the withheld email discusses information that is to be brought forward into a meeting set to strategize about the legal proceeding. This also falls within section 24(1)(b).

[para 78] Pages 1355-1357 are comprised of a chain of emails. Pages 1359-1360 contain the same email found on pages 1356-1357. These emails have been withheld in their entirety, except signature lines, as well as the To/From/Date and Subject lines. In its September 12, 2019 letter, the Public Body has described these emails as being between

- a contractor and Issues Manager of the Alberta Emergency Management Agency (AEMA) of Municipal Affairs (MA); and
- the Issues Manager of AEMA of MA and the Managing Director of AEMA of MA, the Associate Minister of Regional Recovery and Reconstruction, and a Resource Manager from Environment and Parks (EP)

[para 79] The Public Body further states:

In both instances of these two email threads, the contractor and Issues Manager provided information assessing the situation and providing further analysis of the efforts to remediate the flood including a recent meeting to discuss these steps with the public; these emails speak to their specific participation and/or the involvement of the contractor. This analysis is brought forward to a team of people (Issues Manager, Managing Director, Associate Minister, and Resource Manager) who can all take action to decide/impact the next steps in the remediation of the flood and address the media regarding a recent meeting that took place.

[para 80] The emails generally consist of a discussion of past events, for the purpose of deciding how to proceed. The subject of the deliberations is implicit from information in preceding pages of the records, most of which have been disclosed to the Applicant. I agree with the Public Body that the information withheld on pages 1355-1357 and 1359-1360 falls within section 24(1)(a).

#### *Exercise of discretion*

[para 81] 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 82] 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 be 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 83] 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:

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)*. (at para. 104)

[para 84] The Public Body has referred to the need to have frank and candid discussions as a reason for its application of section 24(1) to information on pages 454-455, 628, 1355-1357 and 1359-1360. The Public Body has referred to the discussions between officials as candid and confidential.

[para 85] The Public Body also states in its November 12, 2019 letter:

The public can question the decisions made; however it is imperative the analysis and/or options discussed be protected from disclosure to allow for the best outcome of the decision-making process.

[para 86] The language used by the Public Body to describe how it decided to apply section 24(1) is a basic restatement of the purpose of the exception generally. In other situations, this may not be sufficient to show that the Public Body properly exercised its discretion. However, in this case, the Public Body exercised its discretion to disclose quite a lot of information, including information to which section 24(1) may have applied. While the Public Body didn't explicitly state that it considered factors such as promoting transparency and accountability, its actions show as much. I understand the Public Body's references to the purpose of section 24(1) – to allow candid and confidential discussion and advice – to be that the *particular* information it continues to withhold reveals confidential discussions.

[para 87] With respect to the information withheld on pages 1355-1357 and 1359-1360, I agree that disclosure could have a negative impact on the reputation of some individuals involved in the discussion.

[para 88] I find that the Public Body properly exercised its discretion under section 24(1).

## **V. ORDER**

[para 89] I make this Order under section 72 of the Act.

[para 90] I find that the Public Body properly applied section 4(1) to records at issue.

[para 91] I find that the information described at paragraph 52 of this Order is not personal information to which section 17(1) can apply. As no other exception has been applied, I order the Public Body to disclose that information to the Applicant.

[para 92] Except the information described at paragraph 52 and the information to which section 16(1) is more properly applied (described at paragraphs 25-26 of this Order), I confirm the Public Body's decision to withhold third party personal information under section 17(1).

[para 93] I find that the Public Body properly applied section 24(1) to the information in the records.

[para 94] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

[para 95] If the Applicant wishes to continue with an inquiry into the application of section 16(1), he must make this wish known in writing to this Office and the Public Body. The Applicant will have 30 days from receipt of the Public Body's compliance with this Order to do so. I will retain jurisdiction to decide the issue as necessary.

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Amanda Swanek  
Adjudicator