ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2011-018

November 29, 2011

ALBERTA HEALTH AND WELLNESS

Case File Number F5168

Office URL: www.oipc.ab.ca

Summary: Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), the Applicant asked Alberta Health and Wellness (the "Public Body") for records created and compiled by the Public Body when processing an earlier access request made by him. The Public Body withheld some of the information under sections 16(1), 24(1)(a), 24(1)(b), 27(1) and 27(2) of the Act. The records at issue were a briefing note prepared by the Public Body in the course of processing the Applicant's earlier access request, e-mail correspondence between the Public Body's employees and its legal counsel, and an objection letter in which a third party had objected to disclosure of the previously requested records to the Applicant. The Applicant requested a review of the Public Body's response, including whether it had met its duty to assist him under section 10(1) and had provided a proper response under section 12 (contents of response).

The Adjudicator found that the Public Body had met its duty to assist the Applicant under section 10(1). He found that there was no issue to address under section 12, as the Applicant's concerns were in relation to the Public Body's response to his previous access request, which was not the one that was the subject of the inquiry.

The Adjudicator found that the Public Body had properly applied section 24 of the Act to parts of the briefing note, as the information could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for the Public Body under section 24(1)(a), and/or reveal consultations or deliberations involving officers or employees of the Public Body under section 24(1)(b). He therefore confirmed

the Public Body's decision to refuse access to these parts of the briefing note. The Adjudicator found that background information in the briefing note did not fall within the terms of section 24(1)(a) or 24(1)(b), and therefore ordered disclosure of this information to the Applicant.

The Adjudicator found that the Public Body had properly applied section 27 of the Act to the e-mail correspondence between the Public Body's employees and its legal counsel, as the information was subject to solicitor-client privilege under section 27(1)(a). He therefore confirmed the Public Body's decision to refuse access to that correspondence.

The Adjudicator found that the Public Body had not properly withheld the third party's objection letter under either section 16(1) or section 27. The contents did not contain or reveal information that would harm the business interests of the third party under section 16(1), and did not contain information subject to litigation privilege under section 27(1). The Adjudicator therefore ordered disclosure of the objection letter to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 3(a), 4(1), 4(1)(d), 6(2), 10(1), 12, 12(1)(c)(i), 16(1), 16(1)(a)(ii), 16(1)(b), 16(1)(c), 16(1)(c)(i), 16(3), 17(1), 24, 24(1), 24(1)(a), 24(1)(b), 24(2), 27, 27(1), 27(1)(a), 27(1)(c), 27(1)(c)(iii), 27(2), 30, 30(5)(b), 31, 31(2), 67(1)(a)(ii), 71(1), 72, 72(2)(a) and 72(2)(b). **CAN:** *Access to Information Act*, R.S.C. 1985, c. A-1, s. 25.

Authorities Cited: AB: Orders 96-003, 96-006, 96-013, 96-017, 96-019, 97-008, 98-017, 99-001, 99-013, 2001-009, F2002-024, F2002-028, F2004-003, F2004-026, F2005-004, F2005-018, F2007-013, F2008-028, F2010-013, F2010-026 and F2010-029; External Adjudication Order No. 7 (2009); *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515. **BC:** *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, application for leave to appeal dismissed [2003] S.C.C.A. No. 83 (QL). **CAN:** *Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31; *Blank v. Canada (Minister of Justice)*, 2005 FC 1551; *Blank v. Canada (Minister of Justice)*, 2006 FC 841; *Canada (Minister of Justice) v. Blank*, 2007 FCA 87; *Canada (Minister of Justice) v. Blank*, 2007 FCA 147. **UK:** *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.).

Policy Cited: AB: Office of the Information and Privacy Commissioner (Alberta), *Solicitor-Client Privilege Adjudication Protocol* (Edmonton: October 24, 2008).

I. BACKGROUND

[para 1] In a letter dated August 9, 2009, 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 access request was as follows:

> *I now realize it will become necessary to prepare for an impending inquiry. I am therefore requesting a copy of my entire file regarding what transpired prior to*

the Commissioner's Office review. It will be beneficial to become fully informed of the efforts made by [an employee of the Public Body], [a] previous FOIP coordinator during her processing of file # 2009-G-0148.

In particular, I desire copies of all written correspondence, faxes, emails, etc and documented phone conversations between the representatives of Tesco and any public employees (including the head) of Alberta Health and Wellness that were involved in my [previous] FOIP request. I wish to obtain the reasons the head of the Public Body and Tesco Corporation believe the three part test in section 16 has been satisfied and how section 17 applies. I am self-represented and obtaining this information is absolutely necessary in preparing my written submissions (legal arguments) once this matter proceeds to the inquiry stage.

[…]

Please provide a copy of my entire FOIP file # 2009-G-0148 and an estimate as to the financial cost. I understand that third party personal information (names) will be deleted. I do however request that you provide all written or documented verbal communications made about my motives, conduct or character by Tesco Corporation's employees or their external legal representatives.

[Emphasis omitted]

[para 2] The inquiry, review and file number to which the Applicant refers above were in relation to a previous access request, which he had made to the Public Body in March 2009, for group commencement and termination notices for Tesco Corporation in relation to its group health coverage (the "AHW Notices"). This earlier access request is not the subject of the present inquiry. It was addressed by this Office through Case File Number F4942, which resulted in Order F2010-013 issued on November 30, 2010. The access request addressed by this Order is the Applicant's request, in August 2009, for records created and compiled by the Public Body when processing the access request for the AHW Notices (the "Processing File").

[para 3] By letter dated September 28, 2009, the Public Body granted the Applicant partial access to the information that he had requested in August 2009, withholding the remaining information under sections 16(1), 17(1), 24(1)(a), 24(1)(b), 27(1) and 27(2) of the Act.

[para 4] In a letter dated November 18, 2009, the Applicant requested a review of the Public Body's response to him. The Commissioner authorized a portfolio officer to investigate and try to settle the matter. This was not successful. The Applicant requested an inquiry by letter dated June 30, 2010, followed by a form dated August 6, 2010. A written inquiry was set down.

[para 5] As contemplated by section 67(1)(a)(ii) of the Act, I arranged for this Office to notify Tesco Corporation as a party affected by the Applicant's request for review. Tesco Corporation (the "Affected Party") participated in the inquiry.

II. RECORDS AT ISSUE

[para 6] The records at issue are pages 23-27, 34-37 and 38-39 of the Processing File. These pages consist, respectively, of electronic communications between the Public Body's legal counsel and its employees (the "E-mail Correspondence"), correspondence dated April 27, 2009 from the Affected Party to the Public Body, in which the Affected Party made representations under section 30 of the Act objecting to disclosure of the AHW Notices to the Applicant (the "Objection Letter"), and a briefing note prepared by the Public Body in the course of processing the Applicant's access request for the AHW Notices (the "Briefing Note").

[para 7] Although the Public Body also withheld pages 41-60 of the Processing File, these were copies of the AHW Notices themselves, being the records at issue already addressed in Order F2010-013. I will therefore not deal with them here.

[para 8] The Public Body initially withheld parts of pages 69-70 of the Processing File, but subsequently gave the Applicant access to the pages in their entirety, by letter dated July 23, 2010. Pages 69-70 are therefore no longer at issue.

III. ISSUES

[para 9] The Notice of Inquiry, dated February 28, 2011, set out the following issues:

> Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act?
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> Did the Public Body comply with section 12 of the Act (contents of response)?
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> Does section 16(1) of the Act (disclosure harmful to business interests of a third party) apply to the records/information?
>
> Did the Public Body properly apply section 24 of the Act (advice, etc.) to the records/information?
>
> Did the Public body properly apply section 27 of the Act (privileged information, etc.) to the records/information?

[para 10] No issue was identified in this inquiry regarding the Public Body's application of section 17(1) (disclosure harmful to personal privacy) to any records, as the records that the Public Body withheld under that section were the AHW Notices addressed through Case File Number F4942 and Order F2010-013. However, I will address, in a part of this Order dealing with the Objection Letter, whether section 17(1) applies to any of the information in it, given that the section sets out a mandatory exception to disclosure.

[para 11] In its submissions, the Affected Party raises the possibility that the Objection Letter is excluded from the application of the Act by virtue of section 4(1)(d). I have therefore added the following issue, which I will discuss first:

> Are the records excluded from the application of the Act by virtue of section 4(1)(d) (record of an officer of the Legislature)?

IV. DISCUSSION OF ISSUES

A. Are the records excluded from the application of the Act by virtue of section 4(1)(d) (record of an officer of the Legislature)?

[para 12] Section 4(1) is a provision that limits my jurisdiction because, if a record falls within one of the provisions of section 4(1), the Act does not apply and the Public Body has no obligation to provide access to the record (Order F2002-024 at para. 11).

[para 13] Section 4(1)(d) reads as follows:

> *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:*
>
> *...*
>
> *(d) a record that is created by or for or is in the custody or under the control of an officer of the Legislature and relates to the exercise of that officer's functions under an Act of Alberta;*

[para 14] The Objection Letter was created by the Affected Party for the Public Body, in the course of the Public Body's processing of the Applicant's access request for the AHW Notices. However, a copy fell into the custody and control of the Commissioner, an officer of the Legislature, when the Public Body submitted the Objection Letter in the course of the inquiry into Case File Number F4942.

[para 15] I find that the Objection Letter is not excluded from the application of the Act. This is because, when the Applicant made his access request for it in August 2009, the record was not in the custody or under the control of the Commissioner. Order F2010-013 (at para. 11) states that the Notice of Inquiry for Case File Number F4942 was issued on June 8, 2010, so the Objection Letter was provided to this Office sometime after that. A record does not fall outside the scope of the Act simply because it is subsequently provided to the Commissioner for the purpose of the exercise of the Commissioner's statutory functions. If that were the case, it would mean that, as soon as any public body provided this Office with any record in the course of any review or inquiry – including the very records withheld from an applicant – those records would suddenly become excluded from the application of the Act.

[para 16] I note that records may be excluded under section 4(1)(d) even though they are copies in the custody or under the control of a public body – as opposed to the officer of the Legislature – as the intent is to exclude a certain type of information, regardless of the form of the record or where it is located (Order 97-008 at paras. 23 and 24; Order 2001-009 at para. 20). If an applicant cannot have access to the record in the hands of an officer of the Legislature, it does not make sense that he or she can get the same record from a public body; a party cannot do indirectly that which it cannot do directly (Order 97-008 at para. 25).

[para 17] The foregoing applies where a copy of a record created by or for an officer of the Legislature, or one originally in that officer's custody or under his or her control, comes into the possession of a public body. An applicant cannot then circumvent section 4(1)(d) by requesting the record from the public body. Conversely, where (as here) a record created by or for a public body, and originally in that public body's custody or under its control, comes into the possession of an officer of the Legislature, it does not mean that the record becomes excluded from the application of the Act. This is not the intent of section 4(1)(d), as it would allow a public body to circumvent an access request by giving a copy of the record to an officer of the Legislature.

[para 18] To further clarify, however, where a copy of a record originally in the custody or under the control of the public body falls in the custody or under the control of an officer of the Legislature, and the record was created by or for the officer of the Legislature, it is excluded from the application of the Act. This is due to the fact that the record was created by or for the officer of the Legislature, and not the fact that it later fell in the officer's custody or under his or her control. This situation does not exist here, as the Objection Letter was created by the Affected Party for the Public Body, not for the Commissioner.

[para 19] Finally, where (as here) a record created by or for a public body, and originally in that public body's custody or under its control, comes into the possession of an officer of the Legislature, section 4(1)(d) excludes the application of the Act to the copy that is in the custody or under the control of the officer of the Legislature. In other words, the Applicant could not obtain access to the Objection Letter from this Office [see External Adjudication Order No. 7 (2009) at paras. 8 and 67]. In this case, however, the Applicant has requested the Objection Letter from the Public Body.

[para 20] I conclude that the Objection Letter is not excluded from the application of the Act by virtue of section 4(1)(d). I therefore have jurisdiction over all of the records at issue in this inquiry.

B. Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act?

[para 21] Section 10(1) of the Act reads 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.*

[para 22] The Applicant makes submissions regarding the conduct of the Public Body at various points in his dealings with it, some of which pre-date his August 2009 access request for the Processing File, which is the one that is the subject of this inquiry. Only the conduct of the Public Body following, and in relation to, the August 2009 access request is relevant here. The Public Body's duty to assist the Applicant in relation to his March 2009 access request for the AHW Notices is not within the scope of this inquiry. That access request and whatever issues were determined to be relevant at the time were addressed through Case File Number F4942 and Order F2010-013. The Applicant argues that the inquiry into Case File Number F4942 did not address the Public Body's duty to assist when processing his access request for the AHW Notices, but I have no jurisdiction to re-open any aspect of the previous inquiry.

[para 23] With respect to the access request for the Processing File and therefore this inquiry, the only concern falling within the scope of the Public Body's duty to assist that I derive from the Applicant's submissions is that, according to him, the Public Body did not adequately reply to some of his questions. He says that he telephoned to ask which public bodies or third parties were being consulted by the Public Body in the course of processing his access request, but that an employee refused to answer. He found this secretive and not in keeping with the Public Body's written invitation to call with any questions. He followed up with his question in a letter dated September 9, 2009.

[para 24] The Public Body responds that its employees have varying levels of experience and familiarity with internal policies associated with processing an access request. While the employee who spoke to the Applicant by telephone did not answer his question, the Public Body wrote to him, by letter dated September 15, 2009, advising that it was consulting with Alberta Justice and with Service Alberta. The Public Body says that the Applicant was particularly active in engaging the Public Body with respect to his access request, and it submits that the standard directed by the duty to assist under section 10(1) is not perfection, but what is reasonable (Order F2005-018 at para. 12).

[para 25] The fact that the Public Body did not initially provide an answer to the Applicant's question does not persuade me that it failed to meet its duty to assist. It subsequently sent a response, which I consider reasonable.

[para 26] The Applicant also notes that he wrote to the Public Body on October 7, 2009 to ask why the Objection Letter was being withheld from him and whether the Affected Party had made any personal comments about him. When he received no reply, he wrote again on November 2, 2009. The Public Body replied by letter dated November 10, 2009. The Applicant says that his concerns were still not properly addressed.

[para 27] Again, while the Public Body's reply was not as prompt as it could have been, and the Applicant felt obliged to follow up, I find that the reply fell within the

standard required by the duty to assist. Further, even though the Applicant was not satisfied with the Public Body's letter of November 2, 2009, I find that its content was reasonable. The letter provided additional information as to why the Objection Letter was being withheld, and indicated that the Public Body would ask the Affected Party whether it would allow disclosure (which the Affected Party did not). As for whether the Objection Letter contained personal comments about the Applicant, the Public Body reasonably answered that it would not discuss the contents of the Objection Letter, as they were being withheld.

[para 28] The Applicant's letter of September 9, 2009 also indicates that he did not receive a response to a previous letter of August 10, 2009. However, that letter dealt with Case File Number F4942, not with the access request for the Processing File that is the subject of this inquiry.

[para 29] The Applicant suggests that the Public Body failed to meet its duty to assist him because, after he requested a review into the Public Body's response to his access request for the Processing File, it took the Public Body several months to provide this Office with its reasons as to why the information in the Processing File was being withheld. This argument regarding delay during the review before this Office is not relevant to the Public Body's duty to assist the Applicant. Section 10(1) requires a public body to assist an applicant in the context of responding to an access request, not in the context of a subsequent review by this Office.

[para 30] The Applicant makes arguments to the effect that section 10(1) required the Public Body to disclose to him the contents of the Processing File as part of its duty to assist and in the interest of procedural fairness. Again, however, this argument relates to the Public Body's duty to assist when processing the access request for the AHW Notices, not when processing the access request for the Processing File. In any event, I dismissed a similar argument by the Applicant in the course of another inquiry involving the Applicant, the Affected Party and a different public body (see Order F2010-029 at paras. 38 to 47). I concluded that section 10(1) of the Act does not include an obligation on the part of a public body to give an applicant a copy of a third party's representations concerning disclosure, or any other part of the file generated while processing an access request.

[para 31] As this inquiry involves the Applicant's access request for the Processing File, a determination of whether he is entitled to information in it rests on whether the Public Body properly applied exceptions to disclosure under the Act, which will be discussed later in this Order. It does not rest on the Public body's duty to assist under section 10(1).

[para 32] Given the foregoing, the Applicant's submissions regarding procedural fairness, and the cases that he cites in support of his view that the Public Body should have given him a copy of the Affected Party's Objection Letter at the time of processing his access request for the AHW Notices, are generally not relevant. Having said this, the Applicant's submissions regarding procedural fairness may be relevant to the question of

whether, in response to his access request for the Processing File, the Public Body properly exercised its discretion to withhold information from him, a question to which I will return.

[para 33] I conclude that the Public Body met its duty to assist the Applicant under section 10(1) of the Act.

C. Did the Public Body comply with section 12 of the Act (contents of response)?

[para 34] Section 12 of the Act reads as follows:

> *12(1) In a response under section 11, the applicant must be told*
>
> *(a) whether access to the record or part of it is granted or refused,*
>
> *(b) if access to the record or part of it is granted, where, when and how access will be given, and*
>
> *(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,*
>
> *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
>
> *(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.*

[para 35] The Applicant's concerns in relation to section 12 are about whether the Public Body provided adequate reasons for its refusal to grant access to the AHW Notices. In his submissions regarding the Public Body's compliance with the section, the Applicant repeatedly refers to the Public Body's decision letter of May 1, 2009, which was its response to the previous access request for the AHW Notices. The Applicant argues that, in order to provide proper reasons for withholding the AHW Notices, the Public Body should have given him a copy of the Affected Party's Objection Letter.

[para 36] As explained earlier, a review of the Public Body's response to the Applicant's request for the AHW Notices is not within the scope of this inquiry. In any event, I dismissed a similar argument by the Applicant, regarding his entitlement to a third party's objections to disclosure, in the course of another inquiry involving the Applicant, the Affected Party and a different public body. I concluded that section 12(1)(c)(i) requires that a public body give its reasons for refusing access, not that it provide a copy of any part of its processing file or any particular document to an applicant (Order F2010-029 at para. 30).

[para 37] For the purpose of the present inquiry, it is the contents of the Public Body's response of September 28, 2009 to the Applicant's August 2009 access request that would be the subject of an issue under section 12 of the Act. Because the Applicant's concerns are not in relation to that response, I find that there is no issue under section 12 to address in this inquiry.

D. Does section 16(1) of the Act (disclosure harmful to business interests of a third party) apply to the records/information?

[para 38] The Public Body withheld the Objection Letter under section 16(1), on the basis that disclosure would harm the business interests of the Affected Party. Section 16(1) reads, in part, as follows:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *...*
>
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party,*
>
> *(b) that is supplied, explicitly or implicitly, in confidence, and*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
>
> *...*
>
> *(3) Subsections (1) and (2) do not apply if*
>
> *[various circumstances, none of which exist here]*

[para 39] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 16(1). The Public Body may be assisted by the Affected Party.

[para 40] Section 16(3) states that section 16(1) does not apply in certain circumstances, meaning that the Public Body cannot withhold information in reliance on section 16(1) in those circumstances. I considered whether any of the provisions of section 16(3) were relevant in this inquiry, but found that none of them were.

[para 41] The Public Body makes few submissions regarding its application of section 16(1) to the Objection Letter, instead focusing on its view that the Letter was properly withheld under section 27, which I will discuss later in this Order. The Affected Party

submits that the Objection Letter reveals its commercial or labour relations information under section 16(1)(a)(ii), that it supplied information in confidence under section 16(1)(b), and that disclosure of information in the Objection Letter would harm its competitive position or interfere with its negotiating position under section 16(1)(c)(i).

[para 42] For section 16(1) to apply to information, the requirements set out in all three paragraphs of that section must be met. Whether or not the Affected Party's Objection Letter was provided to the Public Body in confidence, I find that the Letter does not reveal any commercial or labour relations information, and that disclosure would not bring about either of the consequences set out in section 16(1)(c)(i).

[para 43] The Affected Party argues that there is commercial or labour relations information because the Objection Letter specifically responded to the Applicant's earlier access request for the AHW Notices, and these requested records dealt with the management of its workforce and information about its employees. The Affected Party essentially focuses its submissions on the content of the AHW Notices rather than the Objection Letter. While the AHW Notices dealt with group commencement and termination of health coverage, the Objection Letter explains the Notices only in very general terms. In any event, the fact that information might, generally speaking, be about workforce management or about employees does not make it commercial or labour relations information.

[para 44] Definitions for "commercial information" and "labour relations information" were noted in Order F2010-013 (at paras. 19 and 24), being the Order that dealt with the Applicant's right of access to the AHW Notices. I refer to those same definitions for the purpose of reviewing the content of the Objection Letter. I find that the Objection Letter does not contain or reveal information about the "buying, selling or exchange of merchandise or services" (commercial information), and that it does not contain or reveal information about "employer/employee relations including especially matters connected with collective bargaining and associated activities" or "relationships within and between workers, working groups and their organizations and managers, employers and their organization" (labour relations information).

[para 45] As for the alleged harm that would occur on disclosure of the Objection Letter, the Affected Party says that it is concerned that the Applicant, an aggrieved former employer who is involved in a lawsuit against it, will use the information for a purpose that is "hostile" to the Affected Party's interests. It is concerned that its response to the Public Body will become a matter of public record, and it does not want to revisit past matters that it has remedied. The Affected Party is worried that the Applicant will interfere with its workplace, and that disclosure of the Objection Letter will cause a labour interruption or disruption in a manner that will harm its competitive or negotiating position in the course of its business supplying machinery and services.

[para 46] In order for information to fall under section 16(1)(c), one must consider the connection between disclosure of the specific information and the outcome or harm that is alleged, how the outcome or harm would constitute damage or detriment, and whether

there is a reasonable expectation that the outcome or harm will occur (Order 96-013 at para. 33). Stated differently, there must be a clear cause and effect relationship between disclosure of the withheld information and the outcome or harm alleged; the outcome or harm that would be caused by the disclosure must constitute damage or detriment, and not simply hindrance or minimal interference; and the likelihood of the outcome or harm must be genuine and conceivable (Order 96-003 at p. 6 or para. 21).

[para 47] The test regarding a reasonable expectation that a particular harm or outcome will occur must be satisfied on a balance of probabilities, meaning that the evidence must involve more than speculation or a mere possibility; the evidence must demonstrate a probability that the outcome or harm in question will occur on disclosure, and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue (Order 96-013 at paras. 31 and 33). The requirement for an evidentiary foundation for assertions of harm was upheld in *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515 (at paras. 6, 59 and 60).

[para 48] The Affected Party raises the possibility of interference with its labour force if the Objection Letter is disclosed to the Applicant. I dealt with a similar argument from the Affected Party in Order F2010-029 (at paras. 79 and 80), which followed an inquiry also involving the Applicant but a different public body and different records at issue. I wrote as follows:

> With respect to harm, the Affected Party says that releasing the requested information to the Applicant means that an internal enforcement standards matter will become a matter of public record, and cause other employees of the Affected Party to become involved in the dispute. The result, according to the Affected Party, will be a disruption to its workplace or a labour interruption. The Affected Party's view is that the foregoing falls within the terms of section 16(1)(c)(i), in that a labour disruption or interruption will significantly harm its competitive position, especially given the nature of the oil and gas industry, the international supply chain, and the ability of the Affected Party's clients to consider other suppliers.
>
> I find no clear cause and effect relationship between release of the information about the employment standards complaints against the Affected Party and the labour disruption or interruption that it says will occur. It is a leap to say that other employees' knowledge of the complaints, their general topics and the general nature of their outcomes will result in what the Affected Party appears to be saying would be a strike, a mass of resignations, or a preoccupation on the part of a great number of employees with the Applicant's litigation or their own new claims. Even if the information at issue becomes known to employees and some of them react to it in a negative way, become involved in the Applicant's lawsuit or make their own employment standards complaints – which might possibly affect the Affected Party's administration of its workforce to some degree – the Affected Party has not demonstrated that the harm would be "significant" and would affect its "competitive position". On my review of the Affected Party's submissions, I find that the alleged harm caused by disclosure would amount, at most, to a hindrance or minimal interference. There is no

> genuine and conceivable link between disclosure of the information at issue and the Affected Party's suppliers going elsewhere for the services, products and equipment that the Affected Party offers.

[para 49] While Order F2010-029 dealt with employments standards information, I reach a similar conclusion regarding disclosure of the Objection Letter, which responded to the possible release of the AHW Notices. In fact, in this inquiry, the Affected Party fails at all to explain the link between disclosure of the Objection Letter and the labour interruption or disruption that it says will occur. On my review of the Letter, I see nothing in it that would bring about the harm alleged by the Affected Party with respect to its competitive or negotiating position.

[para 50] The Affected Party notes that it has not produced the Objection Letter in the course of underlying litigation between it and the Applicant. It argues that the Applicant should not now be entitled to the Objection Letter under the Act, as he would not be subject to an implied undertaking not to use the Letter for any purpose outside the lawsuit. I explained in Order F2010-029 (at para. 62) that the Applicant is entitled to request information, and obtain access to it subject only to any exceptions to disclosure, regardless of the litigation between the parties or what records have been produced in the course of it. Section 3(a) makes it clear that the Act is in addition to existing procedures for access to information or records.

[para 51] I conclude that section 16(1) of the Act does not apply to the Objection Letter, as disclosure of the information in it would not be harmful to the business interests of the Affected Party.

[para 52] Finally, because it sets out a mandatory exception to disclosure, I considered whether section 17(1) applies to any parts of the Objection Letter. First, disclosure of the name and contact information of the solicitor who wrote the letter would not be an unreasonable invasion of her personal privacy, as she wrote the letter in her professional capacity and the substance of the letter is her work product. Second, while the substance of the letter refers generally to a class of third party individuals, being the employees of the Affected Party, I find that no particular individual is identifiable. There is therefore no personal information, within the terms of section 1(n) of the Act, to which section 17(1) can apply.

E. Did the Public Body properly apply section 24 of the Act (advice, etc.) to the records/information?

[para 53] Section 24 of the Act 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

[various types of information, none of which exist here]

...

[para 54] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 24.

[para 55] The Public Body relies on section 24(1)(a) and 24(1)(b) to withhold the E-mail Correspondence and Briefing Note from the Applicant. I find, later in this Order, that the Public Body properly withheld the E-mail Correspondence under section 27, so I will not discuss the E-mail Correspondence here.

[para 56] Section 24(2) states that section 24 does not apply to certain information, meaning that the 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.

1. Does the information in the Briefing Note fall within the terms of section 24(1)?

[para 57] In order to refuse access to information under section 24(1)(a), on the basis that it could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options (which I will refer to as "advice, etc."), 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 58] 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 (which I will refer to as "consultations/deliberations"). A "consultation" occurs when the views of one or more of the persons described in section 24(1)(b) are sought as to the appropriateness of particular proposals or suggested actions; 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). 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 59] 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 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 60] Some of the information in the Briefing Note meets the test for applying sections 24(1)(a) and/or 24(1)(b). Officers or employees of the Public Body, as part of their responsibilities, are suggesting how to respond to the Applicant's access request of March 2009 for the AHW Notices, and are seeking the approval of other officers or employees who have the authority to give that approval. I indicate the particular information that falls within the terms of section 24(1)(a) and/or 24(1)(b) below.

[para 61] Section 24(1)(a) does not apply to the bare recitation of facts or summaries of information; these may only be withheld if they are sufficiently interwoven with information that constitutes advice, etc. so that they cannot reasonably be considered separate or distinct (Order 99-001 at paras. 17 and 18; Order F2007-013 at para. 108). These same principles apply in the context of consultations/deliberations under section 24(1)(b) (Order 96-006 at p. 10 or para. 50; Order F2004-026 at para. 78). The Public Body argues that the facts and summaries of information in the Briefing Note are sufficiently interwoven with advice, etc. and consultations/deliberations so that they cannot be considered separate or distinct, and therefore that the entire Briefing Note may be withheld.

[para 62] I disagree that the entire Briefing Note falls within the terms of section 24(1). Most of the first page (all but the last three sentences) consists of background information – including, in many instances, background information already known to the Applicant – regarding his access request for the AHW Notices and the process carried out by the Public Body, as required by the Act, in order to respond to it. On the upper third of the second page, there are two sentences (in the first and second bullets) that merely indicate things about what the Applicant requested and about the legislation. These bare facts, aspects of the Public Body's processes and statements about the legislation are not sufficiently interwoven with any advice, etc. or consultations/deliberations to justify withholding them.

[para 63] However, the last three sentences on the first page of the Briefing Note, and the remaining content on the upper third of the second page, consist of factual information that appears to bear on, and be interwoven with, a recommendation appearing later. As for the middle third of the second page, consisting of two bolded paragraphs, there is a recommended course of action and a reason against that course of action, which information falls within the terms of sections 24(1)(a) and/or 24(1)(b).

[para 64] The lower third of the second page of the Briefing Note consists of names and titles of officers and employees of the Public Body. The Applicant argues that employees of a public body who participate in a decision regarding a response to an access request, or who influence that decision, should not operate in anonymity. He says that government officials should take responsibility for their decisions, and that he has a right to know who was involved in making the decision regarding his access request.

[para 65] In Order F2004-026 (at paras. 71 and 75), the Commissioner stated the following:

> In my view, section 24(1) does not generally apply to records or parts of records that in themselves reveal *only* any of the following: that advice was sought or given, or that consultations or deliberations took place; that particular persons were involved in the seeking or giving of advice, or in consultations or deliberations; that advice was sought or given on a particular topic, or consultations or deliberations on a particular topic took place; that advice was sought or given or consultations or deliberations took place at a particular time. There may be cases where some of the foregoing items reveal the content of the advice. However, that must be demonstrated for every case for which it is claimed.
>
> […]
>
> I turn to the second of the Public Body's points (discussed at paragraph 69 above), that the names of public servants who participated in a discussion must be kept confidential to ensure they are not dissuaded from participating in certain kinds of discussions. I accept that the policy behind the rules is to allow a free discussion. However, in my view the rule achieves this policy by shielding the substance of the discussions. Sections 24(1)(a) does not permit the withholding of who gave advice; it permits the withholding of advice. In my view the words "reveal advice" means 'reveal what the advice was'[.] Similarly, with respect to section 24(1)(b), "reveal … consultations or deliberations" means 'reveal what the consultations or deliberations were'.

[para 66] The Public Body makes no argument as to why the names of the officers and employees in the Briefing Note fall within the terms of section 24(1). Given the comments of the Commissioner above, I find that they do not. I fail to see how disclosure of the names would reveal the substance of any advice, etc. or the substance of any consultations/deliberations.

[para 67] I conclude that only some of the information in the Briefing Note falls within the terms of section 24(1), and that the Public Body therefore had the discretion to withhold it in reliance on that section.

2. Did the Public Body properly exercise its discretion not to disclose?

[para 68] 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 69] The Public Body submits that its head concluded that it was appropriate to withhold the information in the Briefing Note, taking into consideration the specific content. It says that its head considered the purposes of the Act and the need to balance the Applicant's general right of access against the legitimate need to retain confidentiality over certain types of information for the proper functioning of the Public Body's advisory and decision-making processes. The Public Body says that its head decided against disclosure on the basis that it was necessary to protect the candid and comprehensive flow of advice, consultations and deliberations within the Public Body.

[para 70] I am satisfied that the Public Body properly exercised its discretion when it refused to disclose the information that I have found to fall within the terms of section 24(1).

[para 71] Earlier in this Order, I noted that the Applicant expresses concern about procedural fairness when the Public Body was processing his earlier access request for the AHW Notices. In short, he believes that the Public Body's response to that access request was unduly influenced by the Affected Party and its lawyer, and that he should have been able to see the Objection Letter in order to refute its contents, particularly any statements or allegations about him that were made by the Affected Party. He argues that government officials and corporations like the Affected Party should not be allowed to agree among themselves to keep information secret.

[para 72] Because the Applicant believes that he was not treated in a procedurally fair manner, I considered whether the Public Body improperly exercised its discretion to withhold the information in the Briefing Note. However, on my review of the content of the Briefing Note and the submissions of the parties, I do not find that the Public Body was procedurally unfair when it processed the Applicant's access request for the AHW Notices, sought representations from the Affected Party or used those representations, in whole or in part, to make the decision in response to the access request.

[para 73] The Applicant argues that he has a right to know the internal rationale for the decision regarding his access request, as set out in the Briefing Note, and that FOIP coordinators should not be influenced by other government officials. First, the internal rationale that officers and employees offered in support of the recommendation in the

Briefing Note is precisely the information contemplated to be withheld under section 24(1). Second, it is not inappropriate for a FOIP coordinator, whose job it is to convey the decision of the head of a public body, or inappropriate for the head of the public body himself or herself, to be "influenced" by other government officials, as that is the point of seeking advice, etc., and engaging in consultations/deliberations.

[para 74] The Applicant asks whether a public body is legally entitled to withhold an applicant's own personal information. The answer is "yes", in that a public body can withhold an applicant's personal information if the information falls within an exception to disclosure under the Act. Here, the fact that the Briefing Note contains the Applicant's personal information does not mean that he is entitled to it, as I have found that some of the information falls within the exception to disclosure set out in section 24(1).

[para 75] I conclude that the Public Body properly applied section 24(1) of the Act to parts of the Briefing Note, on the basis that the information could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for the Public Body under section 24(1)(a), and/or reveal consultations or deliberations involving officers or employees of the Public Body under section 24(1)(b).

F. Did the Public Body properly apply section 27 of the Act (privileged information, etc.) to the records/information?

[para 76] Section 27 of Act the reads, in part, 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.*
>
> *(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.*

[para 77] The Public Body relies on section 27(1)(a) and 27(1)(c) to withhold the E-mail Correspondence from the Applicant, and relies on section 27(2) to withhold the Objection Letter. Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 27. The Public Body may be assisted by the Affected Party.

[para 78] Under this Office's *Solicitor-Client Privilege Adjudication Protocol*, a public body may refuse to submit, during an inquiry, a copy of records over which it is claiming solicitor-client privilege. The Public Body is claiming solicitor-client privilege over the E-mail Correspondence, and chose not to submit a copy to me. As contemplated by the *Protocol*, it instead describes the E-mail Correspondence using a "Record Form" created by this Office, and provides an affidavit from its FOIP Advisor to support its submission that the information is subject to solicitor-client privilege.

1. Did the Public Body properly withhold the E-mail Correspondence under section 27?

[para 79] The Public Body withheld the E-mail Correspondence, found at pages 23-27 of the Processing File, on the basis that it was subject to solicitor-client privilege under section 27(1)(a) of the Act.

(a) Is the E-mail Correspondence subject to solicitor-client privilege?

[para 80] To correctly apply section 27(1)(a) of the Act in respect of solicitor-client privilege, the 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 81] In her affidavit, the Public Body's FOIP Advisor states that pages 23-27 of the Processing File document a series of electronic communications between the Public Body's employees and legal counsel for the Public Body. Part (i) of the *Solosky* test is therefore met.

[para 82] The FOIP Advisor goes on to state that pages 23-27 consist of a request for legal advice to legal counsel, and responses providing legal advice from legal counsel. While it is not explicit, I presume that she means that the Public Body's employees sought legal advice on how to respond to the Applicant's access request for the AHW Notices, and that legal counsel advised them on how to respond to it. I am therefore satisfied that part (ii) of the *Solosky* test is met.

[para 83] Finally, the Public Body's FOIP Advisor states in her affidavit that each e-mail from legal counsel contains an indication that the e-mail is privileged and confidential and is intended for the use of the client only, being the Public Body. The Record Form completed by the Public Body indicates that the e-mails were copied only

to employees of the Public Body, and were subsequently disclosed only to this Office and to nobody else. I am therefore satisfied that part (iii) of the *Solosky* test is met. (The E-mail Correspondence was apparently disclosed to this Office in September and October 2010, but not to me during this inquiry.)

[para 84] Other aspects of the Record Form are consistent with the statements made by the FOIP Advisor in her affidavit, and I see nothing on the Form that causes me to believe that the information in the E-mail Correspondence does not meet the test set out in *Solosky*. The only additional information on the Form to which I have not yet referred is that the e-mails were dated between March 30, 2009 and April 7, 2009, which is consistent with the Public Body seeking legal advice on how to respond to the access request made by the Applicant earlier in March 2009.

[para 85] The Public Body has provided sufficient evidence to establish that the contents of the E-mail Correspondence reveal a communication between a solicitor and client, entail the seeking or giving of legal advice, and are intended to be confidential. I am therefore satisfied that the E-mail Correspondence is subject to solicitor-client privilege and therefore falls within the terms of section 27(1)(a) of the Act. It is not necessary for me to decide whether the E-mail Correspondence falls within the terms of section 27(1)(c).

[para 86] The Applicant argues that a public body should not be able to make what he considers to be an unjustified decision in response to an access request simply by claiming solicitor-client privilege, and that government lawyers should not be able to influence that decision. However, information is subject to solicitor-client privilege if it meets the *Solosky* test, regardless of whether and how a public body relies on the legal advice provided in order to make a decision. Further, there is nothing inappropriate about a public body's lawyer "influencing" a decision, as that is the point of providing legal advice that has been sought in the first place.

(b) Can part of the E-mail Correspondence be severed and disclosed?

[para 87] The Applicant cites section 6(2) of the Act, which reads as follows:

> *6(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.*

Because section 6(2) grants a right of access to the remainder of a record if it can reasonably be severed from the part that is excepted from disclosure, the Applicant argues that he is entitled to at least some of the content of the E-mail Correspondence, such as his own personal information. He also submits that statements of fact are not covered by solicitor-client privilege.

[para 88] In support of his argument that information may be severed from the E-mail Correspondence and disclosed to him, the Applicant cites cases of the Federal Court of Canada, which addressed the possibility of severing a privileged communication under section 25 of the federal *Access to Information Act*. Specifically, he cites *Blank v. Canada (Minister of Justice)*, 2005 FC 1551 at para. 31, and *Blank v. Canada (Minister of Justice)*, 2006 FC 841 at para. 25, both of which stated the following (the latter citing the former):

> Given the paramount nature of section 25 it would seem at first impression that documents determined to be subject to the exemption provided by section 23 of the Act [information subject to solicitor-client privilege] are to be severed in the same manner as any other document subject to severance. On this reading of the requirements of severance under s. 25, information which can stand alone, without compromising privilege, such as facts upon which the advice is based, must be accessible.

[para 89] However, the decisions cited by the Applicant were varied or reversed by the Federal Court of Appeal. In *Canada (Minister of Justice) v. Blank*, 2007 FCA 87 at para. 13, the Federal Court of Appeal concluded as follows:

> … [S]ection 25 must be applied to solicitor-client communications in a manner that recognizes the full extent of the privilege. It is not Parliament's intention to require the severance of material that forms a part of the privileged communication by, for example, requiring the disclosure of material that would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought.

[para 90] In *Canada (Minister of Justice) v. Blank*, 2007 FCA 147 at paras. 2 to 3, the Federal Court of Appeal further wrote as follows:

> Both *Blank 841* and *Blank 1551* [the decisions cited by the Applicant in this inquiry] dealt with the interplay between sections 23 and 25 of the *Access to Information Act*, R.S.C., 1985, c. A-1 (the Act). Section 23 is a discretionary exemption from disclosure for records in respect of which a claim of solicitor-client privilege is made, while section 25 requires the disclosure of non-exempt material which can be severed from records to which an exemption applies. The issue, broadly speaking, is the extent to which the Court is entitled to sever, and therefore disclose, material which appears in a record for which legal advice privilege is claimed. The specific questions raised were the disclosure of the subject line for documents which include a specific subject line, and other general identifying information.
>
> This Court's decision on appeal from *Blank 1551* is reported as *Blank v. Canada (Minister of Justice)* 2007 FCA 87, [2007] F.C.J. No. 306 (*Blank 87*). There, Evans J.A. reviewed the principles involved and concluded that subject matter headings which disclosed the subject upon which legal advice was sought were not to be severed and disclosed to the applicant. At the same time, this Court held that information forming part of the privileged communication could not be disclosed under the rubric of general identifying information if that information

> was in fact part of the privileged communication. In doing so, this Court rejected the notion that privileged communications may be disclosed if their disclosure appears innocuous. I would add that Courts should not strain to surgically excise from a privileged communication sentences which, though of a general nature, are nonetheless part and parcel of that communication.

[para 91] Given the Federal Court of Appeal's pronouncements, I conclude that the Applicant is not entitled to any portion of the E-mail Correspondence. The subject of a privileged communication and the factual assumptions on which legal advice is sought or given are also privileged. Section 6(2) of Alberta's Act does not require a public body to sever information from a privileged communication, even if the information is factual, innocuous or of a general nature, where it is nonetheless part and parcel of the privileged communication.

[para 92] Having said this, I do not preclude altogether the possibility of severing part of a communication that is subject, for the most part, to solicitor-client privilege. There may be instances where an otherwise privileged communication contains extraneous or unrelated information that is not itself subject to solicitor-client privilege, or would not reveal the information that is privileged, in which case the non-privileged part of the communication may be severed and disclosed [see, e.g., *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at paras. 66 to 68, application for leave to appeal dismissed [2003] S.C.C.A. No. 83 (QL)].

[para 93] At the same time, however, an applicant must, in my view, do more than merely speculate that there are parts of a solicitor-client communication that might fall outside the scope of solicitor-client privilege. Under this Office's *Solicitor-Client Privilege Adjudication Protocol*, I may request further argument and evidence from the Public Body to support its claim of privilege, but I find this to be unwarranted in this case. The Applicant has not sufficiently raised the possibility that parts of the E-mail Correspondence are not privileged and therefore may be severed and disclosed to him. On the contrary, the E-mail Correspondence is typical of communications between a solicitor and a client for the purpose of seeking and giving advice, the whole of which is virtually always covered by solicitor-client privilege.

[para 94] The Applicant also cites *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31. There, the Supreme Court of Canada noted (at para. 20) that records subject to a claim of solicitor-client privilege may be ordered disclosed where absolutely necessary, which is a test just short of absolute prohibition. I find this case inapplicable to the Applicant's view that part of the E-mail Correspondence can be severed and disclosed to him, as the Court was referring to disclosure of entire documents, not parts of them. In terms of possibly disclosing the whole of the E-mail Correspondence, the "absolute necessity" test is not met in this inquiry.

(c) Did the Public Body properly exercise its discretion not to disclose?

[para 95] The Applicant makes submissions to the effect that the Public Body, in order to convey its reasons for withholding the AHW Notices, should have exercised its discretion to disclose the E-mail Correspondence to him.

[para 96] Due to the importance attached to solicitor-client privilege, a public body's decision to withhold information under section 27(1)(a) will be a reasonable exercise of discretion in most cases where the public body establishes that this particular privilege applies (Order F2008-028 at para. 167 and 168). Here, I find that the Public Body properly exercised its discretion to withhold the E-mail Correspondence from the Applicant. The Public Body says that its head considered the need to balance the Applicant's right of access against the legitimate need of the Public Body to protect the flow of frank legal advice and to maintain legal privilege.

2. Did the Public Body properly withhold the Objection Letter under section 27?

[para 97] First, by way of additional background, the Public Body wrote to the Affected Party on April 7, 2009, seeking its views regarding disclosure of the AHW Notices to the Applicant, as contemplated by section 30 of the Act. The Affected Party responded by letter dated April 27, 2009, being the Objection Letter. It was written by the Affected Party's solicitor.

[para 98] The Public Body withheld the information in the Objection Letter on the basis that it was subject to litigation privilege under section 27(1)(a) and the information related to a person other than the Public Body under section 27(2) – namely the Affected Party. In support of its decision, the Public Body cites the test for litigation privilege as set out in Order 98-017 (at para. 43):

> … [F]or litigation privilege to apply, the following criteria must be met:
>
> > (1) There must be a third party communication, such as a communication between a solicitor and a third party, to assist with the giving of legal advice;
> >
> > (2) The maker of a document or the person under whose authority a document is made must intend the document to be confidential; and
> >
> > (3) The "dominant purpose" for which a document was prepared must be to submit it to a legal advisor for advice and use in 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.

While the Public Body cites the above test, it does not explain at all how the test is met in this case.

[para 99] The Affected Party also submits that the Objection Letter is subject to litigation privilege. It says that it "drafted its response with the knowledge that disclosure of records [being the AHW Notices] could and may lead to litigation or to the assistance of litigation that had already been commenced". It says that it was not told that the Applicant was the individual who had requested the AHW Notices, but that the Applicant was involved in a lawsuit against it.

[para 100] For a document to be subject to litigation privilege, it must, in addition to being a confidential communication with a third party, be "produced or brought into existence [for the purpose] of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation" [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.) at p. 1183]. The Affected Party suggests that its Objection Letter was provided to the Public Body in an effort to avoid disclosure of the AHW Notices because the recipient of them might use the information to commence or advance litigation. I fail to see how this means that the Affected Party's solicitor was writing to the Public Body in order to assist in the provision of legal advice to the Affected Party, or aid in the solicitor's conduct of the underlying lawsuit involving the Applicant and the Affected Party.

[para 101] In any event, even if there is a connection between the Affected Party's representations to the Public Body and its litigation with the Applicant, I find that the Objection Letter was not prepared for the dominant purpose of the litigation. Rather, its dominant purpose was to make representations under the Act as to whether the Applicant should be given access to the AHW Notices. I therefore find that the Objection Letter is not subject to litigation privilege. The Public Body was therefore not authorized to withhold it on that basis.

[para 102] The Affected Party alternatively argues that the Objection Letter may be withheld under section 27(1)(c)(iii). That section sets out a discretionary exception to disclosure, but the Public Body did not rely on that exception, whether at the time of its initial response to the Applicant's access request or during this inquiry. A third party cannot itself seek to apply a discretionary exception to disclosure.

[para 103] As I have found that the Objection Letter does not fall within the exceptions to disclosure set out in section 16(1) or 27(1) of the Act, I conclude that the Public Body was not authorized to withhold it from the Applicant.

[para 104] I note, however, an additional argument of the Public Body. It submits that it properly withheld the Objection Letter, at the time of its decision to withhold it, as it contained the Affected Party's reasons for its view that section 16(1) applied to the AHW Notices, and the Applicant's right of access to the AHW Notices was, at the time, the subject of the inquiry into Case File Number F4942. The Public Body says that it could not have released the Objection Letter without compromising the information at issue in that inquiry. It further notes that the Adjudicator for the inquiry into Case File Number F4942 allowed the Public Body to submit the Letter *in camera* during that inquiry.

[para 105] While the Public Body does not put it the following way, its argument raises the possibility that the Applicant was improperly circumventing the process set out in the Act regarding resolution of an access request. As I noted in Order F2010-029 (at paras. 40 to 47), sections 30 and 31 set out a scheme governing a public body's responsibilities when processing an access request that involves the interests of a third party. In relation to an applicant, the public body is required by section 30(5)(b) to give notice to him or her that a third party is being given an opportunity to make representations concerning disclosure. Section 31(2) then requires the public body to give both the applicant and the third party notice of its decision on whether to give the applicant access to the requested records, including the reasons for the decision. However, nothing in sections 30 and 31 require a public body to give an applicant a copy of the third party's representations concerning disclosure. Section 30 and 31 set out a fairly comprehensive scheme for balancing an applicant's right of access with the interests of a third party, and it does not include any exchange of representations. If the Legislature had meant for a public body to give certain documents to the applicant, it presumably would have said so in a provision.

[para 106] Therefore, at the time of his access request for the Objection Letter, the Applicant might have been circumventing the process set out in the Act by attempting to obtain a copy of the Affected Party's representations regarding disclosure of the AHW Notices when the Act did not intend for him to obtain a copy, at least so long as his entitlement to the AHW Notices was being determined. On the other hand, the Applicant raises the argument that applicants should be entitled to the representations made by a third party under section 30 as early in the process as possible, precisely because it might result in earlier resolution of an access request and avoid a review or inquiry by this Office altogether.

[para 107] I do not have to decide whether the Applicant would have been entitled to the Objection Letter had the outcome of Case File Number F4942 not yet been finally determined. At this point in time, I conclude that the scheme set out in sections 30 and 31 of the Act does not preclude him from obtaining access. While it might be argued that I should determine the Applicant's entitlement to the Objection Letter as it existed at the time of his access request, I disagree. All of the parties are before me and have made submissions regarding the Public Body's application of sections 16(1) and 27 to the Objection Letter, making it appropriate and expedient for me to determine the Applicant's entitlement to it as at this moment, rather than effectively oblige him to re-

make his access request for the Objection Letter, with the likely result that there would simply be a repetitive review and inquiry by this Office.

V. ORDER

[para 108] I make this Order under section 72 of the Act.

[para 109] I find that none of the records at issue are excluded from the application of the Act by virtue of section 4(1)(d) (record of an officer of the Legislature). I therefore have jurisdiction over all of the records.

[para 110] I find that the Public Body met its duty to assist the Applicant under section 10(1) of the Act.

[para 111] I find that there is no issue to address regarding the Public Body's compliance with section 12 of the Act (contents of response).

[para 112] I find that the Public Body properly applied section 24 of the Act to parts of the Briefing Note found at pages 38-39 of the Processing File, on the basis that the information could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for the Public Body under section 24(1)(a), and/or reveal consultations or deliberations involving officers or employees of the Public Body under section 24(1)(b). Under section 72(2)(b), I confirm the decision of the Public Body to refuse the Applicant access to the following information in the Briefing Note:

- the last three sentences on page 38;
- the last two sentences in the first bullet on page 39;
- the last two sentences in the second bullet on page 39;
- the information in the third bullet on page 39;
- the information in the fourth bullet on page 39; and
- the information in the two bolded paragraphs on page 39.

[para 113] I find that the Public Body did not properly apply section 24 of the Act to the remaining information in the Briefing Note. Under section 72(2)(a), I order the Public Body to give the Applicant access to the information in the Briefing Note, other than that set out in the preceding paragraph of this Order.

[para 114] I find that the Public Body properly applied section 27 of the Act to the E-mail Correspondence found at pages 23-27 of the Processing File, as it has satisfied me that the information is subject to solicitor-client privilege under section 27(1)(a). Under section 72(2)(b), I confirm the decision of the Public Body to refuse the Applicant access to the E-mail Correspondence.

[para 115] I find that section 16(1) of the Act does not apply to the Objection Letter found at pages 34-37 of the Processing File, as disclosure of the information in it would not be harmful to the business interests of the Affected Party. I also find that the Public

Body did not properly apply section 27 of the Act to the Objection Letter, as the information in it is not subject to litigation privilege. Under section 72(2)(a), I order the Public Body to give the Applicant access to the Objection Letter.

[para 116] 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