ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-018

November 26, 2009

ALBERTA JUSTICE AND ATTORNEY GENERAL

Case File Number F4480

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), the Applicant asked Alberta Justice and Attorney General (the "Public Body") for information concerning the interception of his private communications. The Public Body withheld six pages, in full or in part, under sections 24(1)(a), 24(1)(b), 27(1)(a) and 27(1)(c) of the Act. The Applicant requested a review of the Public Body's response.

The Adjudicator found that none of the information in the records at issue fell under section 27(1)(a), as it was not subject to solicitor-client privilege. He found that disclosure of some of the information could reasonably be expected to reveal advice, proposals or recommendations under section 24(1)(a), or reveal consultations or deliberations under section 24(1)(b). He also found that some of the information fell under section 27(1)(c), as it was information in correspondence between a lawyer of the Minister of Justice and Attorney General and another person, in relation to the provision of advice or other services by the lawyer.

However, the Adjudicator found that the Public Body did not properly exercise its discretion not to disclose information to the Applicant. In particular, it did not consider whether non-disclosure of the specific records at issue would actually serve the purpose of promoting free and frank discussion by lawyers and government officials without fear of consequences, or ensuring the proper operation of government. It also failed to consider particular circumstances relating to the Applicant. Therefore, with respect to

most of the information in the records at issue, the Adjudicator ordered the Public Body to reconsider its decision not to disclose it.

As for the remaining information at issue, the Adjudicator ordered the Public Body to give the Applicant access to it. This was information withheld in the "from", "sent", "to" and "cc" lines of various e-mails. The Adjudicator found that these dates, and the names of senders and recipients, did not reveal the substance of advice, consultations or deliberations, and did not constitute information "in correspondence". The Public Body therefore did not have the discretion to withhold the information under section 24(1)(a), 24(1)(b) or 27(1)(c).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2(a), 6(1), 10(1), 15, 24, 24(1), 24(1)(a), 24(1)(b), 24(2), 24(2)(a), 27, 27(1), 27(1)(a), 27(1)(c), 32, 71(1), 72, 72(2)(a), 72(2)(b) and 72(4). **CAN:** *Criminal Code*, R.S.C. 1985, c. C-46, s. 196. **CAN:** *Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821.

Authorities Cited: AB: Orders 96-006, 96-017, 96-019, 98-016, 99-001, 99-013, 2000-019, 2000-021, F2002-016, F2002-028, F2003-001, F2004-003, F2004-026, F2005-004, F2007-004 and F2007-013; External Adjudication Order No. 4 (2003); *Alberta (Employment and Immigration) v. Alberta Federation of Labour*, 2009 ABQB 344.

I. BACKGROUND

[para 1] In a Request to Access Information dated November 22, 2007, the Applicant asked Alberta Justice and Attorney General (the "Public Body") for the following under the *Freedom of Information and Protection of Privacy Act* (the "Act"):

> *I seek to access (all) personal information prejudicial to my constitutional rights and personal freedoms here in the Province of Alberta.*
>
> *I seek to have sight of personal information relating to any allegation(s) levelled in secret against my name and personhood resulting in an administrative decision taken against me, and one giving rise to a conspiratorial criminal harassment of me by persons at city hall and specific private individuals with whom the city hold contractual business relations.*
>
> *I further seek to inspect personal information relating to any class of investigations conducted on me from 1992 to present day.*

[para 2] As the Applicant did not provide sufficient information to enable the Public Body to identify the location of records that may contain his personal information, it sought clarification from him. Following correspondence between the parties, the

Applicant clarified and narrowed his request, in a letter dated February 5, 2008, as follows:

> *Since you did make the point of noting that personal information may exist in the Minister's office or other areas of the department concerning the subject of an authorized interception of private communications, I would please ask that you restrict your search to these areas and to this specific category of personal information. I would expect that a search be carried out within the Special Prosecutions section to the department, as I am of the view that a file may exist concerning a complaint against me from members of the private, corporate sector; which, in particular, may include the corporate media.*

[para 3] On March 7, 2008, the Public Body extended the time for responding to the Applicant's access request. By letter dated April 1, 2008, it granted the Applicant partial access to the requested information, withholding the remaining information under sections 24(1)(a), 24(1)(b), 27(1)(a) and 27(1)(c) of the Act.

[para 4] In a Request for Review dated April 30, 2008, the Applicant requested a review of the Public Body's response to his access request. Mediation was authorized but was not successful. The matter was therefore set down for a written inquiry.

II. RECORDS AT ISSUE

[para 5] The Public Body located 14 pages of records responsive to the Applicant's access request. The records at issue consist of information that it withheld in its entirety on two pages (pages 2 and 5) and partially withheld on four pages (pages 6, 11, 12 and 13).

III. ISSUES

[para 6] The Notice of Inquiry, dated June 3, 2009, set out the following issues:

> Did the Public Body properly apply section 24(1) of the Act (advice) to the information/records?
>
> Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information/records?

[para 7] In this Order, I first determine whether information in the records at issue falls under sections 24(1) and/or 27(1), concluding that some of it does. Then, in a separate section, I review the Public Body's exercise of its discretion not to disclose information that it had the authority to withhold, concluding that it should reconsider its decision. Given this, I have reformulated the above issues as follows:

Does information in the records at issue fall under section 24(1) of the Act (advice, etc.)?

Does information in the records at issue fall under section 27(1) of the Act (privileged information, etc.)?

Did the Public Body properly exercise its discretion not to disclose information to the Applicant?

[para 8] In his initial submissions, the Applicant alleges an unjustified invasion of his privacy by various parties. He also raised this allegation in representations dated August 28, 2009, which he submitted during this inquiry. I arranged for those representations to be returned to the Applicant because this inquiry deals only with his access request. His concerns about alleged improper collection, use or disclosure of his personal information are therefore outside the scope of this inquiry. In a letter dated September 14, 2009, this office advised the Applicant how to proceed with a separate privacy complaint against the Public Body (but not various foreign entities, as the Commissioner has no jurisdiction over them). The Applicant appears, in his rebuttal submissions, to now understand that this inquiry deals only with his access request, as he asks that his initial submissions surrounding the use and disclosure of his personal information be disregarded.

[para 9] Several years ago, the Applicant requested a review of the adequacy of the search for responsive records conducted by the City of Calgary in response to an access request that he made to that public body. An Adjudicator found that the City had conducted an adequate search and otherwise met its duty to assist the Applicant under section 10(1) of the Act (Order F2002-016 at paras. 20 and 28). The Applicant now questions the correctness of that decision, arguing that records that the City said were destroyed are actually still in existence. This issue and others raised by the Applicant about the City of Calgary are outside the scope of this inquiry and I will therefore not address them.

[para 10] The Applicant argues that the Public Body improperly narrowed his access request and therefore failed to respond to his initial one, dated November 22, 2007. I note that, in a letter dated January 19, 2008, he disagreed with the Public Body's understanding of his access request and its need for clarification. However, as set out in the background above, the Applicant subsequently wrote a letter, dated February 5, 2008, in which he did narrow his access request. The Public Body had a duty to respond only to that request.

[para 11] The Applicant takes the position that e-mail correspondence that he sent to the Public Body on May 26 and July 15, 2006 were in relation to a request for his personal information. He argues that the Public Body therefore should have responded within the time limits set out in the Act, and that its response in 2006 should have advised him of his right to request a review by the Commissioner. However, I find that those e-mails – which I discuss in more detail below – were not access requests. Rather, they

were inquiries as to whether the Applicant was the subject of an authorized interception of communications and whether there was a form he should complete in order to receive notification. These questions did not amount to asking the Public Body for records or information under the Act, even though the Public Body necessarily had to provide information in order to respond. The Public Body had no duty to respond to the Applicant's 2006 correspondence in accordance with the Act.

[para 12] In his rebuttal submissions, the Applicant raises the adequacy of the Public Body's search for responsive records. He believes that some of his personal information is contained in records held by Alberta Solicitor General. He argues that these are in the custody or under the control of the Public Body under section 6(1) of the Act, and therefore should have been provided in response to his access request. Alternatively, he argues that the Public Body should have transferred his access request to Alberta Solicitor General under section 15. The Applicant did not raise these issues in his request for review dated April 30, 2008; he only asked whether the Public Body can rely on the "exempt provisions" of the Act. I will not address the foregoing issues at this late stage, as the Applicant should have raised them in a more timely fashion. Having said this, nothing precludes the Applicant from making an access request to Alberta Solicitor General and Public Security for information that he is seeking.

[para 13] Finally, in his rebuttal submissions, the Applicant raises the application of section 32 of the Act, which requires a public body to disclose information about a risk of significant harm to someone, or information the disclosure of which is, for any other reason, clearly in the public interest. He argues that harm has been visited on him as a result of security measures that he believes have been taken against him, and that he and the public have a right to know the grounds giving rise to those security measures. The records at issue in this inquiry do not reveal that any security measures have been taken against the Applicant. My review of the records and submissions of the parties does not lead me to conclude that any information must be disclosed by the Public Body under section 32.

IV. DISCUSSION OF ISSUES

A. Does information in the records at issue fall under section 24(1) of the Act (advice, etc.)?

[para 14] The Public Body relied on sections 24(1)(a) and/or 24(1)(b) of the Act to withhold all of the records at issue. Section 24 reads, in part, as follows:

> *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,

…

(2) This section does not apply to information that

(a) has been in existence for 15 years or more,

…

[para 15] Under section 71(1) of the Act, it is up to the Public Body to prove that the Applicant has no right of access to the information that it withheld under section 24.

[para 16] Section 24(2) states that section 24 does not apply to certain information, meaning that a public body cannot withhold that information in reliance on section 24(1). I considered whether any of the provisions of section 24(2) were relevant in this inquiry, but found that none of them were. Although the Applicant believes that some of the information withheld by the Public Body dates from 1992 or 1993 (when the Applicant was employed by the City of Calgary), the records at issue date from 2006. Therefore, none of the information in them has been in existence for more that 15 years, so as to engage section 24(2)(a) above.

1. Advice, etc. under section 24(1)(a) and consultations/deliberations under section 24(1)(b)

[para 17] In order to refuse access to information under section 24(1)(a) of the Act, on the basis that it could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options, the information must meet the following criteria: (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 96-006 at p. 9 or para. 42; Order F2007-013 at para. 107).

[para 18] Section 24(1)(b) gives a public body the discretion to withhold information that could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body, a member of the Executive Council, or the staff of a member of the Executive Council. The test for information to fall under section 24(1)(b) is the same as that under section 24(1)(a) in that the consultations or deliberations must (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 99-013 at para. 48; Order F2004-026 at para. 57).

[para 19] The Applicant submits that, in order to rely on section 24(1), the Public Body must first conduct an assessment in the form of an "injury test". He also argues that he should have access to the information that he has requested because it will allow him to make full answer and defence against what he believes have been allegations that he has breached national security, the accuracy and quality of advice that he believes has been used against him must be tested, and access is required to satisfy the public's interest in the administration of justice. The Applicant submits that information relating to action taken against an individual is not part of the policy decision-making process or the usual pattern of government operations and therefore does not fall under section 24(1).

[para 20] None of the foregoing is relevant to determining whether information falls within the scope of section 24(1). Unlike some other sections of the Act, section 24(1) does not require a public body to establish that disclosure of information would result in harm, in order for it to fall under the section. A public body may still rely on section 24(1) even if the information being withheld is relevant to a fair determination of an applicant's rights – and even if it is his or her own personal information. Information used to make a decision or take an action in relation to a specific individual may nonetheless reveal advice, etc. or consultations/deliberations within the meaning of the section. Having said this, the foregoing points raised by the Applicant may be relevant to determining whether the Public Body properly exercised its discretion to withhold information falling within section 24(1). I will therefore return to them later in this Order.

[para 21] The Applicant explains that he previously made an access request to the City of Calgary, and that its response led him to believe that the Public Body held his personal information. He refers to an investigative file, witness statements and affidavits relating to a wire tap application, but no information pertaining to an investigation of the Applicant or a wire tap application is among the records at issue in this inquiry. The Applicant believes that the records at issue in this inquiry consist of records created or generated by the City of Calgary, but that is not the case.

[para 22] The Applicant argues that I should not give weight to the Public Body's arguments, as it did not file an affidavit in support of them. He submits that even the copies of the records that were released to him are not admissible as evidence, as they are unsworn and unverified. The formal rules of evidence applicable in the court system do not apply to inquiries under the Act (Order F2002-016 at para. 27). I may give weight to unsworn evidence and to unverified or uncertified copies of documents if I find them to be reliable. Here, I find the evidence and documents submitted by the Public Body to be reliable.

[para 23] The Applicant distinguishes, for various reasons, the Orders of this Office that were cited and submitted by the Public Body. While the facts in the present inquiry are different, I have relied on Orders cited by the Public Body only to the extent that they stand for general tests and principles.

2. Review of the records at issue

[para 24] By way of further background, the Applicant believes that a wire tap application was presented to the Public Body to authorize the Calgary Police Service to intercept his private communications. The records released to him in response to his access request show that he wrote to the Public Body on May 26, 2006, asking to receive notification from the Minister of Justice and Attorney General, under section 196 of the *Criminal Code*, regarding an authorized interception of his data communications. He made a follow-up request on July 15, 2006. In responses sent July 14 and August 9, 2006, the Public Body advised the Applicant that, if he were the object of an authorized interception, he would be notified within 90 days following the period of interception and that, if he were not the object of an authorized interception, he would not receive any notification, as there would be no reason to provide him with notification.

[para 25] As explained by the Public Body, pages 2 and 5 of the records consist of draft letters from the Minister to the Applicant. (The Applicant suspects that page 5 is a letter from the Solicitor General to the Minister of Justice, but it is not.) As shown by e-mail exchanges in relation to one of these draft letters, it was prepared by an employee of the Public Body at the request of a person acting on behalf of the Minister of the Public Body. That person was requesting a response to the Applicant's May 26, 2006 correspondence. The sequence of events resulted in page 4 being sent to the Applicant, which is the actual correspondence sent to him by the Minister. The Public Body indicates that a similar sequence of events relating to the draft letter at page 5 resulted in page 1 being sent to the Applicant. Page 1 is the actual response sent from the Minister to the Applicant in response to his July 15, 2006 correspondence.

[para 26] The test for withholding information under section 24(1)(a) has been met with respect to pages 2 and 5. These draft letters were sought or expected from employees of the Public Body by virtue of their positions, were directed toward the action of responding to correspondence received from the Applicant, and were provided to the Minister who could take action by accepting or rejecting the contents of the draft letters, and then signing and sending final versions to the Applicant. I accordingly find that the information on pages 2 and 5 of the records falls under section 24(1)(a) of the Act, on the basis that it constitutes advice, proposals or recommendations.

[para 27] The information that the Public Body withheld on page 6 of the records consists of an e-mail exchange between employees of the Public Body, and it is the same as the information withheld on pages 12-13. The information that the Public Body withheld on page 11 consists of a different e-mail exchange. The Public Body makes the following submissions in relation to pages 6, 11, 12 and 13:

> *… The records show on their face that the advice is part of the responsibility of the person proffering it, it is directed toward taking an action – responding to the Applicant – and was made to someone who can take or implement the action.*

[…]

The records themselves show that the process is consultative and advisory. The author of the severed information has outlined his planned course of action. As one of the recipients of this correspondence is the Assistant Deputy Minister of the Division in which the author is employed, it is reasonable to presume that he could disapprove of this course of action and provide an alternative course, even absent a declarative statement supporting such a presumption.

[para 28] Part (2) of the test under both sections 24(1)(a) and 24(1)(b) is that the information must be directed toward taking an action. The information must relate to a suggested course of action, which will ultimately be accepted or rejected by the recipient (Order 96-006 at p. 8 or para. 39; Order 99-001 at para. 17; Order F2007-013 at para. 108). Taking an action includes making a decision (Order 96-019 at para. 120; Order F2002-028 at para. 29). However, sections 24(1)(a) and 24(1)(b) do not protect a decision itself, as they are only intended to protect the path leading to the decision (Order F2005-004 at para. 22; Order F2007-013 at para. 109).

[para 29] While information in a record may be implicitly directed toward a person for the purpose of allowing him or her to take an action – which can include approving an action or decision by someone else – I find that that most of the information on pages 6, 11, 12 and 13 is not implicitly of this type.

[para 30] The upper e-mail withheld on page 11 consists of factual statements about something that has already occurred, so I find that it is not directed toward any action or decision. While facts may be withheld if they are sufficiently interwoven with advice, etc. (Order 99-001 at paras. 17 and 18; Order F2007-013 at para. 108) or sufficiently interwoven with consultations/deliberations (Order 96-006 at p. 10 or para. 50; Order F2004-026 at para. 78), I find that the facts in the upper e-mail on page 11 are not interwoven with any information that may be withheld under section 24(1)(a) or (b).

[para 31] Most of the employee's planned course of action that is described on page 6 and repeated on pages 12-13 is a decision already made, which decision the employee is merely conveying to others. He states that he "will" be doing something. Moreover, the first sentence of the e-mail indicates that the employee had already spoken to the Assistant Deputy Minister. I therefore do not, in this case, believe that the Assistant Deputy Minister was included as a recipient of the e-mail for the implicit purpose of enabling him to accept or reject the planned course of action. Rather, I find that the decision of the employee was being provided for the Assistant Deputy Minister's information.

[para 32] I make one exception with respect to the e-mail reproduced on page 6 and again on page 12-13. I find that, unlike the rest of the e-mail, the fourth point in the e-mail consists of information implicitly directed toward making a decision or taking an action. The language used sufficiently implies that the employee is consulting or

deliberating with the individuals to whom he sent the e-mail, in order to decide whether to proceed in the fashion proposed in point four. A "consultation" occurs when the views of other persons are sought as to the appropriateness of a particular proposal, and a "deliberation" is a discussion or consideration of the reasons for and/or against an action (Order 96-006 at p. 10 or para. 48; Order 99-013 at para. 48). In point four of the e-mail, the employee provides a reason against a particular action and is implicitly seeking the views of others in that regard. I therefore find that the information reveals consultations or deliberations under section 24(1)(b).

[para 33] The Public Body submits that the "measured" and "organized" form of communication appearing in the e-mail exchanges on pages 6, 11, 12 and 13 is common practice in large public bodies. I have no doubt that employees of public bodies often inform others, including their superiors, of their decisions or intended actions. However, this does not automatically mean that they are seeking input or approval, or otherwise engaging in consultations/deliberations or the provision of advice.

[para 34] The Public Body's argument that an employee's decision or intended action can be overruled would hold in every case where an employee conveys the decision or action to a person with higher authority. In my view, that bare argument is not sufficient to permit the application of section 24(1). In other words, I do not agree with the Public Body's "presumption" that whenever an employee's superior is the recipient of information, the implied intention is to enable the superior to disapprove of the decision or action and propose a different one. A public body must show, in the circumstances of the given case, that the information was actually directed to a recipient for the purpose of deciding a course of action, and does not merely convey an action already decided by the sender of the information. Here, I find that most of the e-mail exchanges that the Public Body withheld on pages 6, 11, 12 and 13 is not directed toward another person for the purpose of an action or decision, whether explicitly or implicitly. Having said this, my finding in relation to point four of one of the e-mails demonstrates that information may, in some instances, implicitly fall under section 24(1).

[para 35] I find that the lower e-mail withheld on page 11 consists of advice, proposals or recommendations as to how to respond to correspondence from the Applicant. The information was provided by an employee of the Public Body and directed toward someone acting on behalf of another person who could accept or reject the employee's suggestion. The substance of the e-mail therefore falls under section 24(1)(a). However, I find that section 24(1) does not apply to the "from", "sent", "to", "cc" and "subject" lines. Section 24(1) does not generally apply to information that merely reveals that advice was sought or given, consultations or deliberations took place, or that particular individuals or topics were involved, when the information does not reveal the substance of the discussions; there may be cases where some of the foregoing items reveal the content of advice or consultations/deliberations, but that must be demonstrated for every case for which it is claimed (Order F2004-026 at paras. 71 and 75).

[para 36] I point out that my findings differ regarding the information on page 6 and repeated on pages 12-13, on one hand, and the information on the lower e-mail on page 11, on the other hand, because of the context. In the first instance, an employee is conveying a decision already made and action that he himself plans to take when speaking to the Applicant – so the information does not fall under section 24(1). In the second instance, the employee is conveying a suggested course of action when another person writes to the Applicant – so the information does fall under section 24(1).

B. Does information in the records at issue fall under section 27(1) of the Act (privileged information, etc.)?

[para 37] I found above that some of the information that the Public Body withheld on pages 6, 11, 12 and 13 of the records did not fall under section 24(1). However, the Public Body also relied on sections 27(1)(a) and 27(1)(c) of the Act to withhold the information on the foregoing pages. It also relied on section 27(1)(c) to withhold page 5, which I found above to fall under section 24(1)(a) but will discuss again here. (I am reviewing the Public Body's application of both sections 24 and 27 to all of the records at issue because I later order it to reconsider its exercise of discretion not to disclose information to the Applicant, and it must therefore know whether it had that discretion under neither, only one or both of sections 24 and 27 in the first place.)

[para 38] Sections 27(1)(a) and 27(1)(c) read as follows:

> *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,*
>
> …
>
> *(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 39] Under section 71(1) of the Act, it is up to the Public Body to prove that the Applicant has no right of access to the information that it withheld under section 27.

1. Information subject to solicitor-client privilege under section 27(1)(a)

[para 40] The Public Body indicates that it applied section 27(1)(a) of the Act to some of the records at issue, on the basis that information is subject to solicitor-client privilege. To correctly apply section 27(1)(a) in respect of solicitor-client privilege, a public body must meet the criteria for that privilege set out in *Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821 at p. 837, in that the record must (i) be a communication between a solicitor and client; (ii) entail the seeking or giving of legal advice; and (iii) be intended to be confidential by the parties (Order 96-017 at para. 22; Order F2007-013 at para. 72).

[para 41] I find that none of the information in the records at issue is subject to solicitor-client privilege. Although there is withheld information consisting of communications between a lawyer of the Public Body and other representatives of the Public Body, and the communications may be confidential, they do not entail the seeking or giving of legal advice. Legal advice means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications (Order 96-017 at para. 23; Order F2007-013 at para. 73). The test for legal advice 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 his or her legal advisor to determine what those legal implications might be; legal advice may be about what action to take in one's dealings with someone who is or may in future be on the other side of a legal dispute (Order F2004-003 at para. 30).

[para 42] In this case, the matter being dealt with by the Public Body was how to respond to correspondence from the Applicant. Although his correspondence, and the responses from the Public Body, made reference to authorized interceptions of communications and notification under section 196 of the *Criminal Code*, the Public Body has not pointed to any legal opinions that were requested or provided about a legal issue, has not drawn my attention to any legal considerations regarding a matter with legal implications, and has not identified any potential legal dispute. In being asked to assist in responding to the Applicant's correspondence, and in providing information to other representatives of the Public Body, the lawyer was merely providing factual information about the law (i.e., indicating what the *Criminal Code* says) – he was not advising the Public Body on how to proceed in a legal matter or how to respond to a legal problem. The fact that a lawyer provides general information about the law does not automatically mean that he or she is giving legal advice. Just because a lawyer may have been involved is not enough to find that solicitor-client privilege applies to records (Order 2000-019 at para. 39). I find that the Public Body has failed to establish that any of the information in the records at issue falls under section 27(1)(a).

[para 43] The Applicant argues that the Public Body cannot claim privilege over the records at issue because much of his personal information contained in them is already known and has therefore lost any confidentiality. I do not need to address this, as I have found that the records at issue are not privileged in any event.

2. Information in correspondence to or from lawyers or agents under section 27(1)(c)

[para 44] For information to fall under section 27(1)(c) of the Act, 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 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 (Order 98-016 at para. 17; Order F2007-004 at para. 13). It has been said that section 27(1)(c) "permits non-disclosure of information in any correspondence between a lawyer of a public body (which would include all Alberta Justice lawyers), or an agent of a public body (which would extend to non-legal staff of Alberta Justice) on the one hand, and anyone else" [External Adjudication Order No. 4 (2003) at para. 12]. It has also been said that the Legislature has cast a wide net in terms of what is not subject to disclosure under section 27(1)(c), "especially as it relates to documents originating from, or being sent to, Alberta Justice" [External Adjudication Order No. 4 (2003) at para. 24].

[para 45] The e-mails on pages 6, 11, 12 and 13 of the records were written by a lawyer of the Minister of Justice and sent to another person. While page 5 does not itself indicate from whom the draft letter on that page was sent, the Public Body submits – and it appears from other records – that the draft letter was written and sent by a lawyer. Accordingly, most of the information that the Public Body withheld on the foregoing pages – being the substantive information – falls under section 27(1)(c), on the basis that it is information in correspondence between a lawyer of the Minister of Justice and Attorney General and another person, in relation to the provision of advice or services by the lawyer. Although I found above that none of this information entails the giving of *legal* advice, so as to attract solicitor-client privilege, if does involve the provision of (non-legal) advice and services by the lawyer – namely the advice and services provided by the lawyer when assisting in responding to the correspondence from the Applicant.

[para 46] Section 27(1)(c) applies only to information "in correspondence"; it does not apply to other information, such as the fact that a record is correspondence between persons specified in section 27(1)(c) (Order F2003-001 at para. 63). Given this, section 27(1)(c) does not extend to the dates of the e-mails or the names of the senders and recipients in the "from", "sent", "to" and "cc" lines on pages 6, 11 and 12 (there are no such lines on page 13). Section 27(1)(c) does, however, extend to the information in the "subject" lines, as well as any indication of the "importance" of an e-mail, as this is part of the substantive "information in correspondence". Section 27(1)(c) extends to the whole of page 5, as the entire draft letter on that page is the information in correspondence between the lawyer who prepared it and the person to whom the draft letter was given.

C. Did the Public Body properly exercise its discretion not to disclose information to the Applicant?

[para 47] With the exception of the dates of e-mails, and the names of the senders and recipients of them, all of the information in the records at issue falls under section 24(1)(a), 24(1)(b) and/or 27(1)(c) of the Act. Because the purposes of these provisions overlap – in that they protect the substance of advice, etc. provided by employees of a public body [section 24(1)(a)], the substance of consultations or deliberations on their part [section 24(1)(b)] or the substance of advice and services by a lawyer of a public body [section 27(1)(c)] – I have decided to discuss the Public Body's exercise of its discretion not to disclose information to the Applicant all at the same time. It has been stated that solicitors involved in providing advice under section 27(1) should be viewed no differently than other government officials providing advice under section 24(1) (Order F2007-013 at para. 85). I note that the Public Body also addresses its discretion not to disclose information under both sections 24(1) and 27(1) at the same time in its submissions.

[para 48] A public body exercising its discretion relative to a particular provision of the Act should consider the Act's general purposes, the purpose of the particular provision on which it is relying, the interests that the provision attempts to balance, and whether withholding the records would meet the purpose of the Act and the provision in the circumstances of the particular case (Order F2004-026 at para. 46).

[para 49] The Public Body suggests that its burden to show a proper exercise of discretion has become more onerous in recent Orders, in that it used to be required only to show that it considered the objects and purposes of the Act and that it exercised its discretion in good faith, and not for an improper purpose or based on irrelevant considerations (Order 96-017 at paras. 56 and 62). However, it has been clear for some time now that a public body is required to consider all of the relevant facts and circumstances, in order for it to properly exercise its discretion in a given case. For instance, in stating that the rationale for exercising discretion in a particular way must be both demonstrable and reasonable, Order 2000-021 – cited by the Public Body itself – also said, among other things, that a public body cannot abuse discretion by making an arbitrary or irrational decision, which includes one that fails to considering relevant matters or one that adopts a policy without considering the individual merits of the case (Order 2000-021 at para. 51). In order to show that it did not make an arbitrary decision, and that it considered the facts and circumstances of the particular case, a public body must necessarily provide relevant argument and evidence.

[para 50] Here, the Applicant argues that the Public Body has failed to provide evidence of what it considered when exercising it discretion to rely on exceptions to disclosure. He believes that the Public Body did not consider the objects and purpose of the Act or his general right of access, and that it withheld information for an improper or irrelevant purpose. He submits that the Public Body used a blanket approach in its application of exceptions to disclosure without considering the circumstances of his case and whether non-disclosure would be the appropriate result. He points out that

information falling within section 24(1) or 27(1) is not "automatically" protected and that disclosure of a particular record must be decided on the "merits".

[para 51] In turn, the Public Body submits that it exercised its discretion for a relevant purpose, considered the purposes of the Act carefully, and balanced those purposes with the Applicant's perceived right of access to the records at issue. With respect to the purposes of sections 24(1) and 27(1), the Public Body notes that lawyers of public bodies must be able to freely discuss and make recommendations without fear that their frank advice will be made public, and that government officials who have the responsibility of making decisions must be able 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 disclosed (Order F2007-013 at para. 85).

[para 52] The Public Body states that its head at the time echoed the foregoing position, in exercising his discretion, when he considered that lawyers must be able to conduct free and open discussion without fear that their frank advice will be proliferated in the public domain, and that the consultative and advisory role of public officials conducting the affairs of daily business must be allowed to flourish free of the looming spectre of disclosure. (The Public Body also refers to its broad "privilege" – and I acknowledge that there may be additional considerations when information is subject to solicitor-client privilege – but there is no such information here, as found earlier in this Order.) Finally, the Public Body notes that non-disclosure of information may be necessary for the proper operation of government and government bodies [*Alberta (Employment and Immigration) v. Alberta Federation of Labour*, 2009 ABQB 344 at para. 19].

[para 53] I find that the Public Body has not established that it properly exercised its discretion when it refused to disclose information to the Applicant under sections 24(1)(a), 24(1)(b) and/or 27(1)(c). Rather, it appears to have simply applied a general policy of non-disclosure – based on statements made in previous Orders about the need for free and frank discussion among government officials – without actually considering the records at issue in this case, or the facts and circumstances relating to the Applicant. I believe so because, in the absence of better reasoning from the Public Body, I fail to see how most of the information in the records at issue constitutes "frank" discussion, or how disclosure would make someone appear "wrong" or "foolish". Most of the information that was withheld is fairly innocuous in my view (possibly with the exception of point four of the e-mail on pages 6 and 13, which might be characterized as free and frank). The Public Body has not persuaded me that its decision to withhold information under sections 24(1)(a), 24(1)(b) and/or 27(1)(c) serves the very purposes that it has cited, namely to promote free and frank discussion by government lawyers and other employees without fear of consequences, or to ensure the proper operation of government.

[para 54] As I noted earlier in this Order, the Applicant argues that information should not be withheld from him because disclosure would not cause any injury or harm, and the information is required in order for him to defend against allegations that he believes have been made against him and to ensure the proper administration of justice. I

said that these factors do not determine whether information falls under section 24(1) in the first place, but that they may be relevant to a public body's exercise of its discretion to withhold the information. Insofar as the Applicant's argument regarding lack of harm is concerned, I have essentially addressed it in the preceding paragraph in finding that the Public Body did not properly consider whether disclosure of the information, as actually found in the records at issue, would negatively affect the ability of employees to discuss matters and make decisions, or negatively affect the proper operation of government.

[para 55] Insofar as the Applicant's argument regarding a fair determination of his rights and the administration of justice is concerned, I find that this argument is not directly relevant here, as the records that have been withheld from the Applicant would not assist him in defending against any allegations. However, somewhat related to the Applicant's argument is my view that the Public Body failed to consider the Applicant's particular circumstances, which are that he sincerely believes that he has been the subject of an authorized interception of communications, yet has not been given proper notice.

[para 56] An applicant's belief that information has been improperly withheld is generally not a sufficient reason for a public body to exercise its discretion in a particular way – as every applicant seeking a review of a decision to withhold information believes that it has been improperly withheld. In this particular case, however, the Applicant's persistent belief that he has been secretly targeted and that matters are being hidden from him is only being perpetuated by the decision not to disclose information to him. The Public Body failed to consider whether disclosure of information in the records at issue might alleviate the Applicant's concerns about an alleged violation of his personal rights and freedoms, even though the Public Body has the discretion to withhold it.

[para 57] Because the Public Body has not established how, in this case, withholding information under sections 24(1)(a), 24(1)(b) and/or 27(1)(c) of the Act serves the purposes that it cites for those provisions, and has not shown that it considered the Applicant's particular circumstances, I conclude that the Public Body should reconsider its decision not to disclose the information that it has refused to disclose to the Applicant. In doing so, the Public Body should consider whether withholding the information actually meets the purposes that it attributes to sections 24(1)(a), 24(1)(b) and 27(1)(c) – or some other legitimate purpose of those provisions – and balance that, in light of the Applicant's particular circumstances, with his right of access under section 2(a), which is subject only to limited and specific exceptions.

V. ORDER

[para 58] I make this Order under section 72 of the Act.

[para 59] I find that none of the information in the records at issue falls under section 27(1)(a) of the Act, as it is not subject to solicitor-client privilege.

[para 60] I find that the information that the Public Body withheld in the "from", "sent", "to" and "cc" lines on pages 6, 11 and 12 of the records does not fall under

section 24(1)(a), 24(1)(b) or 27(1)(c) of the Act, as it does not reveal the substance of any advice, etc., does not reveal the substance of any consultations or deliberations, and is not information in correspondence. The Public Body therefore did not have the discretion to withhold it. Under section 72(2)(a), I order the Public Body to give the Applicant access to the information that it withheld in the "from", "sent", "to" and "cc" lines on pages 6, 11 and 12.

[para 61] I find that page 2, page 5 and the text of the lower e-mail withheld on page 11 fall under section 24(1)(a) of the Act, as disclosure could reasonably be expected to reveal advice, proposals or recommendations. I find that the information in point 4 of the e-mail withheld on pages 6 and 13 falls under section 24(1)(b), as disclosure could reasonably be expected to reveal consultations or deliberations. However, I find that the Public Body did not properly exercise its discretion when it refused to disclose the foregoing information to the Applicant. Under section 72(2)(b), I order the Public Body to reconsider its decision.

[para 62] I find that the information that the Public Body withheld on pages 5, 6, 11, 12 and 13 of the records – with the exception of the information in the "from", "sent", "to" and "cc" lines – falls under section 27(1)(c), as it is information in correspondence between a lawyer of the Minister of Justice and Attorney General and another person, in relation to the provision of advice or other services by the lawyer. However, I find that the Public Body did not properly exercise its discretion when it refused to disclose the foregoing information to the Applicant. Under section 72(2)(b), I order the Public Body to reconsider its decision.

[para 63] Under section 72(4) of the Act, I specify, as a term of this Order, that the Public Body consider the facts and circumstances relating to this particular case and this particular Applicant, and consider whether non-disclosure of the specific information in the records at issue serves the purposes of section 24(1)(a), 24(1)(b) and/or 27(1)(c), when it is reconsidering its decision not to disclose information under those sections. I also specify that the Public Body provide written reasons, to both the Applicant and me, for the decision resulting from the reconsideration.

[para 64] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Wade Riordan Raaflaub
Adjudicator