

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2007-013

April 2, 2008

ALBERTA HEALTH AND WELLNESS

Case File Number 2875

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to Alberta Health and Wellness. The Applicant requested records which documented communications between the Department and any Department of the Government of Alberta, Cabinet Minister, Minister’s staff, employer, employers’ organization, union or other stakeholder concerning the enactment, promulgation and implementation of Bill 27 and the Regulations thereto.

Alberta Health and Wellness provided the Applicant with some records but withheld a large number of records pursuant to several sections of the Act.

The Commissioner held that a portion of the records were properly withheld as non-responsive. In addition, the Commissioner held that a portion of the records were excluded from the Act by section 4(1)(q) or fell within section 17 (unreasonable invasion of personal privacy), section 27(1) (privilege), section 22 (cabinet confidences), 24(1)(a) (advice) and section 24(1)(b) (consultations and deliberations). However, the Commissioner held that other records were not properly withheld as non-responsive, did not fulfill the criteria under section 4(1)(q) or did not fulfill the criteria of the claimed exceptions to disclosure. The Commissioner ordered Alberta Health and Wellness to disclose that information to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 4(1)(q), 10, 12(1)(c)(i), 16, 17(1), 17(4)(g), 17(5), 22, 24(1)(a), 24(1)(b), 24(1)(e), 27(1)(a), 27(1)(b), 27(1)(c), 71(2), 72; *Freedom of Information and Protection of Privacy Regulation A/R 200/95*, ss. 9, 10, 12, 13.

Orders Cited: AB Orders: 96-006, 96-010, 96-015, 96-017, 96-019, 96-020, 97-009, 97-010, 98-016, 98-017, 99-001, 99-002, 2000-003, 2000-013, 2000-014, F2004-003, F2004-026, F2005-004

Cases Cited: *Opron Construction Co. v. Alberta* (1989), 71 Alta. L.R. (2d) 28 (C.A.)
Solosky v. The Queen [1980] 1 S.C.R. 821

I. BACKGROUND

[para 1] On June 2, 2003, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to Alberta Health and Wellness (the “Public Body”). The Applicant requested the following:

All records of any kind whatsoever documenting communications between the Department and any Department of the Government of Alberta, Cabinet Minister, or Minister’s staff, concerning the enactment, promulgation and implementation of Bill 27 and the Regulations thereto. This includes communications originating with the Department as well as those received by the Department.

All records from the year 2003 of any kind documenting communications between the Department and any employer, employers [sic] organization, union, or other stakeholder concerning the enactment, promulgation and implementation of Bill 27 and the Regulations thereto. This includes communications originating with the Department as well as those received by the Department.

[para 2] The time period identified in the access request was for the year 2003.

[para 3] On October 9, 2003, the Public Body responded to the access request. The Public Body provided the Applicant with access to some of the records but withheld a large number of records pursuant to various provisions of the Act.

[para 4] On May 16, 2007, the Public Body informed my Office that it had located five additional records. In this Order I will refer to those records as Record G, pages 13-17.

[para 5] The Applicant requested a review of the Public Body’s decision. Mediation was authorized but did not resolve the issues. The matter was set down for a written inquiry.

[para 6] The Public Body and the Applicant each submitted an initial submission and a rebuttal. The Public Body also submitted an *in camera* initial and rebuttal

submission. Three of the Affected Parties, Alberta Employment, Immigration and Industry, Capital Health and the Alberta Labour Relations Board each submitted an initial submission. The Alberta Labour Relations Board also submitted a rebuttal.

II. INFORMATION/ RECORDS AT ISSUE

[para 7] At the date of inquiry, 631 pages of records remain at issue.

III. PRELIMINARY ISSUES

A. Public Body's application of additional provisions

(i) Responsiveness

[para 8] In the Public Body's initial submission, the Public Body stated that the records withheld under section 4(1)(q) should also be considered as non-responsive to the access request.

[para 9] Whether these records are responsive directly relates to the scope of the records which are relevant to the access request. Consequently, I will consider whether these records are responsive to the access request.

(ii) Section 4(1)(q)

[para 10] In the Public Body's rebuttal, the Public Body stated that section 4(1)(q) applies to Records D9-D11. Of these pages of records, the Public Body already disclosed Records D9 and D11 to the Applicant. Only Record D10 remains at issue.

[para 11] Section 4(1)(q) is a provision that limits my jurisdiction. If a record falls within this provision, the Act does not apply and the Public Body has no obligation to provide access to the record (Order 2000-003). Consequently, I will consider section 4(1)(q) in regard to Record D10.

(iii) Sections 24(1)(a) and 24(1)(b)

[para 12] In the Public Body's submissions, the Public Body applied section 24(1)(a) and (b) to those records withheld under section 4(1)(q), to those records withheld as non-responsive, to the five additional records provided to this Office on May 16, 2007 which are identified as Records G13-17 and to Record F.

[para 13] Prior orders have held that parties will not be permitted to raise new issues at inquiry where the effect would be to create delay or prejudice a party (Orders 96-010, F2004-026).

[para 14] I find that the Public Body is permitted to apply sections 24(1)(a) and 24(1)(b) to the additional records. I find that permitting these exceptions would not

create a delay or prejudice a party nor allow a broad after-the-fact justification for an earlier exercise of discretion. In coming to this conclusion, I took into account that sections 24(1)(a) and 24(1)(b) were already set out as issues in the inquiry notice and the Public Body had applied those exceptions in regard to other records. The Public Body merely applied these exceptions, which were already at issue, to additional records. I also took into account that the Applicant had the opportunity, in its rebuttal submission, to address the application of these sections to the additional records.

(iv) Section 27(1)

[para 15] In its submissions, the Public Body clarified that the pages within Record F that it withheld under “section 27(1)” were withheld under sections 27(1)(a), (b) and (c).

[para 16] I accept the Public Body’s clarification regarding the application of section 27(1).

B. Is/Are the information/records responsive to the Applicant’s access request?

[para 17] The Public Body states that the following records are non-responsive to the Applicant’s access request:

Record A - 66, 68, 82, 83, 92, 101, 110-112, 113-117, 118, 135, 138 (portion), 139-142, 168, 172-174, 198-200, 220-222, 238-244, 247-248, 252, 253, 257, 298, 326, 330-332, 333 (portion), 334A-337, 338, 339-346, 347-369

Record B – 18-25, 33, 37-38, 39-44, 45, 46, 49, 57-62, 82-87, 88-95

Record C – 1, 3 (portion), 4(portion), 5(portion)

Record D – 4-6

Record E – 16-19

[para 18] Although Record A333 was not identified on the Public Body’s record list as non-responsive, I have included it in the above list as that record, on its face, identifies a portion as non-responsive.

[para 19] In Order 99-002, the former Commissioner interpreted the word “responsiveness” to mean anything that is reasonably related to an applicant’s access request.

[para 20] I find that the following records are non-responsive to the access request as they do not fall within the time period identified on the access request, are not reasonably related to Bill 27 or the Regulations thereto, or are not communications

between the parties identified in the access request. I uphold the Public Body's decision to withhold these records as non-responsive:

Record A - 66, 68, 92, 101, 113, 114-117, 135, 138 (portion), 139-142, 168, 172-174, 198, 199, 200, 220-222, 238-244, 247-248, 252, 253, 257, 298, 326, 330-332, 333 (portion), 335-337, 338, 341-346, 347-369

Record B - 18-25, 37-38, 39-44, 45-46, 49, 58-62, 82-87

Record C - 1, 3 (portion), 4(portion), 5(portion)

Record D - 4-6

Record E - 16-19

[para 21] I also note that the Public Body made several handwritten comments on records A13, A18, A20, A21, A55 and C1 regarding whether or not to disclose the records in response to the access request. Some of those comments appear directly on the record while others appear to be written on a yellow post-it note and photocopied. These comments are also non-responsive as they are not reasonably related to the content of the Applicant's access request. I uphold the Public Body's decision to withhold these comments as non-responsive.

[para 22] After a review of the records, I find that the following records are responsive to the access request.

Record A - 82, 83, 110-112, 118, 334A, 334B, 339-340

Record B - 33, 57, 88-95

[para 23] However, as the Public Body applied either sections 4(1)(q) and/or one of the discretionary exceptions at issue in this inquiry to those records, I will address whether these records were properly withheld under those provisions.

C. Did the Public Body meet the requirements of section 10 and 12(1)(c)(i)?

[para 24] The Applicant states that the Public Body did not meet the requirements of sections 10 and 12(1)(c)(i) of the Act. Sections 10(1) and 12(1)(c)(i) read as follows:

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.

12(1) In a response under section 11, the applicant must be told

...

(c) if access to the record or to part of it is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,...

[para 25] The Applicant states that the Public Body divided the pages of records at issue into six sections labeled A through F and further subdivided section A into 9 subsections. However, the Applicant states that it was not clear how many documents were at issue, and how many pages each document consists of.

[para 26] Section 12 requires a public body to provide the following (see Order F2004-026):

(i) A description of the responsive records - The public body must describe or classify the responsive records without revealing information that is to be or may be exempted. At a minimum, a public body should disclose the number of "records", or in other words the number of documents, withheld and the number of pages within each document.

(ii) The statutory exception applied - A public body must provide the statutory exception for withholding the pages of records and tie those exceptions to the particular records. However, a public body does not, in every case, have to provide reasons in addition to a statutory exception. There are circumstances in which section 12(c)(i) may be fulfilled by naming the section number or describing the provision, as nothing more could be said without revealing information that may be exempted.

[para 27] In this inquiry, the Public Body's response to the Applicant identified the statutory exceptions which were applied and clearly tied those exceptions to the pages that were withheld. Although the Public Body did not provide further reasons for withholding these records, I accept that nothing more could be said without revealing information that was exempted.

[para 28] However, I find that the Public Body did not provide the Applicant with a proper description of the records. The Public Body described each of the six subsections A-F and identified the number of pages at issue within each subsection. The Public Body did not, however, clearly identify the number of documents within a subsection and the number of pages per document. Essentially, the Public Body did not identify where each document began and finished. I intend to order the Public Body to clearly identify the number of documents withheld within each subsection of Records and to provide the Applicant with information regarding the number of pages within each document.

[para 29] The Applicant also argued that the Public Body's failure to provide a proper description of the records puts the Public Body in breach of section 10. In Order 2000-014, the former Commissioner held that the general duty of public bodies to assist applicants under section 10 does not encompass other more specific duties under the Act

including those found within section 12. Consequently, I will not deal with the Public Body's failure to provide a proper description of the records under section 10.

D. The Public Body's request to apply additional fees

[para 30] The Public Body submits that if I order the Public Body to disclose additional non-substantive information in the records as a result of this Order, that the Applicant should pay additional fees related to the severing the records. As part of its rebuttal, the Public Body provided a copy of a fee estimate which outlined these additional fees.

[para 31] In this inquiry, the Applicant made an access request to the Public Body on June 2, 2003. The Public Body responded to the access request on October 9, 2003 by providing the Applicant with access to a portion of the records. Presumably, prior to the disclosure of these records the Public Body provided the Applicant with a fee estimate in accordance with sections 9, 10, 12 and 13 of the *Freedom of Information and Protection of Privacy Regulation* ("Regulation"). Presumably, the Applicant also paid these fees prior to receiving copies of the records. In this Order, the issue before me is whether the Public Body properly applied the exclusions and exceptions to the records. The Public Body has already charged and received payment for the processing of the request. The Act and the Regulation do not state that the Public Body may charge additional fees if I, by Order, find that the Public Body improperly applied the exclusions and exceptions and, therefore, must provide further information to the Applicant.

[para 32] I find that the Public Body is not entitled to charge the Applicant additional fees to compensate the Public Body for the severing and disclosure of additional information that I have outlined in this Order.

IV. ISSUES

[para 33] I will address the issues in this inquiry in the following order:

- A. Are the records excluded from the application of the Act by section 4(1)(q) (record created by or for and sent to a member of the Executive Council or Member of the Legislative Assembly)?
- B. Does section 16 of the Act (business interests) apply to the records/information?
- C. Does section 17 of the Act (personal information) apply to the records/information?
- D. Did the Public Body properly apply section 27 of the Act (privileged information) to the records/information?
- E. Does section 22 of the Act (Cabinet confidences) apply to the records/information?

F. Did the Public Body properly apply section 24 of the Act (“advice”) to the records/information?

V. DISCUSSION

A. Are the records excluded from the application of the Act by section 4(1)(q) (record created by or for and sent to a member of the Executive Council or Member of the Legislative Assembly)?

[para 34] Section 4(1)(q) reads:

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:

...

(q) a record created by or for

(i) a member of the Executive Council,

(ii) a Member of the Legislative Assembly, or

(iii) a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly

that has been sent or is to be sent to a member of the Executive Council, a Member of the Legislative Assembly or a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly;

[para 35] The Public Body applied section 4(1)(q) to the following records:

Record A - 82, 83, 110-112, 118, 334A-337, 339-346

Record B – 33-36, 37, 38, 57-62, 82-87, 88-95

Record D – 10

Record E – 16-19

[para 36] The records that remain at issue under section 4(1)(q) are:

Record A – 82, 83, 110-112, 118, 334A, 334B, 339, 340

Record B - 33-36, 57, 88-95

[para 37] Section 4(1)(q) applies to written communications between specified classes of government members. The purpose of the provision is to allow those persons to communicate internally about matters without fear that their discussion will be disclosed publicly.

[para 38] In Order 96-020, the former Commissioner held that a record created by a person who acts on behalf of one of the classes of enumerated members of government is also excluded under section 4(1)(q). However, the former Commissioner held that if a record is created by a person who acts on behalf of one of the classes of persons listed in section 4(1)(q), either the record must indicate that the individual is acting on that person's behalf, or it must be evident in some other way.

[para 39] In Order 2000-013, the former Commissioner held that an attachment to a record would not fall under section 4(1)(q) unless the attachment individually fulfills the requirements of the section. The fact that a Member of the Executive Council attaches a cover letter to a record authored by someone else does not mean that the Member of the Executive Council "created" the record or that the record was created on behalf of that Member of the Executive Council. To find otherwise would enable a Member of the Executive Council to shield any record from the Act simply by attaching it to a covering letter.

[para 40] After a review of the records at issue, I find that section 4(1)(q) applies to the following records:

Record A - 82, 83, 110-112, 118, 334A, 334B, 339, 340

Record B – 34-36, 57, 89-95

[para 41] I uphold the Public Body's decision to withhold these records.

[para 42] I find that section 4(1)(q) does not apply to Records B33, B88 and D10. However, as the Public Body applied discretionary exceptions to those records, I will address those records under those provisions.

B. Does section 16 of the Act (business interests) apply to the records/information?

[para 43] Section 16 is a mandatory section under the Act. The parties did not address section 16 in their submissions to the Office and there is no evidence before me to suggest section 16 applies. As such, I find that section 16 does not apply to the records at issue.

C. Does section 17 of the Act (personal information) apply to the records/information?

[para 44] The Public Body applied section 17 to a portion of the following records:

Record E – 1-4, 5-8, 9-13, 14, 15

[para 45] In addition to the above, after a review of the records I also applied section 17 to the name of a private individual which appears on Record B88.

[para 46] Section 17 is a mandatory (“ must ”) section of the Act. If section 17 applies, a public body must refuse to disclose the information. There are two criteria under section 17:

- (a) the information must be “personal information” of a third party; and
- (b) the disclosure of the personal information must be an unreasonable invasion of a third party’s personal privacy.

1. Is the information “personal information” of a third party?

[para 47] Personal information is defined in section 1(n). Section 1(n)(i) is relevant in this inquiry. This section reads as follows:

I 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

[para 48] I find that the information at issue in Records E1-E13 and Record E15 consist of personal information, including the names, addresses, phone number, e-mail addresses, place of employment, fax numbers, and information that would identify a fax provider. I find that all of this information fulfills the criteria for personal information under section 1(n). In addition, I find that with the author’s name, the author’s e-mail address, the addressee’s name and the first sentence the information on Record E14 consists of personal information of identifiable individuals. However, I find that the remainder of the information within Record E14 does not consist of personal information of an identifiable individual. Lastly, I find that the name of a private individual found on Record B88 also consists of personal information.

2. Would the disclosure of the personal information be an unreasonable invasion of a third party's personal privacy as provided in sections 17(1) and 17(4)?

[para 49] Section 17(1) reads:

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 50] Section 17(4) lists a number of circumstances where a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. I find that section 17(4)(g) is relevant in this inquiry.

[para 51] Section 17(4)(g) reads:

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 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 52] I find that section 17(4)(g) applies to the personal information withheld in Records E1-E13 and E15 and to the name of a private individual on Record B88. I find that, pursuant to section 17(4)(g)(i), the personal information in those records consists of third parties' names and other personal information about those individuals. In addition, I find that, pursuant to section 17(4)(g)(ii), disclosing those names in the records would reveal personal information about several individuals. I also find that section 17(4)(g) applies to the author's name, the author's email address, name of the addressee and first sentence within Record E14. This personal information is therefore presumed to be an unreasonable invasion of the third party's personal privacy.

[para 53] However, section 17(5) states that a public body must also consider all relevant circumstances including, but not limited to, those set out in that section. In this inquiry I find that the cc'd names within Record E6 and E11 and the name of the Minister to whom the e-mail was addressed in Record E14 are names of individuals who received this correspondence in their capacity as a public officials. I find that this circumstance weighs heavily in favour of a finding that the disclosure of this information would not be an unreasonable invasion of personal privacy. I find that there are no other relevant circumstances that weigh either in favour or against a finding of an unreasonable invasion of privacy.

3. Did the Applicant meet the burden of proof?

[para 54] Section 71(2) of the Act states that an applicant bears the burden of proving that disclosure of the third party personal information would not be an unreasonable invasion of privacy under the Act. I find that the Applicant met this burden of proof in regard to the cc'd names within Records E6 and E11 and the name of the Minister to whom the e-mail was addressed in Record E14. I find that the fact that this personal information consists of names of individuals who received correspondence in their capacity as public officials outweighs the presumption against disclosure that was established under section 17(4)(g).

[para 55] However, I do not find that the Applicant met this burden of proof in regard to the remaining personal information at issue under section 17. I have found that the presumption against disclosure under section 17(4)(g) applies to this personal information. Furthermore, I found that there are no other relevant circumstances under section 17(5) that either weigh in favour or against a finding of an unreasonable invasion of privacy.

4. Conclusion under section 17

[para 56] I find that section 17 applies to the personal information in Records E1-E5, E7-E10, E12, E13, E15. I also find that section 17 applies to the author's name, address, phone number, fax number and fax provider in Record E6, to the authors' names and fax number on Record E11, to the author's name, e-mail address and first sentence in E14 and the name of a private individual on Record B88. Disclosure of this information would be an unreasonable invasion of personal privacy as provided by section 17(1) and must not be disclosed. I intend to order the Public Body not to disclose this information to the Applicant.

[para 57] However, I find that section 17(1) does not apply to the cc'd names in Records E6 and E11 and to the remainder of Record E14. Disclosure of this information would not be an unreasonable invasion of privacy. Furthermore, as there are no other mandatory exceptions that apply and the Public Body did not apply any discretionary exceptions to this information, I intend to order the Public Body to disclose this information to the Applicant. I will provide the Public Body with a copy of these records highlighting the portion that is to be disclosed to the Applicant.

D. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records/information?

1. Section 27(1)(c)

[para 58] Section 27(1)(c) reads:

27(1) The head of a public body may refuse to disclose to an applicant

...

(c) information in correspondence between

(i) the Minister of Justice and Attorney General,

(ii) an agent or lawyer of the Minister of Justice and Attorney General, or

(iii) an agent or lawyer of a public body,

and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or by the agent or lawyer.

[para 59] The Public Body applied 27(1)(c) to the following records:

Record A - 59-60, 63, 64, 69-72, 73-78, 87, 88, 89, 90, 92, 93, 94-100, 102, 103, 104-109, 126, 299-300, 384

Record B – 3, 4, 5, 8, 9, 50-56, 72-78

Record C –6, 7, 8, 9, 16, 17-30, 31-33, 34-49, 50, 51

Record F – 1, 2, 3, 4-7, 8, 9-13, 14-16, 17, 18-32, 33-34, 35-43, 44, 45-46, 47-48, 49-53, 54-58, 59-60, 61, 68-81, 82-88, 89-99, 100, 101-111, 112-116, 117-120, 121-123, 124, 125-126, 128-132, 136-139, 140-142, 144-148, 149, 150, 151-154, 155, 156, 157, 159, 160, 161, 162, 163, 164, 165-169, 170-171, 172, 173, 174, 175, 176, 177-180, 181-184, 185-186, 187-188, 189, 190-191, 192, 195-197, 198-199, 200, 201-205, 206-222, 223-225, 226, 227

[para 60] The records that remain at issue under section 27(1)(c) are as follows:

Record A - 59-60, 63, 64, 69-72, 73-78, 87, 88, 89, 90, 93, 94-100, 102, 103, 104-109, 126, 299-300, 384

Record B – 3, 4, 5, 8, 9, 50-56, 72-78

Record C –6, 7, 8, 9, 16, 17-30, 31-33, 34-49, 50, 51

Record F – 1, 2, 3, 4-7, 8, 9-13, 14-16, 17, 18-32, 33-34, 35-43, 44, 45-46, 47-48, 49-53, 54-58, 59-60, 61, 68-81, 82-88, 89-99, 100, 101-111, 112-116, 117-120, 121-123, 124, 125-126, 128-132, 136-139, 140-142, 144-148, 149, 150, 151-154, 155, 156, 157, 159, 160, 161, 162, 163, 164, 165-169, 170-171, 172, 173, 174, 175, 176, 177-180, 181-184, 185-186, 187-188, 189, 190-191, 192, 195-197, 198-199, 200, 201-205, 206-222, 223-225, 226, 227

[para 61] In Order 98-016, the former Commissioner identified two criteria that must be fulfilled under section 27(1)(c):

(i) the record must be correspondence between an agent or lawyer of the Minister of Justice and Attorney General or a public body and any other person; and

(ii) the information in the correspondence must be in relation to a matter involving the provision of advice or other services by the agent or lawyer.

[para 62] After a review of the records I find that the following records fulfill the requirements of section 27(1)(c):

Record A - 59-60, 63, 64, 69-72, 73-74, 75-78, 87, 88, 89, 90, 93, 94-100, 102, 103, 104-109, 126, 299-300, 384

Record B – 3, 4, 5, 8, 9, 50-56, 72-78

Record C –6, 7, 8, 9, 16, 17-30, 31-33, 34-49, 50, 51

Record F – 1- 60, 68-126, 128-132, 136-142, 144-157, 159-192, 195-227

[para 63] I do not find that Record F61 fulfills the criteria for section 27(1)(c). However, as the Public Body applied other discretionary exceptions to this record, I will address that record under those provisions.

2. Section 27(1)(b)

[para 64] Section 27(1)(b) reads:

27(1) The head of a public body may refuse to disclose to an applicant

...

(b) information prepared by or for

(i) the Minister of Justice and Attorney General,

(ii) an agent or lawyer of the Minister of Justice and Attorney General, or

(iii) an agent or lawyer of a public body,

in relation to a matter involving the provision of legal services, ...

[para 65] The Public Body applied section 27(1)(b) to the following records:

Record A - 59-60, 63, 64, 69-72, 73-78, 87, 88, 89, 90, 92, 93, 94-100, 102, 103, 104-109, 126, 299-300, 384

Record B –3, 4, 5, 8, 9, 50-56, 72-78

Record C – 2, 3 (portion), 5 (portion), 6, 7, 8, 9, 16, 17-30, 31-33, 34-49, 50, 51

Record F – 1, 2, 3, 4-7, 33-34, 35-43, 49-53, 54-58, 59-60, 61, 62-67, 68-81, 89-99, 112-116, 117-120, 121-123, 124, 125-126, 127, 128-132, 133-134, 135, 136-139, 140-142, 143, 144-148, 149, 150, 151-154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165-169, 170-171, 172, 173, 174, 175, 176, 177-180, 181-184, 185-186, 187-188, 189, 190-191, 192, 193, 194, 195-197, 198-199, 200, 201-205, 206-222, 223-225, 226, 227, 228-230

[para 66] [para 66] The records that remain at issue under section 27(1)(b) are as follows:

Record C – 2, 3 (portion), 5(portion),

Record F – 61, 62-67, 127, 133-134, 135, 143, 158, 193, 194, 228-230

[para 67] In Order 96-017, the former Commissioner defined the term “legal services” to include any law-related service performed by a person licensed to practice law. In that Order, the former Commissioner also emphasized that this provision applies to information prepared in relation to a matter involving the provision of legal services.

[para 68] After a review of the records I find the following records fulfill section 27(1)(b):

Record C – 2, 3 (portion), 5 (portion)

Record F -61, 62-67, 127, 133, 134, 135, 143, 158, 193, 194, 228-230

3. Section 27(1)(a)

[para 69] Section 27(1)(a) reads:

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 70] The Public Body applied section 27(1)(a) to the following records:

Record A - 13, 37-42, 43, 44, 59-60, 63, 64, 69-72, 73-78, 79, 87, 88, 89, 90, 92, 93, 94-100, 102, 103, 104-109, 126, 138 (portion), 299-300, 324, 325, 329, 384

Record B – 1, 2, 3, 4, 5, 8, 9, 50-56, 66, 68, 72-78

Record C – 2, 3(portion), 5(portion), 6, 7, 8, 9, 10, 11, 15, 16, 17-30, 31-33, 34-49, 50, 51,

Record D – 12

Record F – 8, 9-13, 14-16, 17, 18-32, 33-34, 35-43, 44, 45-46, 47-48, 49-53, 59-60, 61, 62-67, 68-81, 82-88, 89-99, 100, 101-111, 125-126, 127, 128-132, 133-134, 135, 136-139, 143, 144-148, 149, 150, 151-154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165-169, 170-171, 172, 173, 174, 175, 176, 177-180, 181-184, 185-186, 187-188, 189, 190-191, 192, 193, 194, 195-197, 198-199, 200, 201-205, 206-222, 228-230

[para 71] The records that remain at issue under section 27(1)(a) are as follows:

Record A – 13, 37-42, 43, 44, 79, 138 (portion), 324, 325, 329

Record B – 1, 2, 66, 68

Record C – 10, 11, 15

Record D – 12

Solicitor-Client Privilege

[para 72] In Order 96-017, the former Commissioner adopted the following test for solicitor client privilege which was set out in *Solosky v. The Queen* [1980] 1 S.C.R. 821, which must be met on a document-by-document basis:

- (a) it must be a communication between solicitor and client,
- (b) which entails the seeking or giving of legal advice, and
- (c) which is intended to be confidential by the parties.

[para 73] Further, in that Order, the former Commissioner adopted the definition of “legal advice” set out by the Ontario Information and Privacy Commissioner. This advice requires that the advice in question “include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications”. In Order F2004-003, the Adjudicator held that this test is satisfied where the person seeking advice has a reasonable concern that a particular decision or course of action may have legal implications, and turns to their legal advisor to determine what those legal implications might be.

[para 74] After a review of the records I find the following records fulfill the criteria for solicitor-client privilege under section 27(1)(a):

Record A – 37-42

[para 75] I find that the following do not meet the criteria for solicitor-client privilege:

Record A – 13, 43, 44, 79, 138(portion), 324, 325, 329

Record B – 1, 2, 66, 68
Record C- 10, 11, 15
Record D - 12

[para 76] In particular, I note that although records A43, A44, B1, B2, C15 and D12 were sent to a Public Body solicitor, it is unclear from the records whether the communications were provided merely as information or whether the communications were sent for the purpose of seeking legal advice. There is also no evidence on the face of these records that the communications were intended to be confidential.

[para 77] However, as the Public Body has applied litigation privilege and/or other discretionary exceptions to those records, I will address those records under those provisions.

Litigation Privilege

[para 78] In Order 97-009, the former Commissioner held that in order to correctly apply litigation privilege, a public body must meet the following three-part test:

- a. there is a third party communication, which may include
 - (i) communications between the client or the client's agents and third parties for the purpose of obtaining information to be given to the client's solicitors to obtain legal advice;
 - (ii) communications between the solicitor or the solicitor's agents and third parties to assist with the giving of legal advice; or
 - (iii) communications which are created at their inception by the client, including reports, schedules, briefs, documentation, etc.
- b. the maker of the document or the person under whose authority the document was made intended the document to be confidential; and
- c. the 'dominant purpose' for which the documents were prepared was to submit them to a legal advisor and use in the litigation, whether existing or contemplated. The "dominant purpose" test consists of three requirements:
 - (i) the document must have been produced with existing or contemplated litigation in mind,
 - (ii) the document must have been produced for the dominant purpose of existing or contemplated litigation, and
 - (iii) if litigation is contemplated, the prospect of litigation must be reasonable.

[para 79] In Order 96-015, the former Commissioner held that the intent of the maker of the document or the person under whose authority the document was made is to be considered when determining “dominant purpose”: *Opron Construction Co. v. Alberta* (1989), 71 Alta. L.R. (2d) 28 (C.A.). In addition, the maker of the document or the person under whose authority the document was made must have intended the document to be confidential (the one possible exception is the “work product” or “lawyer’s brief” rule): see Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, p. 96.

[para 80] In Order 98-017, the former Commissioner held that litigation privilege ends with the litigation. There is no existing or contemplated litigation once the litigation is settled.

[para 81] The records that remain at issue under litigation privilege are:

Record A - 13, 43, 44, 79, 138 (portion), 324, 325, 329
Record B – 1, 2, 66, 68
Record C – 10, 11, 15
Record D - 12

[para 82] After a review of these records I find that they do not fulfill the criteria for litigation privilege. There is insufficient evidence before me that the three criteria necessary for that privilege are fulfilled. However, as the Public Body applied further discretionary exceptions to these records, I will address those records under those provisions.

4. Exercise of Discretion – Section 27(1)

[para 83] The Public Body states that it properly exercised its discretion to withhold the records at issue under section 27(1). The Public Body emphasized that the records at issue under section 27(1) show that legal counsel advised extensively on legal issues related to the development and implementation of Bill 27.

[para 84] In Order 96-017, the former Commissioner stated that a public body exercises its discretion properly when (1) it considers the objects and purposes of the legislation in question and (2) it does not exercise its discretion for an improper or irrelevant purpose.

[para 85] After a review of the records withheld under sections 27(1)(a), 27(1)(b) and 27(1)(c), I find that the Public Body properly exercised its discretion to withhold these records under those sections. I am satisfied that the Public Body took into account both the objects and purposes of the legislation and did not exercise its discretion for an improper or irrelevant purpose. The information withheld under these sections include requests for advice which were made to Public Body solicitors as well as advice from those solicitors. In many cases, the advice consists of whether draft legislation should be amended, in what manner and the legal implications of those amendments. In my view, legal counsel involved in this type of work must be able freely discuss and make

recommendations without fear that their frank advice will be made public. In Order 96-006, the former Commissioner discussed the importance of government officials having the opportunity to freely provide advice in relation to section 24(1). In that Order, the former Commissioner stated that the purpose of section 24 is to allow government officials who have the responsibility of making decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions without fear of being wrong or appearing foolish if these frank deliberations were made public. Given the circumstances of the present case, and the nature of records at issue in this inquiry, I find the solicitors involved in the section 27(1) records providing the advice should be viewed no differently than other government officials providing advice under section 24. In this regard, I also note that some of the records withheld under sections 27(1)(b) and 27(1)(c) would also have met the criteria for solicitor-client privilege had they not also been withheld under sections 27(1)(b) and 27(1)(c).

[para 86.] I find that the Public Body properly exercised its discretion to withhold the records under sections 27(1)(a), 27(1)(b) and 27(1)(c).

E. Does section 22 of the Act (Cabinet confidences) apply to the records/information?

[para 87] Section 22(1) reads:

22(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.

[para 88] The Public Body applied section 22(1) to the following records:

Record A - 11,12, 26-33, 37-42, 63, 64, 73-78, 89, 90, 110-112, 123-125, 137 (portion), 311, 324, 325, 379

Record B – 8, 9, 10, 33-36, 57-62, 82-87

Record C – 5, 6, 50, 51

Record F – 4-7, 9-13, 18-32, 45-46, 59-60, 82-88, 89-99, 101-111, 112-116, 117-120, 121-123, 128-132, 133-134, 143, 144-148, 151-154, 155, 156, 158, 159, 163, 164, 165-169, 170-171, 172, 173, 174, 177-180, 181-184, 185-186, 187-188, 190-191, 193, 194, 195-197, 198-199, 201-205

[para 89] The records that remain at issue under section 22(1) are as follows:

Record A - 11,12, 26-33, 123-125, 137 (portion), 311, 324, 325, 379

Record B –10, 33

[para 90] Section 22(1) is designed to protect the deliberations of the Executive Council. The purpose of section 22(1) is to prevent public bodies from disclosing the kind of information that would reveal the substance of Executive Council’s deliberations.

[para 91] In Order 97-010, the former Commissioner held that for information to be withheld under section 22, the information must fall within the general rule: the information must reveal the “substance of the deliberation of the Executive Council”. The former Commissioner defined the term “substance” as having its normal dictionary meaning of essence, the material or essential art of a thing. “Deliberation” was defined as meaning the act of deliberating, the act of weighing and examining the reasons for and against a contemplated action or course of conduct or a choice of acts or means.

[para 92] In Order 97-010, the former Commissioner held that the words “submitted or prepared” mean that information went before Cabinet or one of its committees or that it was incorporated into a Cabinet submission or used as the basis for developing a Cabinet submission. Information that is reasonably expected to be placed before Cabinet or one of its committees qualifies for this purpose. Records or information which might be incorporated into a Cabinet submission are not considered “submitted or prepared” for Cabinet.

[para 93] In Order F2004-026, I held that section 22 applied to information that would reveal the *substance* of deliberations of Executive Council. It did not, however, extend to the withholding of other information such as the names of persons who prepared the material, the dates, or the topic of deliberations, unless that information would in itself reveal the substance of the deliberations. I also held that although it is not necessary to show that a record was actually placed before Cabinet, it must be shown that the information would reveal the substance of deliberations, not that the information would *likely* reveal it.

[para 94] I find that the Public Body properly applied section 22(1) to a portion of Records A11, A137 and A379. I uphold the Public Body’s decision to withhold this information from the Applicant.

[para 95] However, I find that the Public Body did not properly apply section 22(1) to the following records:

Record A - 12, 26-33, 123-125, 311, 324, 325

Record B –10, 33

[para 96] As previously mentioned, in order for a record to fulfill the requirements of section 22(1), it need not be shown that a record was actually placed before Executive

Council or any of its committees. However, it must be shown that the information *would reveal* the substance of the deliberations of Executive Council or any of its committees. It is not sufficient to show that the information would *likely* reveal it.

[para 97] In the Public Body’s submissions, the Public Body outlined various types of records that it believes fulfill the requirements of section 22(1). The Public Body did not, however, refer to the specific records withheld under section 22(1) nor provide any affidavit evidence to support its arguments regarding the application of this provision.

[para 98] Some of the records remaining at issue under section 22(1) contain recommendations regarding various drafts of Bill 27. Some of the records at issue also refer to various issues surrounding Bill 27 and, in some cases, refer to the need to prepare a three-column document or present a Ministerial report. However, it is unclear what aspects of these records, or what level of detail contained in these records were eventually deliberated before Executive Council or any of its committees or what advice, recommendations, policy considerations, draft legislation or regulations were eventually submitted or prepared for submission to the Executive Council or its committees. As such, I do not find that those records fulfill the requirements of section 22(1).

[para 99] However, as the Public Body applied further discretionary exceptions to the remaining portion of Records A11 and A137, and to Records A12, A26-33, A123-125, A311, A324, A325, B10 and B33, I will address those records under those exceptions.

[para 100] As there are no mandatory exceptions that apply to headings, dates and names of correspondents in Record A379 and the Public Body did not apply any discretionary exceptions to that information, I intend to order the Public Body to disclose that information to the Applicant. I will provide the Public Body with a copy of this record, highlighting the portion that must be disclosed to the Applicant.

F. Did the Public Body properly apply section 24 of the Act (“advice”) to the records/information?

1. Sections 24(1)(a) and 24(1)(b)

[para 101] Sections 24(1)(a) and 24(1)(b) read:

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 102] The Public Body applied sections 24(1)(a) and 24(1)(b) to the following records:

Record A - 1, 2, 3, 5, 6, 8-10, 11,12, 13, 16, 18, 20-24, 26-33, 36, 37-42, 43, 44, 49-53, 55-58, 59-60, 61, 62, 63, 64, 65, 66, 67, 68, 69-72, 73-78, 79, 80, 81, 82, 83, 85-86A, 87, 88, 89, 90, 91, 92, 93, 94-100, 101, 102, 103, 104-109, 110-112, 113-117, 118, 119, 120, 121, 122, 123-125, 126, 127, 128-131, 132-134, 135, 137 (portion), 138 (portion), 139-142, 143, 144, 168, 172-174, 197, 198-200, 220-222, 238-244, 247-248, 252, 253, 256, 257, 265-268, 271, 272, 286-288, 298, 299-300, 301-305, 307-310, 311, 312, 313, 318, 319, 321, 323, 324, 325, 326, 327, 328, 329, 330-332, 333 (portion), 334A-337, 338, 339-346, 347-369, 371, 372, 381, 383, 384

Record B – 1, 2, 3, 4, 5, 7, 8, 9, 10, 12, 18-25, 26-30, 32, 33-36, 37-38, 39-44, 45, 46, 47, 48, 49, 50-56, 57, 58-62, 63-65, 66, 68, 69, 70, 71, 72-78, 80-81, 82-87, 88-95

Record C – 1, 2, 3 (portion), 4 (portion), 5 (portion), 6, 7, 8, 9, 10, 11, 15, 16, 17-30, 31-33, 34-49, 50, 51, 52-53, 54-56

Record D – 4-6, 10, 12

Record E – 16-19

Record F – 1-230

Record G – 13-17

[para 103] I note that, on its record list, the Public Body did not refer to section 24(1)(b) in regard to Record A1. However, a review of the record shows that section 24(1)(b) was applied to that record. As such, I have included Record A1 as one of the records at issue under section 24(1)(b).

[para 104] The records that remain at issue under sections 24(1)(a) and 24(1)(b) are as follows:

Record A - 1, 2, 3, 5, 6, 8-10, 11, 12, 13, 16, 18, 20-24, 26, 27, 28, 29, 30, 31, 32, 33, 36, 43, 44, 49-53, 55-58, 61, 62, 65, 67, 79, 80, 81, 85-86A, 91, 119, 120, 121, 122, 123, 124, 125, 127, 128-131, 132-134, 137 (portion), 138 (portion), 143, 144, 197, 256, 265-268, 271, 272, 286-288, 301-305, 307-310, 311, 312, 313, 318, 319, 321, 323, 324, 325, 327, 328, 329, 333 (portion), 371, 372, 381, 383

Record B –1, 2, 7, 10, 12, 26-30, 32, 33, 47, 48, 63-65, 66, 68, 69, 70, 71, 80-81, 88

Record C – 4 (portion), 10, 11, 15, 52-53, 54-56

Record D –10, 12

Record G – 13-17

[para 105] The Public Body states that section 24 applies to the records that contain discussions between the Government of Alberta and third party stakeholders.

[para 106] The Applicant states that the Public Body did not properly apply section 24 of the Act to the records and refers to a number of specific pages that it believes should not have been withheld under that section.

[para 107] In Order 96-006, the former Commissioner set out the criteria for “advice” (which includes advice, proposals, recommendations, analyses or policy options) under section 24(1)(a). The advice should:

- (a) be sought or expected, or be part of the responsibility of a person by virtue of that person’s position;
- (b) be directed toward taking an action; and
- (c) be made to someone who can take or implement the action.

[para 108] In Order 99-001, the former Commissioner held that section 24(1)(a) does not apply to the bare recitation of facts or summaries of information. The information must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process. Facts may only be withheld if the facts are sufficiently interwoven with other advice, proposals, recommendations, analyses or policy options so that they cannot reasonably be considered separate or distinct.

[para 109] In Order F2005-004, I held that section 24(1) does not protect the decision itself; it only offers to protect the path leading to the decision: see Orders 96-012, 97-010. If the records being considered under section 24(1) reveal only that a decision has been made, the records should not be withheld: see Orders 97-010 and 2001-010.

[para 110] In Order 96-006, the former Commissioner said that a “consultation” under section 24(1)(b) occurs when the views of one or more officers or employees is sought as to the appropriateness of a particular proposal or suggested action. The former Commissioner defined a “deliberation” as a discussion or consideration by the persons described in the sections of the reasons for or against an action. In that Order the former Commissioner also held that the criteria for advice applies to section 24(1)(b).

[para 111] In Order F2004-026, I addressed both sections 24(1)(a) and 24(1)(b). I held that section 24(1)(a) applies to information that reveals substantive information about the matter or matters on which advice is being sought or given. This includes substantive advice, proposals, recommendations, analyses or policy options as well as background information which is interwoven with the advice.

[para 112] In that same order I held that section 24(1)(b) applies to information that reveals substantive information about a matter about which consultations or deliberations were being held. I held that consultations include correspondence between third party advisors and government departments, that was conveyed to the Public Body by a government department as background information to enable the Public Body to provide advice. Deliberations include comments that indicate or reveal reliance on the knowledge or opinions of particular persons throughout the decision-making process, including those of the person making the communication.

[para 113] In Order F2004-026, I held that the following information cannot be withheld under sections 24(1)(a) or 24(1)(b):

- names of correspondents
- dates
- subject lines that do not reveal advice or consultations or deliberations
- information that reveals that a person participated in a discussion about a particular subject matter, or was asked to do so, without indicating anything substantive about their involvement

[para 114] After a review of the records at issue, I find that the Public Body properly applied sections 24(1)(a) or 24(1)(b) to the following records:

Record A – 2, 3, 5, 6, 9, 10, 12, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 50, 52, 85, 86, 121, 123, 124, 309, 310

Record B – 30, 71

Record C – 4 (portion)

[para 115] I note that a very small portion of some of the above records did not fulfill the requirements of section 24(1)(a) or 24(1)(b). However, disclosure of that information out of context would provide meaningless information to the Applicant and would be worthless (Order 96-019). Consequently, I find that the Public Body reasonably severed that information and I will not order that information to be disclosed.

[para 116] I find that the Public Body properly applied section 24(1)(a) or section 24(1)(b) to a portion of the following records:

Record A- 1, 8, 13, 16, 18, 36, 43, 44, 49, 51, 53, 55, 56, 57, 58, 61, 62, 65, 67, 79, 80, 81, 86A, 91, 119, 120, 122, 125, 127, 128, 129, 130, 131, 132, 133, 134, 137,

138, 143, 144, 197, 256, 265, 266, 267, 268, 271, 272, 286, 287, 288, 301, 302, 303, 304, 305, 307, 311, 312, 313, 318, 319, 321, 323, 324, 325, 327, 328, 329, 333, 371, 372, 381, 383

Record B- 1, 2, 7, 10, 12, 26, 27, 28, 29, 32, 47, 48, 63, 64, 65, 68, 69, 80, 81

Record C- 15, 52, 53, 54, 55, 56

Record D - 12

Record G – 13, 14, 15, 16, 17

[para 117] However, I find that the Public Body did not properly apply section 24(1)(a) or section 24(1)(b) to the remaining portions of many of those records. Furthermore, as there are no mandatory exceptions that apply and the Public Body did not, with the exception of Records A43, A44, A125, A143, A144, A324, A325, B1, B2, C15 and D12 apply any further discretionary exceptions to those portions of records, I intend to order the Public Body to disclose the remaining portions to the Applicant. I will provide the Public Body with a copy of those records, highlighting the portion that must be disclosed.

[para 118] The Public Body applied section 24(1)(e) to Records A43, A44, A125, A143, A144, A324 A325, B1, B2, C15 and D12. As such, I will address those records under that exception.

[para 119] I find that the Public Body did not properly apply section 24(1)(a) or 24(1)(b) to the following:

Record A- 11, 308

Record B - 33, 66, 70, 88

Record C – 10, 11

Record D – 10

[para 120] Furthermore, as there are no mandatory sections that apply to the records, and the Public Body did not apply any other discretionary exceptions to the records or remaining portion of records, I intend to order the Public Body to disclose those records or portions of records to the Applicant. I will provide the Public Body with a copy of these records highlighting the portion that must be disclosed to the Applicant.

2. Exercise of Discretion – Sections 24(1)(a) and 24(1)(b)

[para 121.] The Public Body states that it properly exercised its discretion under sections 24(1)(a) and 24(1)(b). The Public Body states that disclosure of the records at

issue under sections 24(1)(a) and 24(1)(b) would adversely affect the ability of the government to seek advice from persons within and outside the government regarding various options, strategies and proposals that may need to be considered as part of the deliberation process regarding past, current and future policies and legislation.

[para 122] As previously mentioned, in Order 96-017, the former Commissioner stated that a public body exercises its discretion properly when (1) it considers the objects and purposes of the legislation in question and (2) it does not exercise its discretion for an improper or irrelevant purpose.

[para 123] In Order 96-006, the former Commissioner stated that the purpose of section 24 is to allow government officials who have the responsibility of making decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions without fear of being wrong or appearing foolish if these frank deliberations were made public.

[para 124.] The information contained in the records at issue consists of advice, consultations and deliberations regarding various options that were considered regarding Bill 27. I find that pursuant to the reasoning in Order 96-006, government officials must be permitted to consider, review and deliberate over various options, and then be free to reject, vary or proceed with proposals as it deems appropriate, without threat that every consideration, option and consultation will be open to public scrutiny. Given the foregoing and after a review of the content of the records at issue, I find that the Public Body properly exercised its discretion to withhold information under sections 24(1)(a) and 24(1)(b).

3. Section 24(1)(e)

[para 125] Section 24(1)(e) reads:

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

...

(e) the contents of draft legislation, regulations and orders of members of the Executive Council or the Lieutenant Governor in Council,...

[para 126] The Public Body applied section 24(1)(e) to the following records:

Record A - 12, 37-42, 43, 44, 63, 64, 69-72, 73-78, 87, 88, 89, 90, 94-100, 102, 103, 104-109, 123-125, 126, 138 (portion), 143, 144, 324, 325,

Record B – 1, 2, 8, 9, 50-56, 72-78

Record C – 2, 3 (portion), 4 (portion), 5 (portion), 7, 8, 9, 15, 16, 31-33, 50, 51,

Record D – 12

Record F – 4-7, 8, 9-13, 14-16, 17, 18-32, 33-34, 35-43, 44, 45-46, 47-48, 54-58, 62-67, 68-81, 82-88, 89-99, 100, 101-111, 112-116, 117-120, 121-123, 127, 128-132, 133-134, 136-139, 140-142, 143, 144-148, 150, 151-154, 155, 156, 157, 158, 159, 163, 164, 165-169, 170-171, 172, 173, 174, 176, 177-180, 181-184, 185-186, 187-188, 190-191, 193, 194, 195-197, 198-199, 200, 201-205, 223-225, 226, 228-230

[para 127] The records that remain at issue under section 24(1)(e) are as follows:

Record A – 43, 44, 125 143, 144, 324, 325

Record B – 1, 2

Record C – 15

Record D- 12

[para 128] In Order F2004-026, I held that section 24(1)(e) does not apply to who was involved in the creation or editing of legislation, who commented on it, the dates on which the drafts were written, sent or commented on, or the topic of the legislation. I held that section 24(1)(e) does not cover such information unless that information would reveal the substantive contents of the legislation.

[para 129] After a review of the records I find that the Public Body did not properly apply section 24(1)(e) to the records. Furthermore, as there are no mandatory exceptions that apply and the Public Body did not apply any further discretionary exceptions to the records, I intend to order the Public Body to disclose the portions remaining within those records to the Applicant. I will attach a copy of those records to this Order, highlighting those portions that must be disclosed.

VI. ORDER

[para 130] I make the following order under section 72 of the Act.

Preliminary Issue A: Public Body’s application of additional provisions

[para 131] For the reasons given in this Order, I have considered the additional provisions which the Public Body identified in its submissions.

Preliminary Issue B: Is/ Are the information/records responsive to the Applicant's access request?

[para 132] The Public Body properly withheld the following records as non-responsive to the Applicant's access request. I uphold the Public Body's decision to withhold these records:

Record A - 66, 68, 92, 101, 113, 114-117, 135, 138 (portion), 139-142, 168, 172-174, 198, 199, 200, 220-222, 238-244, 247-248, 252, 253, 257, 298, 326, 330-332, 333 (portion), 335-337, 338, 341-346, 347-369

Record B - 18-25, 37-38, 39-44, 45-46, 49, 58-62, 82-87

Record C - 1, 3 (portion), 4 (portion), 5 (portion)

Record D - 4-6

Record E - 16-19

[para 133] I also find that the Public Body properly withheld its written commentary on records A13, A18, A20, A21, A55 and C1 regarding whether or not to disclose the records in response to the access request. I uphold the Public Body's decision to withhold those records.

[para 134] The Public Body did not properly withhold the following records as non-responsive:

Record A - 82, 83, 110-112, 118, 334A, 334B, 339-340

Record B - 33, 57, 88-95

[para 135] However, the Public Body applied either section 4(1)(q) and/or one or more discretionary exceptions to those records. I have addressed those records under those provisions.

Preliminary Issue C: Did the Public Body meet the requirements of section 10 and section 12(1)(c)(i)?

[para 136] I find that the Public Body failed to comply with its duty under section 12(1)(c)(i). I find that the Public Body failed to provide the Applicant with a proper description of the records. I order the Public Body to clearly identify the number of documents withheld within each subsection of Records and to provide the Applicant with information regarding the number of pages within each document.

Preliminary Issue D: The Public Body’s request to apply additional fees

[para 137] I find that the Public Body is not entitled to charge the Applicant additional fees to compensate the Public Body for the severing and disclosure of additional information that I have outlined in this Order.

Issue A: Are the records excluded from the application of the Act by section 4(1)(q) (record created by or for and sent to a member of the Executive Council or Member of the Legislative Assembly)?

[para 138] I find that section 4(1)(q) applies to the following records:

Record A - 82, 83, 110-112, 118, 334A, 334B, 339, 340

Record B – 34-36, 57, 89-95

[para 139] I uphold the Public Body’s decision to withhold these records.

[para 140] I find that section 4(1)(q) does not apply to Records B33, B88 and D10. However, as the Public Body applied other discretionary exceptions to those records, I addressed those records under those provisions.

Issue B: Does section 16 of the Act (business interests) apply to the records/information?

[para 141] I find that section 16 does not apply to the records at issue.

Issue C: Does section 17 of the Act (personal information) apply to the records/information?

[para 142] I find that section 17 applies to the information withheld in Records E1-E5, E7-E10, E12, E13, E15 as well as to the author’s name, phone number, address, fax number and fax provider in Record E6, to the authors’ names and fax number on Record E11, to the author’s name, e-mail address and first sentence in E14 and to the name of a private individual on Record B88. I order the Public Body not to disclose this information to the Applicant.

[para 143] I find that section 17(1) does not apply to the cc’d names in Records E6 and E11 and to the remainder of Record E14. I order the Public Body to disclose this information to the Applicant. I will provide the Public Body with a copy of these records highlighting the portion that must be disclosed.

Issue D: Did the Public Body properly apply section 27 of the Act (privileged information) to the records/information?

1. Section 27(1)(c)

[para 144] I find that the Public Body properly applied section 27(1)(c) to the following records and properly exercised its discretion in that regard:

Record A - 59-60, 63, 64, 69-72, 73-74, 75-78, 87, 88, 89, 90, 93, 94-100, 102, 103, 104-109, 126, 299-300, 384

Record B – 3, 4, 5, 8, 9, 50-56, 72-78

Record C –6, 7, 8, 9, 16, 17-30, 31-33, 34-49, 50, 51

Record F – 1- 60, 68-126, 128-132, 136-142, 144-157, 159-192, 195-227

[para 145] I uphold the Public Body’s decision to withhold these records.

[para 146] I do not find that Record F61 fulfills the criteria for section 27(1)(c). However, as the Public Body applied other discretionary exceptions to this record, I addressed that record under those provisions.

2. Section 27(1)(b)

[para 147] I find that the Public Body properly applied section 27(1)(b) to the following records and properly exercised its discretion in that regard:

Record C – 2, 3 (portion), 5 (portion)

Record F – 61, 62-67, 127, 133-135, 143, 158, 193, 194, 228-230

[para 148] I uphold the Public Body’s decision to withhold these records.

3. Section 27(1)(a)

Solicitor- Client Privilege

[para 149] I find the following records fulfill the criteria for solicitor-client privilege under section 27(1)(a) and the Public Body properly exercised its discretion to withhold the records:

Record A – 37-42

[para 150] I uphold the Public Body’s decision to withhold these records from the Applicant.

[para 151] I find that the following records do not meet the criteria for solicitor-client privilege:

Record A – 13, 43, 44, 79, 138 (portion), 324, 325, 329
Record B – 1, 2, 66, 68
Record C- 10, 11, 15
Record D - 12

[para 152] However, as the Public Body has applied litigation privilege and/ or other discretionary exceptions to those records, I have addressed those records under those provisions.

Litigation Privilege

[para 153] I find that the following records do not meet the criteria for litigation privilege:

Record A – 13, 43, 44, 79, 138 (portion), 324, 325, 329
Record B – 1, 2, 66, 68
Record C- 10, 11, 15
Record D - 12

[para 154] However, as the Public Body has applied other discretionary exceptions to those records, I have addressed those records under those provisions.

Issue E: Does section 22 of the Act (Cabinet confidences) apply to the records/information?

[para 155] I find that the Public Body properly applied section 22(1) to a portion of Records A11, A137 and A379. I uphold the Public Body's decision to withhold this information from the Applicant.

[para 156] I find that the Public Body did not properly apply section 22(1) to the following records:

Record A - 12, 26-33, 123-125, 311, 324, 325
Record B –10, 33

[para 157] However, as the Public Body applied discretionary exceptions to the remaining portion of Records A11 and A137 and to Records A12, A26-A33, A123-A125, A311, A324, A325, B10 and B33, I have addressed those records under those exceptions.

[para 158] As there are no mandatory exceptions that apply to headings, dates and names of correspondents in Record A379 and the Public Body did not apply any discretionary exceptions to that information, I order the Public Body to disclose that information to the Applicant. I will provide the Public Body with a copy of this record, highlighting the portion that must be disclosed to the Applicant.

Issue F: Did the Public Body properly apply section 24 of the Act (“advice”) to the records/information?

1. Sections 24(1)(a) and 24(1)(b)

[para 159] I find that the Public Body properly applied section 24(1)(a) or section 24(1)(b) to the following records and properly exercised its discretion in that regard:

Record A – 2, 3, 5, 6, 9, 10, 12, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 50, 52, 85, 86, 121, 123, 124, 309, 310

Record B – 30, 71

Record C – 4 (portion)

[para 160] I uphold the Public Body’s decision to withhold this information from the Applicant.

[para 161] I find that the Public Body properly applied section 24(1)(a) or section 24(1)(b) to a portion of the following records and properly exercised its discretion in that regard:

Record A- 1, 8, 13, 16, 18, 36, 43, 44, 49, 51, 53, 55, 56, 57, 58, 61, 62, 65, 67, 79, 80, 81, 86A, 91, 119, 120, 122, 125, 127, 128, 129, 130, 131, 132, 133, 134, 137, 138, 143, 144, 197, 256, 265, 266, 267, 268, 271, 272, 286, 287, 288, 301, 302, 303, 304, 305, 307, 311, 312, 313, 318, 319, 321, 323, 324, 325, 327, 328, 329, 333, 371, 372, 381, 383

Record B- 1, 2, 7, 10, 12, 26, 27, 28, 29, 32, 47, 48, 63, 64, 65, 68, 69, 80, 81

Record C- 15, 52, 53, 54, 55, 56

Record D - 12

Record G – 13, 14, 15, 16, 17

[para 162] I uphold the Public Body’s decision to withhold a portion of those records. However, I find that the Public Body did not properly apply section 24(1)(a) or section 24(1)(b) to the remaining portions of many of those records. Furthermore, as there are no mandatory exceptions that apply and the Public Body did not, with the exception of

Records A43, A44, A125, A143, A144, A324, A325, B1, B2, C15 and D12 apply any further discretionary exceptions to those records, I order the Public Body to disclose the remaining portions to the Applicant. I will provide the Public Body with a copy of those records, highlighting the portions that must be disclosed.

[para 163] The Public Body applied section 24(1)(e) to Records A43, A44, A125, A143, A144, A324 A325, B1, B2, C15 and D12. As such, I addressed those records under that exception.

[para 164] I find that the Public Body did not properly apply section 24(1)(a) or section 24(1)(b) to the following records:

Record A- 11, 308

Record B - 33, 66, 70, 88

Record C – 10, 11

Record D – 10

[para 165] Furthermore, as there are no mandatory sections that apply to the records, and the Public Body did not apply any other discretionary exceptions to those records, I order the Public Body to disclose those records or remaining portions of records to the Applicant. I will provide the Public Body with a copy of those records, highlighting the portion that must be disclosed to the Applicant.

2. Section 24(1)(e)

[para 166] I find that the Public Body did not properly apply section 24(1)(e) to the following records:

Record A – 43, 44, 125, 143, 144, 324, 325

Record B – 1, 2

Record C – 15

Record D - 12

[para 167] Furthermore, as there are no mandatory exceptions that apply and the Public Body did not apply any further discretionary exceptions to the records, I order the Public Body to disclose the remaining portions of those records to the Applicant. I will provide the Public Body with a copy of those records, highlighting those portions that must be disclosed.

[para 168] I order the Public Body to notify me within 50 days of receiving a copy of this Order that it has complied with the Order.

Frank Work, Q.C.
Information and Privacy Commissioner