ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2012-10

April 30, 2012

ALBERTA HEALTH SERVICES

Case File Number F5501

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request to Alberta Health Services (the Public Body) for her personal information.

Alberta Health Services located 1326 records responsive to the request. It withheld some of these records under section 24 (advice from officials) and section 27 (privileged information).

The Applicant requested review by the Commissioner of the Public Body's response to her access request.

The Adjudicator found that the contents of the records located by the Public Body pointed to the existence of records that the Public Body had not included in its response. She ordered it to conduct a new search for responsive records.

With regard to the records to which the Public Body had applied sections 24(1)(a) and (b), the Adjudicator found that, with the exception of two records to which section 24(1)(b) applied, the Public Body had not demonstrated that these provisions applied.

With regard to the information to which the Public Body had applied solicitor-privilege, the Adjudicator found that while some information was subject to solicitor-client privilege, the remaining information was not. She found that the remaining information

had been subject to litigation privilege, but that the matter for which the information had been gathered had either concluded or expired.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 13, 24, 27, 72;

Authorities Cited: AB: Orders 96-006, 97-007, 96-015, 2001-016, F2007-014, F2008-028, F2008-031, F2010-007, F2010-036, F2012-06

Cases Cited: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Canada v. Solosky* [1980] 1 S.C.R. 821; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39

Other Source Cited:

Access and Privacy Branch, Alberta Government Services. *Freedom of Information and Protection of Privacy Guidelines and Practices 2009*. Edmonton: Government of Alberta, 2009.

I. BACKGROUND

[para 1] On May 12, 2010, the Applicant requested access from Alberta Health Services (the Public Body) to the following records:

> All HR (Human Resources) records (documents / correspondence / memos / emails / etc)
> All OH&S (Occupational Health and Safety) records (documents / correspondence / memos / emails / etc)
> All Grievance records (documents / correspondence / memos / emails / etc)
> All correspondence between Alberta Blue Cross and Alberta Health Services
> All my personnel files, including Employee Relations files and any recorded information within Alberta Health Services regarding me personally and my work / health history
> Any and all other documentation / information in regards to my employee records
> Entire and complete files / records please, for all of the above (1) to (6) inclusive, from December 15, 1997 to May 12, 2010, inclusive

[para 2] The Public Body responded to the Applicant's access request. It located 1326 pages of responsive records and severed information from 132 of these records under sections 17, 24, and 27 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). The Public Body stated:

> Please be advised that the following pages: 67, 87, 224 – 235, 239 – 267, 275, 279, 349 – 50, 366, 417, 497, 505, and 1314 are the best possible copies and may be difficult for you to read. Pages 1054 and 1055 are blank and the original copies sent to our office from Occupational Health and Safety (OH&S) [were] blank as well. OH&S advised that this is the manner in which their department received the records. However, later in the file pages 810, 811 and 812 reveal the blacked out information. It appears that whoever removed the information did so with the intent to provide only necessary medical information rather than all your personal details.

[para 3] The Applicant requested review by the Commissioner of the Public Body's response to her access request. In particular, she complained that information was

severed when it should not have been, that records created by particular employees of the Public Body and Blue Cross had not been provided in the response, and that many of the records were illegible, or had faint printing, or were copied in such a way that information was missing from them.

[para 4] The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 5] The Public Body provided me with all the records it had retrieved, including the information it had disclosed to the Applicant and all the information it had withheld, for my use in the inquiry.

[para 6] Prior to providing its initial submissions, the Public Body reconsidered its decision to withhold information from the records. The Public Body decided that it would continue to withhold records 546 and 547 under section 27(1)(a) on the basis that it was subject to solicitor-client privilege. It determined that it would withhold information from records 122, 142, 144, 185, 298, 415, 419, 487, 491, 516, 518, 545, 841, 999, 1109, 1131, and 1287 under sections 24(1)(a) and (b). The Public Body provided the remaining information to the Applicant. The Public Body stated that it was no longer relying on section 17 of the FOIP Act to withhold information from the records.

II. INFORMATION AT ISSUE

[para 7] Information withheld from records 122, 142, 144, 185, 298, 415, 419, 487, 491, 516, 518, 545, 546, 547, 841, 999, 1109, 1131, and 1287 is at issue.

III. ISSUES

Issue A: Did the Public Body meet its obligations as required by section 10(1) of the FOIP Act (duty to assist)?

Issue B: Did the Public Body properly apply section 24(1) of the FOIP Act (advice from officials) to the information in the records?

Issue C: Did the Public Body properly apply section 27(1) of the FOIP Act (privileged information) to the information in the records?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its obligations as required by section 10(1) of the FOIP Act (duty to assist)?

[para 8] Section 10(1) of the FOIP Act establishes the obligations of public bodies in assisting applicants when applicants request access to records. It states:

> *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 9] The Public Body has the onus of establishing that it has made every reasonable effort to assist the Applicant, as it is in the best position to explain the steps it has taken to assist the Applicant within the meaning of section 10(1).

[para 10] Previous orders of this Office have established that the duty to assist includes conducting an adequate search for responsive records. In Order 2001-016, the Commissioner said:

> In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) [now 10(1)] of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) [now 10(1)].
>
> Previous orders ... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now 10(1)] of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

[para 11] The scope of this portion of the inquiry is to consider whether the Public Body assisted the Applicant by responding to her access request openly, accurately, and completely, which includes consideration of whether the Public Body conducted a reasonable search for responsive records in its custody or control.

[para 12] The affidavit of the Public Body's Information and Privacy Advisor explains the search that was conducted in the following terms:

> On May 13, 2010 a call for records was sent to Occupational Health & Safety, Employee Relations, the Applicant's Human Resources Advisor, the Clinic Manager of the Applicant and TSSI ([…] a contractor who stored employment records). Due to the nature of the request and the fact that the Applicant was employed in the Calgary Zone, I was satisfied that these were the only departments where such records would be stored.

[para 13] The Applicant argues that the Public Body has not located all records that would be responsive to her request. Specifically, she argues that the Public Body did not provide records predating her workplace injury or letters of reference, portions of her submissions regarding a human rights complaint, records regarding the termination of benefits, or records of meetings involving managerial staff regarding her employment.

[para 14] I note that the records do contain some records predating the Applicant's workplace injury and a letter of reference regarding the Applicant. However, from my review of the 1326 pages of records located by the Public Body, I agree with the Applicant that it does not appear that all records that would be responsive to the access request have been located. Moreover, I find that the reason that not all responsive records have been located is because the Public Body has not conducted an adequate search of all locations where responsive records are reasonably likely to be located. I make these findings for the reasons that follow.

[para 15] First, I note that there are insufficient records among the records located by the Public Body that document payment of salary or the administration of benefits to the Applicant. I accept that records 5 and 6 contain information documenting the payment of benefits; however, these records refer to benefits claimed in 2009. One would reasonably expect that there are also records documenting payments or nonpayment of salary and benefits to the Applicant from December 15, 1997 to the time of the termination of her employment. In the absence of evidence to the contrary, I do not accept that the Public Body, a public sector employer subject to a collective agreement, has not kept records of the wages and benefits it paid or provided to the Applicant since the commencement of her employment, or decisions made regarding payment or nonpayment of wages and benefits to her. Moreover, I note that records 71, 144, and 145 make reference to a "personnel file" of the Applicant. However, the Information and Privacy Coordinator's affidavit does not refer to searching for, or locating, the personnel file, even though the Applicant specifically requested a copy of this file.

[para 16] Second, I note that there are no records documenting the Applicant's work history from the time of hire to the time of her workplace injury. One would expect there to be some documentation of her performance, the hours she worked, and any leave taken, as well as her remuneration during this time period of approximately four years. However, records containing this kind of information are not present among the records before me. This is the kind of information one would expect to find on a personnel file; however, as noted above, it does not appear that the Public Body has searched for, or located, this file.

[para 17] Third, I note that the records contain reference to a human rights complaint and to a legal file created in relation to this matter. While a portion of the Applicant's submissions regarding her complaint are among the records, there are no records documenting the Public Body's position or submissions regarding the complaint or the outcome of the complaint. However, there are references to such records in record 82 and in record 545. I acknowledge that record 82, a memo which the Public Body provided to the Applicant in its entirety, contains a suggestion that a "human rights document" concerning the Applicant should be "shredded"; however, the email also indicates that the attachments to this document should be placed on the Applicant's file. The Applicant argues that the attachments are not present in the records that the Public Body has located.

[para 18] In addition, record 545 confirms the existence of a legal file regarding the human rights complaint, which would likely contain more information regarding the Applicant's human rights complaint than has been retrieved. However, from the Public Body's evidence, I understand that it has not extended its search to files that may be located in its legal department.

[para 19] Fourth, there are no records documenting the decision to terminate the Applicant prior to her termination. Record 71 refers to a human resources employee drafting the termination letter on behalf of the Applicant's supervisor. This record also indicates that this employee may "have more information". Records 177 and 178 contain

emails written by human resources employees that make reference to a process for terminating employees that was being followed in relation to the Applicant's employment. Record 145 indicates that an employee was asked to prepare background information so that decisions could be made regarding the termination: however, a record of this kind does not appear to be among the records the Public Body has located. There are no records documenting the decision-making process in relation to the termination, although there are records that make reference to such a process being followed. The records also indicate that employees other than the Applicant's former supervisor and who worked in areas other than those to which the call for records was made, were involved in this process. As a result, an inference may be drawn that there are records documenting this process that have not yet been located.

[para 20] Fifth, there are references in the records to records located in the "human resources department", which is a different department than either the occupational health and safety department or ITTI, from which many of the records were retrieved. Record 151, which was provided to the Applicant in its entirety, refers to decisions made by AHS Human Resources to which a Manager of HR Administration Services does not have access. Record 706 is a letter sent to the former Calgary Health Region Human Resources Department, which suggests that this entity also created and maintained records regarding the Applicant.

[para 21] The Public Body states that it asked a human resources advisor employed with AHS human resources for his records. However, it appears that the Public Body did not conduct a search of AHS human resources for records that other individuals may have received or created in that area. Record 165 indicates that on February 8, 2010, the AHS human resources advisor had only been recently assigned to the Applicant's file, and was unfamiliar with the facts regarding it. While this individual may have provided all the information to the Public Body's information and privacy advisor that he created or received after February 8, 2010, such records would not necessarily comprise all the records located in AHS human resources. Records may exist that were created or handled by others. There is evidence in the records that the human resources departments of the Calgary Health Region, and subsequently AHS, created and maintained files regarding the Applicant. However, the Public Body has not provided evidence of the search it undertook to locate those records, with the exception of a request it made to the human resources advisor.

[para 22] Sixth, record 145 contains a request that an employee file information referencing the Applicant in file "HSA 002324". From the information in record 145, I conclude that the Public Body has created a file in which it stores information regarding a grievance made by the Applicant and that responsive records may also be located on that file. However, the contents of this file do not appear to be among the records before me.

[para 23] In conclusion, from my review of the records, I find that there is information missing that one would normally expect to be present among an employee's personnel records, such as performance reviews, and complete details of salary and benefit payments, as described above. Moreover, given that the records contain references to a human rights complaint, a termination, and a grievance regarding the

termination, I find it likely that there would be documentation of actions taken and decisions made regarding these actions. However, no such documentation is present in the records. In addition, and as set out above, I find that there are references in the records to responsive information being located in areas of the Public Body other than those that were searched.

[para 24] The Public Body has not established that it has searched for all potentially responsive records that may be located in its legal files, its grievance files, AHS human resources, or in areas responsible for administering payroll or benefits. Moreover, I am not satisfied that all relevant files that may have been created by employees of the former Calgary Health Region human resources department have been located. I must therefore order the Public Body to look for responsive records in these areas.

Legibility of records

[para 25] The Applicant complains that some of the records she has received are illegible. She also raised this complaint with the Public Body's information and privacy advisor, who sought to obtain better copies of records. The Public Body's information and privacy advisor documented the steps she took to obtain better copies of the records for the Applicant, which included contacting the Occupational Health and Safety area to obtain better copies. However, the information and privacy advisor also states that she believes better copies were produced and provided to the Applicant, but that she was no longer with the privacy office when the requested copies were provided to the privacy office. The information and privacy advisor does not state that she has knowledge that better copies were produced and provided to the Applicant.

[para 26] The Public Body provided a complete copy of the records for my review on CD-ROM. I note that records 225, 226, 227, 228, 229, 231, 232, 233, 234, 235, 243, 245, 246, and 247, which contain handwritten notes, are either entirely, or partly, illegible. In some cases, the illegibility is caused by poor handwriting, and in some cases it is because the writing is too faint.

[para 27] From her evidence, I find that the Public Body's information and privacy advisor did take some steps to determine whether it is possible to produce better copies of records as requested by the Applicant; however, I find that it is not clear from the submissions of either party what the result of those steps was. Given the illegibility of the records that were provided for my review and which I have documented above, I infer that this attempt was unsuccessful.

[para 28] I note that section 13(4) of the FOIP Act requires the head of a public body to allow an applicant to examine a record, if a copy of the record cannot reasonably be reproduced, or if an applicant has made a request to examine the record. It does not appear that the Applicant or the Public Body has considered whether the originals would be more legible than the copies provided to the Applicant, or whether it would be possible to allow the Applicant to review the originals so that she may obtain the

information she seeks. The applicability of section 13 has not been raised by the parties in this inquiry.

[para 29] However, I draw the attention of the parties to section 13, which authorizes an applicant to make a request to examine the original record, and requires the head to grant that request, subject to the regulations. The parties may wish to follow the terms of this provision to resolve the issue of illegible copies.

Conclusion regarding the duty to assist

[para 30] I find that the Public Body has not established that it met its duty to assist the Applicant within the terms of section 10(1) of the FOIP Act, for the reason that it has not established that it has conducted an adequate search for responsive records. I will therefore order it to conduct a new search for responsive records.

Issue B: Did the Public Body properly apply section 24(1) of the FOIP Act (advice from officials) to the information in the records?

[para 31] Section 24 creates an exception to the right of access in relation to "advice from officials". It states, in part:

> *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*
>
> ...
>
> *(f) is an instruction or guideline issued to the officers or employees of a public body…*

[para 32] The Public Body withheld information from records 122, 142, 144, 185, 298, 415, 419, 487, 491, 516, 518, 841, 999, 1109, 1131, and 1287 under section 24(1)(a) and (b). The Public Body argues that these provisions apply to the information it withheld for the following reasons:

> It is submitted that to correctly apply section 24(1)(a) a public body must show that there is advice, proposals, recommendations analysis or policy options ("advice") developed by or for a public body and the advice must be:
>
> a. Sought or expected or be part of the responsibility of a person by virtue of that person's position;
> b. Directed towards taking an action or making a decision; and
> c. Made to someone who can take or implement a decision (Order F2008-032 paragraph 17)
>
> To correctly apply section 24(1)(b) a view solicited during a consultation or deliberation must:
>
> a. Either be sought or expected as part of the responsibility of the person from whom they are sought;
> b. Be sought for the purpose of doing something, such as taking action or making a decision;
> c. Involve someone who can take or implement the action (Order 96-006 p. 8)

[para 33] The *FOIP Guidelines and Practices 2009* (the FOIP Guidelines) offers the following definition of the terms included in section 24(1)(a):

> The exception provides specific coverage for advice, proposals, recommendations, analyses, and policy options developed by or for a member of the Executive Council.
>
> *Advice* includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts.
>
> *Recommendations* includes suggestions for a course of action as well as the rationale for a suggested course of action.
>
> *Proposals* and *analyses or policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

[para 34] Under the above interpretation, advice, proposals, recommendations, analyses, and policy options are largely synonymous terms, and describe the information employees of a public body may provide to an individual or individuals empowered to make decisions on behalf of a public body, such as a member of the executive council, in order to assist that individual or individuals, to make decisions on behalf of a public body. The information in question will put forward a course of possible action or evaluate various courses of action, in relation to an area or issue where an individual or individuals responsible for making decisions on behalf of a public body, or a member of the executive council, is considering taking action, or could consider taking action. The interpretation put forward in the FOIP Guidelines is consistent with previous orders of this office, and recognizes the public interest that section 24(1)(a) is intended to protect.

[para 35] In Order 96-006, former Commissioner Clark considered the meaning of "consultations and deliberations" within the terms of section 24(1)(b). He said:

> When I look at section 23 as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank

> deliberations were to be made public. Again, this is consistent with Ontario and British Columbia. I therefore believe a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of the responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice.

[para 36] I agree with the interpretation Commissioner Clark assigned to the terms "consultation" and "deliberation" generally. However, in my view, section 24(1)(b) differs from the section 24(1)(a) in that section 24(1)(a) is intended to protect communications developed for a public body by an *advisor*, while section 24(1)(b) protects communications involving *decision makers*. That this is so is supported by the use of the word deliberation: only a person charged with making a decision can be said to *deliberate* that decision. Moreover, "consultation" typically refers to the act of *seeking* advice regarding an action one is considering taking, but not to *giving* advice in relation to it. Information that is the subject of section 24(1)(a) may be voluntarily or spontaneously provided to a decision maker for the decision maker's use because it is the responsibility of an employee to provide information of this kind; however, such information cannot be described as a "consultation" or a "deliberation". Put simply, section 24(1)(a) is concerned with the situation where advice is given, while section 24(1)(b) is concerned with the situation where advice is sought or considered.

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

[para 38] In my view, the test the former Commissioner developed to assist in determining whether advice, proposals, recommendations, analyses and policy options have been developed by or on behalf of a public body for the purposes of section 24(1)(a), is not useful in determining whether information is subject to section 24(1)(b). I say this because it does not make grammatical sense to suggest that a consultation or deliberation would be *made to* someone who can take an action, given that only the person charged with making a decision can consult or deliberate regarding it. Moreover, I find that the test, as the Public Body has stated it, for determining whether section 24(1)(b) applies is arguably too narrow. There is no requirement in section 24(1)(b) that a decision maker consult with only those whose delineated responsibility or duty it is to provide advice to that decision maker. A consultation or deliberation falls under section 24(1)(b) so long as one of the individuals enumerated in section 24(1)(b) consults or deliberates. However, unsolicited views regarding a decision will not fall under section 24(1)(b).

[para 39] It is conceivable that a decision maker might choose to consult with a colleague or an expert, or someone else that the decision maker considers it useful to consult, but who has no formal duty to provide advice to the decision maker. Section 24(1)(b) is designed to enable a decision maker to seek out the information the decision maker believes is necessary to make a decision without interference or second guessing. This purpose would be undermined if a decision maker were restricted to seeking advice from only those whose official responsibility it is to advise the decision maker. In any event, the language of the provision, which does not restrict the kinds of persons who may be consulted, does not support such a narrow reading.

[para 40] The first step in determining whether section 24(1)(a) or (b) applies is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options, in the case of section 24(1)(a), or consultations or deliberations involving specified individuals, in the case of section 24(1)(b).

[para 41] The Public Body provided specific arguments for the inquiry in which it characterizes the contents of each piece of information it severed. However, in some cases, there is tension between its description of the record and the contents of the record. In other cases, its summaries omit details regarding the identity of the author or the recipient of a record. In all cases, the Public Body provided no evidence to support its characterization of the severed information. Consequently, the Public Body's arguments are of limited use. However, I will consider its arguments and review each piece of information severed in the context of the records and consider whether the Public Body has established that the information severed falls under either section 24(1)(a) or (b).

Record 122

[para 42] The Public Body withheld the final paragraph of an email contained on record 122 under both sections 24(1)(a) and (b). It argues:

> The email is from a Senior Employee Relations Consultant to an operational Director offering an opinion as to the likely progress of the Applicant's grievance.

I agree that in this email a senior employee relations consultant offers an opinion as to what is likely to transpire; however, there is nothing in the email, or the evidence of the Public Body, to suggest that this opinion is intended to influence or guide a course of action or that there was a course of action that the Public Body could have taken in any event. Rather, the information withheld from the email is offered as an assessment of a factual situation.

[para 43] The Public Body has not explained whether it considers the opinion put forward in the email to be an example of advice, proposals, recommendations, analyses or policy options within the terms of section 24(1)(a) or (b) or a "consultation or deliberation" within the terms of section 24(1)(b).

[para 44] That an employee offers an opinion regarding a factual situation does not, in and of itself, support a finding that the information is subject to either section 24(1)(a)

or (b). Recently, in Order F2012-06, I rejected the argument that an objective evaluation or assessment of factual information constitutes information that is subject to section 24(1)(a), if that information reveals only a state of affairs, rather than advice or analysis directed at taking an action.

[para 45] Similarly, in Order 97-007, former Commissioner Clark rejected the argument that a collection of facts, without evidence that the facts were collected and presented in order to influence a decision, is subject to section 24(1)(a).

> Upon reviewing the briefing notes, I note that there is no reference to a possible course of action for the Minister. In short, the briefing notes appear to be a narration or a status report. The authors of the briefing notes were not advising the Minister as to what he should do or not do, nor were they providing an analyses of the events using their expertise. "Analyses" is defined in the *Concise Oxford Dictionary*, 9th edition, (New York: Oxford, 1995) as:
>
> > *a detailed examination of the elements or structure of a substance etc.; a statement of the result of this.*
>
> While there is some discretion exercised in choosing which facts are gathered, without more, a compilation of facts is not an [analysis]. Gathering pertinent factual information is only the first step that forms the basis of an [analysis]. It is also the common thread of "advice, proposals, recommendations, or policy options" because they all require, as a base, a compilation of pertinent facts.
>
> In Order 96-012, I stated that I took section 23(1)(a) to contemplate the protection of information generated during the decision-making process. There is nothing in the information to indicate a decision or a pending decision.

[para 46] I find that the final paragraph of the email is an objective evaluation or assessment of factual information and there is no indication that it was created in order to influence a decision, or that there was any decision to make. In addition, there is no evidence that the operational director would be empowered to make a decision regarding the facts offered in the email. As a result, I find that the final paragraph of the email is not subject to section 24(1)(a).

[para 47] It may be that the Public Body considers the final paragraph of the email to document a consultation or deliberation between the two employees.

[para 48] While the Public Body has provided the job titles of the author and the recipient of the email, it has not provided any details as to a decision that either employee was charged with making, or that an employee was consulted about a decision that the other was charged with making. The email on its own does not support a finding that it contains a consultation or deliberation. I therefore find that the final paragraph of record 122 is not subject to section 24(1)(b).

[para 49] For these reasons, I find that neither section 24(1)(a) nor 24(1)(b) applies to the information withheld from record 122.

Record 142

[para 50] The Public Body makes the following argument in support of its decision to withhold a sentence from record 142 under sections 24(1)(a) and (b):

> Advice is given by an HR advisor to an HR client services advisor regarding the approach to be taken to the grievance.

[para 51] The sentence in question contains the statement of a human resources advisor as to the legal position he believes should be adopted in relation to a grievance. I agree that the statement, in and of itself, is possibly consistent with advice, if it were given to someone responsible for making a decision regarding the subject matter of the statement. However, the statement is also consistent with asking the recipient of the email to document his opinion on a file.

[para 52] While the Public Body refers to the recipient of the email in record 142 as a "HR client services *advisor*," and argues that the email was intended to advise her, the email establishes that the position of the recipient at the time the email was sent was that of "client services *assistant*". The Public Body's rationale for referring to the position of the recipient within its organization as anything other than that which is indicated by record 142 has not been stated to me.

[para 53] I note that records 143 and 145 establish that the client services assistant's duties included setting up meetings and filing records, which supports a finding that the client services assistant performed an administrative function, which would not include making decisions regarding the legal strategy to be adopted in relation to a grievance. In my view it would be very unlikely that an assistant who performs administrative duties of the kind documented in the records would have the power to make decisions regarding legal strategy, or that a human resources advisor would advise courses of action to an assistant in that regard. In any event, the Public Body did not explain to me what role, if any, the recipient of the email would have had in relation to the position to be taken regarding the grievance, and what actions or decisions, if any, she might have had to take in that regard. Thus the test for the application of section 24(1)(a) set out by Commissioner Clark in 96-006 is not met.

[para 54] The language of the email and the position of the recipient is most consistent with a finding that the email was not intended to advise the recipient about a labour relations question, but rather was intended to direct the recipient of the email to make a note of the human resources advisor's opinion on the file. If that is the case, possibly the human resources advisor was asking that his opinion be documented, so that ultimately it could be given to someone else. However, if that is so, I was not told who that other person might be, or what role or decision-making powers such a person might have had in relation to the matter. Thus, again, the test in Order 96-006 is not met.

[para 55] As to the idea that the "advice" was that the contents of the email should be placed on the file, even if that could be characterized as advice (which I do not believe

to be the case), section 24(2)(f) prohibits public bodies from withholding directions issued to employees under section 24(1).

[para 56] I am therefore unable to find that the information severed from record 142 is advice developed by or for a public body within the terms of section 24(1)(a).

[para 57] The records indicate that the Public Body withheld this sentence under both section 24(1)(a) and (b), although its arguments address only section 24(1)(a). As to the application of section 24(1)(b), there is no evidence before me that the sender of the email was deliberating or seeking input regarding the opinion he directed the assistant to record. Rather, it appears that his opinion is final. I am therefore unable to find that the email is properly interpreted as a consultation or deliberation regarding a decision. In any event, the theory of the Public Body as it has been presented to me is that the author of the email was not ultimately responsible for making a decision, which argues against a finding that the emails reveals a consultation or deliberation.

[para 58] For the reasons above, I find that it has not been established that the information severed from record 142 is subject to either section 24(1)(a) or (b).

Record 144

[para 59] The Public Body withheld the text of an email appearing on record 144 under both sections 24(1)(a) and (b). The Public Body argues the following:

> This email is from a Labour Relations Consultant to a HR Advisor with advice as to whether to accept a procedural request regarding the grievance.

[para 60] I agree with the Public Body that the email is from an employee who is a labour relations consultant and is written to an employee who is a human resources advisor. However, I am unable to find that any of the information withheld by the Public Body from record 144 is advice within the terms of section 24(1)(a). Rather, the email appears intended to provide background information to a human resources advisor who was responsible for gathering background information. This finding is supported by the following statement, which appears in an email on record 145 from the labour relations consultant to the human resources advisor, and which was not withheld:

> HSAA has called me regarding the recent grievance filed on behalf of [the Applicant] regarding her termination. I know you are working on getting us the background information on this file…
>
> …
> HSAA is alleging that she did not find out she was terminated until she made claim on her benefits (January) and then was told her benefits were terminated. We need to find out if management made any attempts to contact her via phone or other means regarding this termination. Did they courier the termination letter and if so do they have confirmation that it was received or not.
>
> Another query that HSAA is asking is related to the attached. She did send this request, but not sure to whom as it was on her personnel file. Can you see if anyone in HR Services received this and if they advised her of the appropriate process for file review and to receive copy or if she was

> sent copy of her file. I want to update HSAA on this. HSAA is saying she sent the request but she did not get a response. If we did receive it do we know when?

[para 61] This email predates the email withheld by the Public Body by thirteen minutes. The withheld email appears to be an afterthought to, or continuation of, the earlier email that the Public Body did not withhold and provided for my review in the inquiry. The earlier email indicates that the human resources advisor was asked to research facts and to provide background information so that the labour relations consultant could answer factual questions from the Applicant's union. The contents of the emails do not support a finding that the human resources advisor was charged with making a procedural decision, or sought advice in relation to such a decision, from the labour relations consultant or that the labour relations consultant was giving any advice.

[para 62] I am not satisfied that the email withheld by the Public Body from record 144 is advice within the terms of section 24(1)(a) or was intended as such. Moreover, there is nothing in the records to indicate that the labour relations consultant or the human resources advisor was required to make a decision or take an action, such that the email could be construed as a consultation or deliberation. As a result, I find that section 24(1)(b) does not apply to record 144.

[para 63] For the reasons above, I find that neither section 24(1)(a) nor (b) applies to record 144.

Record 185

[para 64] Record 185 appears among the records to which the Public Body applied sections 24(1)(a) and (b). However, the Public Body made no arguments in relation to this record and the record does not indicate that information has been withheld from it. I therefore infer that this record was included in error. In any event, the record indicates that its contents are progress notes, and I find that record 185 consists entirely of facts and background information. As a result, sections 24(1)(a) and (b) do not apply.

Record 298

[para 65] The Public Body withheld a portion of an email written to the Applicant's supervisor, and the Applicant's supervisor's reply to the email. The Public Body refers to the Applicant's supervisor as an operational manager. The Public Body argues:

> The severed portion of the bottom email suggests a course of action while the top email a reply from the operational manager considers the reasons for and against and the appropriateness of the suggested action.

With regard to the bottom email, I find that the severed portion is intended to report the professional opinion of a physiotherapist. I find that the severed portion is not intended to provide advice regarding a course of action, but factual information only.

[para 66] With regard to the response of the supervisor, the email states that it is intended to express concerns. However, the email primarily recounts facts. Having reviewed the Public Body's argument, and the contents of the record, I find that there is no evidence before me that the author or the recipient of the email had a decision to make or action to take, or that the email was intended to provide advice to someone empowered to make a decision.

[para 67] The email is consistent with an email written to document facts and to express a concern. However, I find that the expression a concern, in and of itself, does not constitute information subject to section 24(1)(a) or (b) in the absence of evidence that there was a decision to make, that the author or the recipient was responsible for making such a decision, or that the expression of the concern was clearly part of the process of making a decision. I find that the contents of the email and the description of the email provided by the Public Body do not amount to evidence of this kind on their face.

[para 68] For these reasons, I am unable to conclude that the information severed from record 298 is subject to either section 24(1)(a) or (b).

Record 415

[para 69] The Public Body severed an email written by a medical advisor from record 415. The Public Body provided the following argument in support of the decision to apply section 24(1)(a) and (b) to this information:

> This email is from a medical advisor to the Director of Workforce Services. In the email consultation and advice are tendered with regard to the appropriateness of actions by a third party.

[para 70] The email recounts facts and provides an opinion about decisions that had already been made, and the process that had been followed, by a third party public body. I find that the email is not consistent with a consultation within the terms of section 24(1)(b), or with advice within the terms of section 24(1)(a). There is no indication that the Public Body, or the medical advisor, had a decision to make in relation to the actions of the third party public body or that it would have the power to do so should it choose to. I find that the email is consistent with criticism of the actions of a third party public body; however, on the evidence before me, I am unable to find that this email was intended to influence or guide a decision that the Public Body was in the process of making, or that the medical advisor was providing an opinion on a proposed course of action that the Public Body was considering taking. This is because there is no evidence before me that the Public Body was considering taking any action in relation to the decision of the third party public body.

[para 71] For these reasons, I find that the Public Body has not established that record 415 contains information subject to either section 24(1)(a) or (b).

Record 419

[para 72] The Public Body withheld a paragraph from an email written by a medical advisor from record 419. The Public Body states:

> Record 419 (last paragraph) is an email from a medical advisor to a HR Advisor giving opinions to the future action of a third party and a course of action that should be followed.

[para 73] The paragraph in question contains conjecture as to what three third parties, none of which is the Public Body, might do in the future. I find that the conjecture in the email, in and of itself, does not transform the information into information that is subject to section 24(1)(a) of (b). Moreover, I find that the paragraph severed by the Public Body does not contain any information that can reasonably be construed as advice or other information that would be subject to section 24(1)(a). In addition, there is no evidence that the recipient of the email had a decision to make or action to take or that the email was intended to assist a decision maker to make a decision on behalf of the Public Body, such that section 24(1)(b) could be said to apply.

[para 74] For these reasons, I find that neither section 24(1)(a) nor (b) applies to the information in record 419.

Record 487

[para 75] The Public Body severed a portion of a memorandum prepared by a medical advisor from record 487. The Public Body states:

> The medical advisor is giving advise [*sic*] as to proposed course of action.

[para 76] Record 486, which contains the first page of the memorandum, indicates that the memorandum was "written to file," as opposed to "written to someone who could take an action" within the terms of the test set out by former Commissioner Clark in Order 96-006. Given that this memorandum was written "to file", it is unclear why the Public Body refers to the medical advisor as "giving advice". While it is possible that that the medical advisor wrote the memorandum to file with the expectation that someone responsible for making a decision might use it, there is no evidence before me to give this possibility a factual foundation. There is no evidence before me that the Public Body had a decision to make regarding the contents of the memorandum, or to explain how the memorandum would feature in decision making process.

[para 77] The contents of the memorandum and the fact that it is written "to file" support a finding that it was written for the purpose of recording events that had taken place and to document a course of action that the medical advisor had himself decided to take.

[para 78] I also find that the memorandum does not constitute a deliberation within the terms of section 24(1)(b), as the paragraph severed by the Public Body documents a plan that the medical advisor had already adopted, as opposed to an analysis of reasons

for or against adopting the plan. Though a decision may reflect deliberations that were involved in reaching them, decisions themselves do not fall within the terms of section 24(1)(a) or (b) (see Orders F2008-028 and F2008-031).

[para 79] I find that record 487 does not contain information that could reasonably be considered subject to either section 24(1)(a) or (b).

Record 491

[para 80] The Public Body severed the final paragraph of record 491 under sections 24(1)(a) and (b). Record 491, like record 487, is a memorandum created by the medical advisor. There is no indication that this memorandum was intended to be sent to an employee of the Public Body.

[para 81] The Public Body argues:

> The medical advisor concludes an overview of the applicant's condition with recommendations for the future.

[para 82] I find that the memorandum contains a history of events and the medical advisor's medical diagnosis. I find that there is no information contained in this record consistent with recommendations as to action that should be taken by the Public Body. There is no indication that this memorandum was ever intended to be provided to anyone. Rather, the memorandum is consistent with one intended to record the medical diagnosis of the medical advisor and to document the action he had decided to take. Again, sections 24(1)(a) and (b) are not intended to protect decisions, but the process of arriving at a decision, if the process relies on the kinds of information set out in these provisions.

[para 83] I find that record 491 does not contain information that could reasonably be considered subject to either section 24(1)(a) or (b).

Records 516 and 518

[para 84] Records 516 and 518 are duplicates of one another. The records consist of an email sent by a Manager of HR Services for the former Calgary Health Region to a medical advisor. The Public Body severed the bottom paragraph of this email. The Public Body states:

> This is an email from Manager HR Services to the medical advisor. The severed paragraph is a draft of a proposed response to a question in which the Manager is seeking the advice and review of the medical advisor prior to sending the reply.

I agree with the Public Body that the portion of the email it severed is categorized as a "proposed response" by its author, the manager of human resources services. However, I find that it is not a "proposal" within the terms of section 24(1)(a) for the reasons that follow.

[para 85] The third step of the test set out in Order 96-006, and to which the Public Body refers in its submissions, requires that a proposal be made to someone who can take or implement a decision. However, in this case, the person who can take or implement the decision is the person presenting the proposed response. It is clear from the email that the medical advisor would not have the final decision as to the contents of the response; this is because the medical advisor was being asked for his input in relation to a decision that the manager of human resources services was required to make. Consequently, the information is not subject to section 24(1)(a).

[para 86] From the context provided by the email, the information described as a proposal is clearly a course of action that the manager of human resources services was considering taking. However, she decided to consult with the medical advisor prior to taking the action. In my view, the portion of the email severed by the Public Body is a "consultation" within the terms of section 24(1)(b), as it reveals that the manager of human resources services sought the views of a medical advisor regarding a decision she was empowered to make, and would reveal the considerations involved in the decision making process if disclosed.

[para 87] I therefore find that the information withheld from records 516 and 518 is subject to section 24(1)(b).

Record 841

[para 88] Record 841 contains an email dated May 30, 2005 from an employee the Public Body identifies as a human resources advisor to a disability claims coordinator. It also contains an email written by the disability claims coordinator to the human resources advisor. The Public Body severed the contents of both these emails under sections 24(1)(a) and (b). It states:

> Record 841 is a discussion between the Disability Claims Coordinator and HR Advisor with regard to possible courses of action dependent on updated information.

[para 89] While I accept that the email consists of a discussion between two employees, it does not contain a discussion of "potential courses of action." Rather, the disability claims coordinator provided the human resources advisor with facts and the human resources advisor asked the disability claims coordinator whether she was certain of the facts she had presented. Nothing in these emails is consistent with advice within the terms of section 24(1)(a), or a consultation or deliberation within the terms of section 24(1)(b).

[para 90] Even if the two emails did consist of a "discussion" of "possible courses of action dependent on updated information," this alone would not bring the information within the terms of section 24(1)(a) or (b).

[para 91] For these reasons, I find that sections 24(1)(a) and (b) do not apply to record 841.

Record 999

[para 92] Record 999 consists of an email written by a rehabilitation consultant for Great-West Life, an insurance company, to an employee of the former Calgary Health Region.

[para 93] The Public Body argues:

> Record 999 is an email from a contracted service provider of the Public Body giving an opinion as to the future progress of its file as well as endorsing and proposing future action. The email has been sent to a member of the public body dealing with the claim.

The purpose of the email is primarily to communicate a medical prognosis and to document medical findings. I find that this information is not consistent with information that is subject to section 24(1)(a) or (b). However, I agree that the third severed paragraph contains a proposed course of action that the author of the email suggests that both Great-West Life and the Public Body should consider mutually taking.

[para 94] Section 24(1)(a) applies to advice, proposals, recommendations, analyses, and policy options developed *by or on behalf of a public body*. While Great-West Life has a contract with the Public Body to provide disability insurance, it does not follow from that that all actions of Great-West Life employees are developed by or on behalf of the Public Body. The context of the email establishes that both Great-West Life and the Public Body would be engaged in taking the action should the Public Body agree to the Great-West Life employee's suggestion. The action put forward in the third paragraph involves discussing the facts presented in the email at a later date.

[para 95] I accept that Great-West Life may provide the Public Body with the opportunity to provide its views when it makes entitlement decisions, and that Great-West Life must necessarily involve the Public Body in planning the return to work of an employee on disability. However, while the Public Body asserts that Great-West Life is a "contracted service provider" of the Public Body, it has not provided or explained the terms of the contractual relationship so as to demonstrate that any suggested course of action contained in correspondence created by an employee of Great-West Life is necessarily advice developed on behalf of the Public Body. Given that the suggested action is one that both the Public Body and Great-West Life would both participate in, and that the employee of Great-West Life would participate in on behalf of Great-West Life, I find that the email was not intended to develop information subject to section 24(1)(a) on behalf of the Public Body.

[para 96] Moreover, the email does not contain a deliberation or consultation regarding a course of action; assuming that the parties to the email have the power to make decisions, any consultation or deliberation would take place when the contents of the email are discussed. I am therefore unable to find that section 24(1)(b) applies to the email.

[para 97] For these reasons, I find that record 999 is not subject to either section 24(1)(a) of (b).

Record 1109

[para 98] Record 1109 is a portion of an email written by an "employee rehabilitation coordinator" of the Public Body. Record 1108, which contains the initial portion of this email, establishes that the email was sent to an employee of the Workers' Compensation Board (WCB) who was responsible for making entitlement decisions under Alberta's workers' compensation legislation in relation to the Applicant's workplace injury. The Public Body argues:

> …this email suggests a course of action as well as giving an opinion as to the materials on disability already obtained.

[para 99] I agree with the Public Body that the email suggests a course of action and gives the opinion of its author. However, context establishes that the employee of the Public Body referred to the course of action and provided her opinion in order to advocate the position of the Public Body regarding the Applicant's claim for compensation to the WCB.

[para 100] In my view, it is not accurate to say that a party making arguments to an independent third party decision maker to support its case is developing advice or other information subject to section 24(1)(a) on behalf of that decision maker. The arguments are not made on behalf of the decision maker (in this case, the WCB), but on behalf of the party making the arguments. In a sense, one may consider the arguments of a party to reflect the party's decision to make particular arguments. However, as discussed above, section 24(1)(a) and (b) do not apply to decisions, but to certain kinds of information revealing how a decision was arrived at.

[para 101] Within the terms of the test developed by former Commissioner Clark for determining whether information falls under section 24(1)(a), the contents of the email on record 1109 fail to meet the first part of the test. The first part of the test requires advice to be "sought or expected as part of the responsibility of the person from whom they are sought". While it may be the role or responsibility of the employee of the Public Body to provide arguments to the WCB, it is not the responsibility of such an employee to *advise* the WCB. It is clear from the content of the email that the author's purpose was to argue the Public Body's case. Arguments made to an independent decision maker are not subject to either section 24(1)(a) or (b).

[para 102] For these reasons, I find that neither section 24(1)(a) nor (b) applies to record 1109.

Record 1131

[para 103] The Public Body severed an email that was written by a manager of operations and sent to an employee of the Public Body and to the Workers' Compensation Board under sections 24(1)(a) and (b). The Public Body argues:

> Record 1131 is an email from the manager of the operational area to another member of the public body discussing concerns as to the origin of a medical condition.

[para 104] I agree that the email contains a description of concerns. However, the intent of the author of the email in writing it is not entirely clear from the context of the email. First, there is no evidence that the employee of the Public Body to whom it is addressed has a decision to make, or would have any authority to make a decision in relation to some of the concerns raised in the email. Second, the email is also copied to an employee of the Workers' Compensation Board apparently responsible for making entitlement decisions, which supports the view that the concerns that are raised are intended to express the Public Body's position regarding the Applicant's entitlement to workers' compensation. If that is so, then the email is not intended to advise, but to argue a position.

[para 105] Based on the contents of the email, I find that it is more likely than not that the email was written to persuade the WCB of the correctness of the Public Body's position. Neither the author nor the recipient of the email would be in a position to act on the information contained in the email; however, making decisions regarding the contents of the email would be within the purview of the WCB. If the email had been intended to provide advice regarding an internal decision of the Public Body, then it would be unlikely that the manager of operations would include a member of an external public body in that email. However, if the email is intended to persuade the Workers' Compensation Board of the merits of the Public Body's case, then it would be logical for the manager of operations to send a copy of the email to an employee of the Workers' Compensation Board.

[para 106] As discussed above, I find that arguments made to further one's case before an independent decision maker are not information to which section 24(1)(a) or (b) applies.

[para 107] For these reasons, I find that sections 24(1)(a) and (b) do not apply to record 1131.

Record 1287

[para 108] Record 1287 is an email written by a rehabilitation consultant employed by Great-West Life and sent to the Public Body. The Public Body severed a portion of this email under sections 24(1)(a) and (b). The Public Body argues:

> Record 1287 is an email from a contracted service provider of the public body to the public body setting out a proposed course of action which is to form the basis of a future meeting.

[para 109] The Public Body argues:

> Record 999 is an email from a contracted service provider of the Public Body giving an opinion as to the future progress of its file as well as endorsing and proposing future action. The email has been sent to a member of the public body dealing with the claim.

The purpose of the email is primarily to communicate a medical prognosis and to document medical findings. However, I agree that the third severed paragraph contains a proposed course of action.

[para 110] As discussed in my analysis of record 999, section 24(1)(a) applies to advice, proposals, recommendations, analyses, and policy options developed *by or on behalf of a public body*. While Great-West Life has a contract with the Public Body to provide disability insurance, it does not follow from that that all actions of Great-West Life employees are actions of the Public Body. It has not been established for this inquiry that this email was written by an employee of Great-West Life acting as the agent of the Public Body. Rather, record 419 supports a finding that Great-West Life acts independently of the Public Body, and not on its behalf.

[para 111] I accept that Great-West Life may provide the Public Body with the opportunity to provide its views when it makes entitlement decisions, and that Great-West Life must necessarily involve the Public Body in planning the return to work of an employee on disability. However, while the Public Body asserts that Great West Life is a "contracted service provider" of the Public Body, it has not provided or explained the terms of the contractual relationship so as to demonstrate that Great West Life's decisions respecting entitlements or its proposals in planning returns to work are developed *on behalf of* the Public Body. Neither does the information that was withheld that relates to this matter make it in any way clear whether it was Great-West Life independently, or the Public Body (possibly on receipt of advice from Great-West Life), that had the power to make decisions in relation to the question of back-to-work plans; in other words, it is not clear whether statements about that topic contained in the withheld records expressed the position Great-West Life was adopting and had the power to adopt, or whether it was providing advice as to decisions the Public Body had to make about the matter. Certainly, some statements in the email are consistent with being intended to communicate the views and position of Great-West Life.

[para 112] As already noted above, to justify a withholding of information on the basis of section 24(1)(a), a Public Body must demonstrate that information consisting of information subject to this provision must be given to someone who has the responsibility to act on it. A body that has the power to decide what is to be decided or done, and indicates that to another body (which possible state of affairs is consistent with the information withheld from the email) is not giving advice. The Public Body has not provided evidence to establish that the purpose of the writer in writing the email was anything other than communicating Great West Life's position regarding a decision it had authority to make, or had made, and I am unable to find that the information that was withheld is subject to section 24(1)(a) or (b). Certainly, Great-West Life is not one of the entities listed in section 24(1)(b). If its purpose in writing was to assist the Public Body in

making a decision, there is no evidence that the Public Body had a decision to make or that it solicited Great-West Life's views regarding it.

[para 113] For these reasons, I find that neither section 24(1)(a) nor (b) applies to record 1287.

Exercise of Discretion

[para 114] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that are involved.

> A discretion conferred by statute must be exercised consistently with the purposes underlying its grant: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 53, 56 and 65. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.
>
> …
>
> In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[para 115] As I find that section 24(1)(b) applies to the information severed from records 516 and 518, I must now consider whether the Public Body appropriately exercised its discretion when it decided to withhold information from this record.

[para 116] The Public Body explained its decision to withhold information under section 24(1)(a) and (b) in the following terms:

> With regard to the exercise of discretion by the Public Body it considered section 2(c) of the Act (to allow individuals, subject to limited and specific exceptions as set out in the Act). In this case the ability of employees of the public body giving frank and full advice was given more weight than the right of access to a limited number of records.

[para 117] Records 516 and 518 would reveal a request for advice from a decision maker and also reveal that she was considering stating a position in a particular way. While the Public Body has stated its reasons for withholding these records in terms of protecting the ability of its employees to *give* frank and full advice, I accept that its purpose in withholding this information from these records may have been to ensure that its employees may *seek* frank and full advice when they are making decisions. Although it is generally more useful when a public body explains its exercise of discretion in terms

that are reflected by the contents of the information it has chosen to withhold, the contents of the records satisfy me that in this case, withholding the information would serve the purpose of preserving consultations within the terms of section 24(1)(b). Moreover, the Public Body states that it also considered the public interest in disclosing the information in arriving at its decision. I therefore find that the Public Body has established that it exercised its discretion appropriately when it withheld information from record 516 and 518.

Conclusion

[para 118] For the reasons above, I find that section 24(1)(b) applies to the information severed from records 516 and 518.

[para 119] I find that the remaining information withheld by the Public Body under section 24(1)(a) or (b) does not fall under these provisions. I will therefore order the Public Body to disclose the remaining information severed under sections 24(1)(a) and (b) to the Applicant.

Issue C: Did the Public Body properly apply section 27(1) of the FOIP Act (privileged information) to the information in the records?

Is the information in the records subject to solicitor-client privilege?

[para 120] The Public Body withheld records 545, 546, and 547 on the basis that they are subject to solicitor-client privilege and are therefore subject to section 27(1)(a). Counsel for the Public Body in this inquiry swore an affidavit in support of the Public Body's position that these records are subject to solicitor-client privilege. He states:

> Records 546 and 547 are two emails dated November 6, 2009. Record 546 is an email from a medical advisor to a solicitor of the then Calgary Health Region. I have confirmed by reference to the Law Society of Alberta website that this individual remains an active member of the society in good standing. Record 546 was also copied to three other employees of the Calgary Health Region. The content of the email consisted of information for the solicitor and instructions as to who would follow up with inquiries with other members of the health region. Record 547 was from the solicitor to the medical advisor provisionally setting up a meeting to discuss issues further. Both records were in the context of seeking and giving legal advice.

[para 121] While Counsel for the Public Body states that the records in question are dated November 6, 2009, I note that the date actually set out on the emails is November 6, 2006. Even though counsel for the Public Body has given evidence only as to the current status of the solicitor, I find that the context provided by the records establishes that she was also a solicitor in 2006.

[para 122] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky* [1980] 1 S.C.R. 821. Speaking for the Court, Dickson J. (as he then was) said:

> … privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[para 123] The first question to consider whether solicitor-client privilege applies to records is whether the records are a communication between a solicitor and a client.

[para 124] I find that portions of the records appear to contain communications between a solicitor and the medical advisor and I am prepared to find, from the context provided by the records, that when the medical advisor communicated with the solicitor, he did so as a representative of the Public Body. However, I note that three emails contained on the bottom of record 545 and the bottom email on record 547 are not communications between the solicitor and the medical advisor. Rather, they are communications between the medical advisor and other employees that the medical advisor decided to forward to the solicitor to assist the solicitor in preparing for the litigation being conducted. However, the top portion of record 545, all of record 546, and the top portion of record 547 contain communications between the solicitor and the medical advisor.

[para 125] I cannot find that the emails that were forwarded to the solicitor amount to communications between a solicitor and client, as it does not appear that the employees involved were aware that their emails would be forwarded to the solicitor, or wrote them for that purpose. Moreover, the medical advisor did not ask the solicitor for advice or an opinion regarding these emails. Instead, context indicates that these emails were forwarded to the solicitor to assist her in preparing for litigation. I will consider whether these emails are subject to litigation privilege below.

[para 126] I find that the communications between the medical advisor and the solicitor (as opposed to the communications between the medical advisor and other employees that were forwarded to the solicitor) were created for the purpose of seeking legal advice. Moreover, I find that there is nothing to suggest that the solicitor or the medical advisor considered the communication to be anything but confidential. I therefore find that the email at the top of record 545, the email on record 546, and the email at the top of record 547 are subject to solicitor-client privilege.

Exercise of discretion

[para 127] Once a public body establishes that records are subject to solicitor-client privilege, withholding them is usually justified for that reason alone. In *Ontario (Public Safety and Security), (supra)*, the Supreme Court of Canada held that the public interest in maintaining solicitor-client privilege is such that it is unnecessary to balance the public interests in withholding records subject to this privilege and those in relation to disclosing them, as the public interest in withholding such records will, in almost all cases, outweigh any interests associated with disclosing them.

> We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in McClure, stressed the categorical nature of the privilege:
>
> > . . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis… Accordingly, we would uphold the Commissioner's decision on the s. 19 claim.

[para 128] As I find that the email at the top of record 545, the email on record 546, and the email at the top of record 547 are subject to solicitor-client privilege, it follows that I find that the Public Body properly exercised its discretion when it withheld this information (see Orders F2007-014, F2010-007, F2010-036).

Is there information in the records that is subject to litigation privilege?

[para 129] The emails the medical advisor forwarded to the solicitor are not communications between a solicitor and a client, but are emails between the medical advisor and other employees. I find that these emails were forwarded by the medical advisor to the solicitor so that the information they contained could be used by the solicitor in preparing for litigation.

[para 130] As stated in Order 96-015, litigation privilege applies to papers and materials created or obtained by the client for a lawyer's use in existing or contemplated litigation, or created by a third party on behalf of the client for a lawyer's use in existing or contemplated litigation.

[para 131] This position was affirmed in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, in which the Supreme Court of Canada explained the difference between solicitor-client privilege and litigation privilege in the following terms:

> Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.
>
> Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

[para 132] Having reviewed the records, I find that the purpose of the medical advisor in providing the email exchanges involving himself and other employees to the solicitor was to assist the solicitor to prepare the Public Body's case for litigation. I therefore find that litigation privilege attached to the three emails appearing at the bottom of record 545 and the email appearing at the bottom of record 547.

[para 133] Unlike solicitor-client privilege, litigation privilege ends once litigation has concluded or expired. In *Blank, supra*, the Supreme Court of Canada found that records that had once been subject to litigation privilege could not be withheld from an applicant once the litigation had concluded or expired.

[para 134] The records to which the Public Body has applied section 27(1)(a) are dated November 2006. I am unable to find any other references to the litigation of which these records were the subject in the records. As discussed above, this may be because the Public Body has not yet conducted an adequate search for responsive records. However, I note that there are no records among the records located by the Public Body that refer to this litigation as a going concern or make reference to it in any way following November 2006. Moreover, over five years have passed since records 545 and 547 were created. In the absence of any evidence to the contrary, I conclude that the litigation that prompted the medical advisor to forward the emails to the solicitor has concluded or expired. I therefore find that the emails appearing on the bottom of record 545 and 547 are no longer subject to litigation privilege.

Conclusion

[para 135] I find that the top of record 545, the email on record 546, and the email at the top of record 547 are subject to solicitor-client privilege and that the Public Body properly exercised its discretion when it withheld this information. However, I find that the remaining information on these records, while once subject to litigation privilege, is no longer privileged. I will therefore order the Public Body to disclose the three emails appearing on the bottom of record 545 and the email appearing at the bottom of record 547.

V. ORDER

[para 136] I make this Order under section 72 of the Act.

[para 137] I order the Public Body to conduct a new search for responsive records that will include its human resources and payroll areas, its legal files and its grievance files, as discussed in the order above.

[para 138] I confirm the decision of the Public Body to withhold information from records 516 and 518.

[para 139] I confirm the decision of the Public Body to withhold the email at the top of record 545, the email on record 546, and the email at the top of record 547.

[para 140] I order the Public Body to disclose all remaining information to the Applicant.

[para 141] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Teresa Cunningham
Adjudicator