ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-17

May 31, 2013

CITY OF CALGARY

Case File Number F5808

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Summary: The Applicant requested records from the City of Calgary (the Public Body) relating to the retaining walls built in Crestmont Phase 3, between the upper and lower lots on Crestridge Way S.W. The Public Body identified responsive records. The Public Body withheld information on the basis of sections 16 (disclosure harmful to third party business interests), 17 (disclosure harmful to personal privacy), 24 (advice from officials), and 27 (privileged information).

The Adjudicator found that section 16 did not apply to the information withheld by the Public Body.

She upheld the decision of the Public Body to withhold the names and other personally identifying information of homeowners under section 17. However, she did not confirm the decision of the Public Body to withhold statements made by its employees under section 17, and ordered it to disclose that information to the Applicant.

The Adjudicator confirmed some of the decisions of the Public Body to withhold information under section 24; however she ordered it to reconsider its decision to withhold the information under section 24.

With the exception of one record, the Adjudicator upheld the decision of the Public Body to withhold information on the basis of solicitor-client privilege. With regard to information that the Public Body withheld under section 27(1)(c), the Adjudicator agreed

that the provision applied. However, she ordered the Public Body to reconsider its decision to withhold information under this provision, as it had not provided reasons for withholding information under this provision.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 3,16, 17, 24, 27, 72; Alberta Rules of Court, Alberta Regulation 124/2010

Authorities Cited: AB: Orders 96-006, 99-018, 99-026, 2000-017, F2002-002, F2004-026, F2005-011, F2007-029, F2008-016, F2008-018, F2008-028, F2008-031, F2009-007, F2009-008, F2009-018, F2009-026, F2009-028, F2010-036, F2011-002, F2011-018, F2012-06, F2012-10, F2013-03, F2013-13; **ON:** Order P-1621

Cases Cited: *Mount Royal University v. Carter***,** 2011 ABQB 28; *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Ontario (Public Safety and Security)*, 2010 SCC 23; *Canada v. Solosky* [1980] 1 S.C.R. 821

I. BACKGROUND

[para 1] On March 21, 2011, the Applicant made a request for access to the City of Calgary (the Public Body). The Applicant requested records relating to the retaining walls built in Crestmont Phase 3, between the upper and lower lots on Crestridge Way S.W.

[para 2] On May 24, 2011, the Public Body responded to the access request. The Public Body denied access to some of the records on the basis of sections 16 and 17 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). Subsequently, the Public Body also applied sections 24 and 27 in order to withhold records.

[para 3] The Applicant requested review by the Commissioner of the Public Body's decision to deny access to some of the information in the records.

[para 4] Homeowners acting collectively as the "Homeowners of Crestridge Way" were identified as affected parties for the inquiry. "The Homeowners of Crestridge Way' was invited to participate at the inquiry; however, this body did not make submissions for the inquiry.

[para 5] The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

II. RECORDS AT ISSUE

[para 6] The records at issues are those records from which the Public Body withheld information under sections 16, 17, 24, and 27 of the FOIP Act.

III. ISSUES

Issue A: Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the information in the records?

Issue B: Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?

Issue C: Did the Public Body properly apply section 24(1)(b) of the Act (consultations or deliberations) to the information in the records?

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

IV. DISCUSSION OF ISSUES

Issue A: Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the information in the records?

[para 7] Section 16 is a mandatory exception to disclosure. It states:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*
> *(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,*
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
> *(iii) result in undue financial loss or gain to any person or organization, or*
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[para 8] The purpose of mandatory exceptions to disclosure for the proprietary information of third parties in access to information legislation is set out in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* at page 313:

> The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information.

[para 9] This statement of the purpose of section 16 has been adopted in Orders F2009-028, F2010-036, F2011-002, F2012-06, and F2012-10 and found to inform the rationale behind the mandatory exception to disclosure created by section 16 of the FOIP Act. In these orders, it was determined that section 16 is intended to protect specific types of proprietary information or "informational assets" of third parties from disclosure, so that businesses may be confident that they can continue to invest in this kind of information, and to encourage businesses to provide this kind of information to government when required.

[para 10] The foregoing interpretation is also consistent with the heading of section 16, "Disclosure harmful to business interests of a third party". The heading of the provision supports the view that the information protected by section 16 is that which would be harmful to business interests if it is disclosed.

[para 11] In Order F2005-011, former Commissioner Work adopted the following approach to section 16 analysis:

> Order F2004-013 held that to qualify for the exception in section 16(1), a record must satisfy the following three-part test:
> Part 1: Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?
> Part 2: Was the information supplied, explicitly or implicitly, in confidence?
> Part 3: Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

I will therefore consider whether the information withheld by the Public Body under section 16 meets the requirements of sections 16(1)(a), (b), and (c) and, as a consequence, falls under section 16(1).

Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

[para 12] The Public Body applied section 16 to withhold information it argues belongs to citizens of Calgary who submitted the information to it. In particular, the Public Body applied section 16 to information submitted by residents of Crestridge Way

regarding retaining walls constructed on their properties. As noted above, the Homeowners of Crestridge Way, to which these citizens belong, did not make submissions for the inquiry. As a result, the only arguments and evidence before me in relation to the information severed by the Public Body, is that provided by the Public Body.

[para 13] The Public Body argues that the records it withheld under section 16 contain the commercial, scientific, or technical information of the third parties who submitted them. It states:

> The Public Body submits that Section 16 of the Act is designed to protect valuable information of a proprietary nature that belongs to a third party.
>
> …
>
> The Public Body applied section 16 of the Act to the third-party records where the Public Body found that the records contained scientific, technical or commercial information.
>
> Citizens of Calgary provide information to the Public Body. Sometimes the information comes in the form of a complaint, sometimes in the form of questions, sometimes it takes the form of seeking assistance. Information can come in many forms: thoughts, ideas, rationales and conclusions expressed by Third Parties contain their own intrinsic value. In this case the Third Parties created information which was to be used for their own purpose. The information has value, it is proprietary and represents the fruits of their labours.
>
> The Public Body submits that the information in this case is representative of commercial information. The information contained therein is a result of the Third Party's personal knowledge of the matters and has not been made public…
>
> The Third Parties have expended time, money and effort in developing their analyses regarding the issues surrounding the retaining wall. The conclusions drawn from this are those of the Third Parties. The Public Body submits that information is representative of the intrinsic value that thoughts and rationale can have, and it is to this information that the Public Body has applied Section 16(1).
>
> Scientific information is information that relates to experiments, principles and procedures derived by scientific method.
>
> "Technical information" has been defined in Order F2000-017 at para. 31 Tab 2 "technical information as information relating to a particular subject, craft or technique".

[para 14] The Applicant argues that the information severed from the records is not proprietary information and that section 16 cannot be applied to it.

Commercial information

[para 15] In Order F2009-028, I reviewed the definitions of "commercial" information and said:

> In Order MO-2496, an order of the Office of the Information and Privacy of Commissioner of Ontario, the Adjudicator considered the meaning of "commercial" and "financial" information as they appear in Ontario's equivalent of the FOIP Act's section 16. The Adjudicator stated:

> These terms have been defined in previous orders of this office as follows:
> …
> Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621]…
> …
>
> In my view, Orders 96-013 and 96-018 of this office, and Order MO-2496 of the Office of the Information and Privacy Commissioner of Ontario, are essentially stating the same thing. "Commercial information" is information belonging to a third party about its buying, selling or exchange of merchandise or services.

[para 16] In Order F2011-018, the Adjudicator reviewed previous decisions which considered "commercial" information within the terms of section 16(1)(a). He said:

> 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)…

[para 17] In addition, to fall within the terms of section 16(1)(a), commercial information must be "of a third party" in the sense that the information must be about the third party's buying, selling, or exchange of merchandise and services.

[para 18] I find that there is no information meeting the requirements of commercial information in the records. From the correspondence in the records, I understand that the third parties are homeowners whose homes are located on Crestridge Way. There is no evidence to support a finding that the third parties engage in commerce, whether acting singly or collectively. Moreover, the records they submitted to the Public Body do not contain information about buying, selling, or exchange of merchandise and services in which the homeowners engage.

[para 19] The Public Body's position that the records contain commercial information is partly based on its view that in some instances the third parties may have expended financial resources in order to create the records. However, as discussed in Order F2009-028 of this office, and in Order P-1621 of the Office of the Ontario Information and Privacy Commissioner, the fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information. Information will only have that character if it refers to the third party's buying, selling, or exchange of merchandise and services.

Scientific or technical information

[para 20] The Public Body also argues that the third party homeowners expended intellectual resources to create the information to which the Public Body has applied section 16. I believe the Public Body refers to the fact that one of the third parties provided his own technical analysis of the retaining wall problems.

[para 21] In Order 2000-017, the former Commissioner defined "scientific information" as "information exhibiting the principles or methods of science". Scientific information for the purposes of section 16(1)(a), then, is information belonging to a third party that exhibits the principles or methods of science. In the context of section 16, which protects business interests in information, scientific information of a third party is proprietary information exhibiting principles or methods of science.

[para 22] The *Canadian Oxford Dictionary* 2nd Edition (Don Mills; Oxford University Press Canada, 2004) offers the following definitions of the word "technical": "1. of or involving the mechanical arts and applied sciences 2. of or relating to a particular subject or craft". Previous decisions of this office differ from one another to a certain extent, given that Order F2008-018 considers technical information to refer to information relating to fields of applied sciences or mechanical arts, while Order F2002-002 holds information to be technical for the purposes of section 16(1)(a) provided it relates to particular subjects or crafts. Reconciling these two orders, technical information, is the proprietary information of a third party regarding its designs, methods, and technology.

[para 23] The Public Body argues that the information in the records referring to scientific or technical principles is the scientific or technical information of the third parties because some of the third parties commissioned scientific or technical reports.

[para 24] In Order F2012-06, I found that references to scientific or technical information in records will not bring information within the terms of section 16(1)(a); rather, the information must belong to the third party and reveal something about how a third party applies science or technology in its business. I said:

> With regard to those records containing references to scientific or technical principles, I find that those references are not to "the scientific or technical information of GChem", within the terms of section 16(1)(a). These records contain a discussion of well data and opinions by a consultant of GChem as to the causes of the presence of methane in a water well. The consultant apparently provided opinions as a service to MGV Energy in some cases, and to well owners in others. However, there is nothing in the records to suggest that the scientific principles referred to in the discussions belong to GChem or are associated with GChem as an organization in any way. The references to scientific or technical principles in these discussions do not refer to the ways GChem applies science or technology in its business, but were incorporated in the discussions as a service to clients.

This approach to the application of section 16(1)(a) was also followed in Order F2010-036.

[para 25] I acknowledge that information that could be termed "scientific" or "technical" is present in the records. I say this because the third party homeowners have

included analysis of soil makeup and drainage, and the composition of the retaining wall, as well as conclusions regarding the adequacy of the retaining walls in the documents they submitted to the Public Body. However, I am unable to find that the information in the records is scientific or technical information in which the third parties have a business interest.

Was the information supplied explicitly, or implicitly, in confidence?

[para 26] As I noted above, the third party homeowners did not make submissions for the inquiry. As a result, I do not have the benefit of their evidence as to the expectations of third parties as to how the information they supplied to the Public Body would be treated, or how they themselves have maintained the confidentiality of information.

[para 27] The Public Body argues:

> The Third Parties, from an objective standpoint, must have a reasonable expectation of confidentiality, consideration should be given to the circumstances surrounding the provision of their information and the steps taken to protect the information. The Public Body has maintained confidentiality of the information contained in the records. It has not provided this information to any individuals outside the Public Body. The information has only been used for the purpose for which it was provided (to answer queries of the Third Parties).
>
> The Third Parties had a reasonable expectation of privacy when the records were provided to the Public Body. Some of the records explicitly indicate that they were provided in confidence to the Public Body. The Public Body submits that on a balance the Third Parties did have a reasonable and objective expectation of privacy.

Was the information supplied in explicit confidence?

[para 28] The records do not contain any statements or assurances regarding confidentiality. The records do not indicate that any limits were imposed on the Public Body's ability to disclose or disseminate the information it received. While the Public Body refers to records that "explicitly indicate that they were provided in confidence to the Public Body" I was unable to identify any such indications.

[para 29] It may be that the Public Body considers the fact that some of the records are marked "without prejudice" as evidence of an intent on the part of third parties to impose terms of confidentiality on the Public Body; however, I do not have confirmation from those supplying the information that this was their intent in doing so. Marking correspondence "without prejudice" means that the information is not an admission for legal purposes.

[para 30] The correspondence marked "without prejudice" (records 33 – 38, 67 – 75) does not refer to any expectation of confidentiality on the part of the third parties, nor do the records that are not marked "without prejudice". The records state the position of the third parties and describe the condition of the retaining walls and properties in the area of the retaining wall.

[para 31] It is possible that the third parties marked their correspondence "without prejudice" to indicate that the information they submitted was confidential; however, without evidence from the third parties as to their purpose in marking their correspondence in this way, I am unable to find that they did so to put the Public Body on notice that the information being supplied was to be kept confidential.

[para 32] As I find that the records were not supplied with an explicit expectation of confidence, I will consider whether the third parties supplied the information to the Public Body with an implicit expectation of confidence.

Was the information supplied with an implicit expectation of confidence?

[para 33] In Order 99-018, former Commissioner Clark adopted a test to determine when information is supplied in implicit confidence for the purposes of section 16(1)(b). He said:

> The Third Party did not present evidence of any explicit statement or agreement with the Public Body concerning the confidentiality of the information in the Records. There is nothing on the face of the Records that would lead one to conclude that the Third Party was supplying the information on the condition that it remain undisclosed.
>
> The issue then turns to the question of whether the information can be said to have been supplied implicitly in confidence. In my view, the word "implicit" denotes a particular state of understanding: a belief in a certain set of facts.
>
> The 1998 Freedom of Information and Protection of Privacy Policy and Practices Manual published by the Information Management and Privacy Branch at Alberta Labour (now Municipal Affairs) states, at page 64:
>
> > Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement or other physical evidence of the understanding that the information will be kept confidential. In such cases, all relevant facts and circumstances need to be examined to determine whether or not there is an understanding of confidentiality.
>
> In Ontario Order M-169, Inquiry Officer Holly Big Canoe made the following comments with respect to the issue of confidentiality in the equivalent of section 15(1) found in the *Municipal Freedom of Information and Protection of Privacy Act* of Ontario:
>
> > In regards to whether the information was supplied in confidence, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.
>
> In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

> (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
> (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization.
> (3) Not otherwise disclosed or available from sources to which the public has access.
> (4) Prepared for a purpose which would not entail disclosure.
>
> Here, the Public Body says there was no understanding of confidentiality. Other than stating its expectations that the Records would be held in confidence, the Third Party has not provided evidence in support of this assertion. I find that the Third Party has not pointed to any particular circumstance or facts that would give rise to a reasonable expectation that the information was communicated on the understanding that it was supplied, explicitly or implicitly, in confidence.

[para 34] Order 99-018 addressed a situation in which a third party had supplied information to a public body without stating expressly that the information had been supplied in confidence. However, the third party argued that it had supplied the information at issue with an implicit understanding that it would be held in confidence. The former Commissioner considered whether the third party had established that it had objectively reasonable grounds for its expectation that the information it had supplied would be kept confidential, even though it had not expressly stated that it was supplying information in confidence. He determined that the third party in that case had not established that it had communicated its expectations that the information it had submitted was supplied explicitly or implicitly in confidence and that it was not objectively reasonable for the third party to expect that the information would be held in confidence. He decided that making a determination as to whether information has been supplied in confidence, or not, will depend on consideration of the four factors reproduced above.

[para 35] In the present case, there is no evidence, other than the evidence of the records, as to the basis on which the records were supplied to the Public Body. I am unable to conclude, based on the evidence before me, that conditions of confidentiality were implied.

[para 36] While I have the evidence of the Public Body that it has not disseminated the information supplied by the third parties, I am not able to find that the homeowners themselves have protected the information from disclosure and have not disseminated the information itself, as there is no evidence on these points. I am also unable to find that the purpose of the third parties in preparing the information was one that would not entail disclosure. It appears from some of the records that information appearing in the homeowners' correspondence was discussed at meetings taking place at the neighbourhood community league.

[para 37] For these reasons, I find that the information submitted by the third party homeowners has not been established as having been supplied in confidence.

Would disclosure of the information be reasonably expected to result in one of the harms set out in section 16(1)(c)?

[para 38] The Public Body argues:

> The Public Body submits that the outcomes listed in section 16(1)(c) are not exhaustive. The Public Body submits that disclosure of the information contained in the records to which it applied Section 16, as an exception to disclosure, would result in financial harm to the Third Parties. The information contained therein forms the basis of the lawsuit instituted by the Third Parties and its disclosure would impact the Third Parties' negotiating position in that lawsuit.

[para 39] I find that disclosure of the information at issue cannot reasonably be expected to bring about or result in one of the outcomes in section 16(1)(c) for the reasons that follow.

[para 40] Section 16(1)(c), reproduced above, describes the harms that must reasonably be expected to result from disclosure of information before section 16 can be said to apply. Although the Public Body argues that section 16(1)(c) is not intended to be exhaustive, its interpretation is not supported by the language of the provision. Section 16(1)(c) is not drafted so as to *include* other similar harms; rather, it contains a finite list of harmful outcomes. As a result, it is not open to me to find that section 16(1)(c) is met on the basis of harms that parties anticipate will result from disclosure, if those harms are not enumerated in section 16(1)(c). Section 16(1)(c) lists only four potential harms arising from disclosure that section 16 is intended to protect against. To qualify, disclosure of information meeting the requirements of section 16(1)(a) and (b) must be reasonably expected to result in the following:

> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
> *(iii) result in undue financial loss or gain to any person or organization, or*
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

The harm the Public Body argues may result from disclosure is that the third parties' position in litigation may be weakened by disclosure of the information in the records, which the Public Body considers could result in undue financial loss, which is a harm contemplated by section 16(1)(c) (iii). Alternatively, it may be that the Public Body considers harm to position in litigation is harm to competitive position for the purposes of section 16(1)(c)(i).

[para 41] In Order F2009-007, I rejected the argument that harm to a third party's position in litigation falls within the terms of section 16(1)(c)(i). I said:

> In Order PO 2490, a decision of an Adjudicator of the Office of the Information and Privacy Commissioner of Ontario, the Adjudicator decided that "competitive position" in section 17 of the Freedom of Information and Protection of Privacy Act of Ontario, which is equivalent to

section 16 of the FOIP Act, does not include a litigant's competitive position, as the provision is intended to protection confidential informational assets of businesses. He said:

> In my opinion, the reference to "competitive position" in section 17(1)(a) of the Act was not intended to include a litigant's competitive position in civil litigation. As noted above, previous orders of this office have found that section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions, and the Divisional Court endorsed this view in Boeing Co. v. Ontario (Ministry of Economic Development and Trade), [2005] O.J. No. 2851 (Div. Ct.). In my view, this is aimed at protecting such assets in the competitive context of the marketplace, rather than before the courts…
>
> The interpretation that "competitive position" does not include the position of the parties to civil litigation is further supported by the legislative history of section 17. The Williams Commission report entitled Public Government for Private People (Toronto: Queen's Printer, 1980) (the Williams Commission report) described the purpose of the third party information exemption found in section 17 of the Act and made the following comment:
>
> ... It is accepted that a broad exemption for all information relating to businesses would be both unnecessary and undesirable .... Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be preserved. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as is practicable, form part of the public record.
> ...
> The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information.
> It is clear from a review of the discussion in the Williams Commission report that the intent of the provision was to protect the information assets of business that might be exploited by competitors in the marketplace, rather than other litigants.
> Previous orders of this office have consistently adopted this view. For example, in Order PO-2293, former Assistant Commissioner Tom Mitchinson stated:
> Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the Act is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO- 2184, and MO-1706].
>
> Even if I had concluded otherwise, and found that litigation qualified as a suitable venue for "competition" in the context of section 17(1)(a), I would not have found that the appellant had established this harm in the present circumstances. In my view, the appellant's representations on this point do not explain how its position would be harmed by disclosure. Beyond providing a basic description of the litigation, and saying that the records "in part respond" to the requester's claim, no explanation is provided of how disclosure of these particular records could reasonably be expected to harm the appellant's competitive position. In addition, such a reasonable expectation is not self-evident from even a careful review of their contents…

I agree with the reasoning of the Adjudicator in that order, and find that harm to competitive or negotiating position within the context of section 16 refers to harm to competitive or negotiating

> position in commercial or business transactions, as opposed to litigation. Further, in the case before me, I have been told that Sundance is involved in litigation, but I have not been told how the information in the records at issue could be expected to harm Sundance's position in that litigation, nor is the likelihood of harm to its position in litigation resulting from disclosure evident from the contents of the records. Therefore, even if I were to consider section 16 as applying to litigation, I would be unable to find that Sundance had established harm to its negotiating position in litigation.

[para 42] The Public Body's argument essentially rests on the position that the third party homeowners' position in litigation would be made vulnerable by disclosure of the information in the records. Any financial loss would result from this vulnerability, which is not a harm recognized by section 16(1)(c). As in Order F2009-007, I reject the argument that harm in litigation is recognized by section 16(1)(c). Rather, the intent of this provision is to protect an organization from harm in the marketplace resulting from disclosure of its trade secrets or similar types of information.

[para 43] In any event, there is no evidence before me to support the position that disclosure of the information to which the Public Body applied section 16 would be in any way harmful to the cases of third parties, such as would be the case if an admission against the homeowners' interests were among the information to which the Public Body applied section 16, and assuming such information fell within the terms of section 16(1)(c). Moreover, there is no evidence to support finding that the third party homeowners would be exposed to financial loss as a result of disclosure.

Conclusion

[para 44] I find that section 16 does not apply to the records to which the Public Body applied this provision. For that reason, I will order the Public Body to disclose the information it withheld under this provision.

Issue B: Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?

[para 45] Section 17 requires a public body to withhold the personal information of an identifiable individual when it would be an unreasonable invasion of the individual's personal privacy to disclose his or her personal information.

[para 46] Section 1(n) of the FOIP Act defines personal information. It states:

> *1 In this Act,*
>
> > *(n) "personal information" means recorded information about an identifiable individual, including*
> >
> > > *(i) the individual's name, home or business address or home or business telephone number,*
> > > *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*

> *(iii) the individual's age, sex, marital status or family status,*
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
> *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
> *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
> *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
> *(viii) anyone else's opinions about the individual, and*
> *(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 47] Information is personal information within the terms of the FOIP Act if it is recorded and is about an identifiable individual. The Public Body withheld the names and contact information of the individual homeowners who contacted the city regarding their retaining walls on the basis that this information is personal information. I agree that this information is personal information within the terms of section 1(n)(i) of the FOIP Act.

[para 48] However, the Public Body has also withheld statements made by its employees in the course of their employment that do not contain the personally identifying information of individuals. This kind of severing appears on records 89, 90,178, 179, 188, 192, 208, 209, 354, 370, 396, 434, 468, 469, and 470.

[para 49] The Applicant questions the manner in which the Public Body has severed personal information from the records and states:

> If there is any information in the Records which would be exempt by section 17 of the Act, the Applicant submits that such information should be severed from the Records and the remainder of the Records be provided to the Applicant, as requested.

[para 50] I agree with the Applicant that where personally identifying information, such as names of individuals, can be severed, the remaining information must be provided to an applicant under section 6(2) of the FOIP Act.

[para 51] In addition to severing the names and identifiers of homeowners, the Public Body has severed statements written by its employees under section 17, although it provided the names and identifying information of the employees who wrote the statements.

[para 52] I will now address whether the employee statements to which the Public Body applied section 17 is information to which section 17 can apply.

[para 53] In Order F2009-026, I said:

> If information [contained in the record in issue] is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. In Order 99-032, the former Commissioner noted:
>
> > The Act applies to public bodies. However public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.
>
> In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which Section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of Section 17 may apply to the information. I must therefore consider whether the information about employees [in] the records of issue is about them acting on behalf of the public body, or is information conveying something personal about the employees.

[para 54] In *Mount Royal University v. Carter***,** 2011 ABQB 28, the Court denied Mount Royal University's application for judicial review, finding the above analysis reasonable. I will therefore apply the approach set out in Orders 99-026 and F2009-026 and consider whether the information in the records at issue is about the Third Party as a representative of the Public Body, in which case section 17 would not apply, or conveys something about the Third Party as an identifiable individual, in which case, the provisions of section 17 may apply.

[para 55] The Public Body made the following argument in its submission:

> The Public Body submits that personal views and opinions expressed by individuals (especially where those individuals are not experts in the subject matter) also constitutes personal information to which the Public Body applied Section 17 of the Act.

[para 56] The Public Body does not explain to which records this argument is intended to apply. However, I note that the records in which statements made by its employees have been severed under section 17 are records 89, 90,178, 179, 188, 192, 208, 209, 354, 370, 396, 434, 468, 469, and 470. I understand from its submissions, that the Public Body considers statements made by its employees to be their personal information if it considers them to lack expertise on the subject regarding which they make statements, or possibly, that it does not agree with their statements. I infer that it applied section 17 to withhold the statements appearing in these records on that basis.

[para 57] I have reviewed the statements of employees to which the Public Body has applied section 17, and find that like the body of the text in which they appear, they were created as part of the assigned duties of the employees. There is nothing in the records to suggest that the employees stepped out of their area of authority or expertise when they made the statements. There is also nothing to suggest that employees were expressing their personal views, or that they were expressing anything other than what they were authorized and expected to express by the Public Body in the course of their duties. I find that there is no personal dimension to the information in the statements of the employees the Public Body has severed from records 89, 90,178, 179, 188, 192, 208, 209, 354, 370,

396, 434, 468, 469, and 470. As a result, I find that this information is not personal information to which section 17 can be applied.

[para 58] I note that the severing done in relation to the application of section 17 to the statements of the employees was done in an unusual way, given that the statements were removed and the names and identifying information of the employees was provided. However, the manner in which the severing was done in relation to the statements of the employees is irrelevant, given my conclusion that the information is not personal information and should not have been severed at all under section 17.

Does section 17(1) require the Public Body to withhold the personal information it severed?

[para 59] I turn now to the names and identifying personal information of the individual homeowners that the Public Body severed from the records under section 17. Section 17 states in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy…*
>
> …
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> …
>
> *(e.1) the personal information consists of an individual's bank account information or credit card information,*
>
> …
>
> *(g) the personal information consists of the third party's name when*
> *(i) it appears with other personal information about the third party, or*
> *(ii) the disclosure of the name itself would reveal personal information about the third party…*
>
> …
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny*

> *(b) the disclosure is likely to promote public health and safety or the protection of the environment,*
> *(c) the personal information is relevant to a fair determination of the applicant's rights,*
> *(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
> *(e) the third party will be exposed unfairly to financial or other harm,*
> *(f) the personal information has been supplied in confidence,*
> *(g) the personal information is likely to be inaccurate or unreliable,*
> *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
> *(i) the personal information was originally provided by the applicant.*

[para 60] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 61] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and other relevant circumstances must be considered.

[para 62] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

> In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. 16(5) and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4).
>
> In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) is [*sic*] met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4).

[para 63] I am unable to identify any relevant considerations weighing in favor of disclosure of the names of the individual homeowners and their contact information from the records.

Conclusion

[para 64] To reiterate, I find that the Public Body properly severed the names and contact information of individual homeowners from the records under section 17. However, I find that the Public Body improperly applied section 17 to sever statements made by its employees from records 89, 90,178, 179, 188, 192, 208, 209, 354, 370, 396, 434, 468, 469, and 470. I will therefore order the Public Body to disclose the information it withheld from these records under section 17(1).

Issue C: Did the Public Body properly apply section 24(1)(b) of the Act (consultations or deliberations) to the information in the records?

[para 65] Section 24 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 66] In Order 96-006, former Commissioner Clark considered what "consultations and deliberations" means 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 67] As I noted in Order F2012-10, which was cited by the Public Body in its submissions, 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, the *Canadian Oxford Dictionary* defines the verb "consult" as "to seek information or advice from", or "to refer to a person for advice". It defines a consultation as "an act or instance of consulting". 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". When a decision maker within the terms of section 24(1)(b) seeks advice from an advisor, the advice given will be "developed for a public body" within the terms of section 24(1)(a), regardless of whether the advisor is an employee of the public body or whether providing the advice is part of the employee's area of responsibility or "job description". Advice provided to a decision maker at the decision maker's request will reveal both advice within the terms of section 24(1)(a), and a deliberation under section 24(1)(b), given that the advice will reveal the actions a decision maker is considering taking.

[para 68] 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 69] In Order 96-006, former Commissioner Clark distinguished information merely intended to provide facts from advice, consultations and deliberations. He said:

> In passing, I want to note that the equivalent section of the British Columbia Act (section 13) specifically states that "factual material" (among other things) cannot be withheld as "advice and recommendations". As I stated, I fully appreciate that our section differs significantly from that of our neighbours. However, I cannot accept that the bare recitation of facts, without anything further, constitutes either "advice etc" under section 23(1)(a) or "consultations or deliberations" under section 23(1)(b).

[para 70] The Public Body argues that section 24(1)(b) is intended to encompass *all* information gathered by a public body as part of a deliberative process. It states:

> The Public Body submits that deliberations and consultations, envisioned under Section 24(1)(b) of the Act, refers to the deliberative or consultative process undertaken by the Public Body. Consequently, information assembled for the specific purpose of forming the basis for a deliberation or consultations is excluded along with information that forms part of the deliberation itself. Section 24(1)(b) protects the process until a decision has been finally made.
>
> …
>
> The ultimate decision and actions undertaken by the Public Body have been released to the Applicant.
>
> Since deliberations and consultations cannot occur in a vacuum, the Public Body submits that all information that "could reasonably be expected to reveal" the process of consultations and deliberations "involving officers or employees" of the Public Body may be exempted from disclosure. This includes all information that is created, and necessary for a deliberation or consultation to occur.
>
> The Public Body further submits that all information that forms part of the process of deliberation and consultation may be exempted from disclosure because it reveals the path that leads to a decision. Section 24(1)(b) protects the information generated, and considered, until a decision results from this process.
>
> In order to coordinate a response to the concerns raised by the Third Parties in this inquiry the Public Body needed to ascertain the issues and formulate its response. The Public Body developed information, in order to identify issues and facilitate discussion between the business units, as part of the deliberative process.
>
> Deliberations cannot occur in a vacuum. Draft documents were generated as part of the process of consultations and deliberations involving the officers and employees of the Public Body. The drafts provided the foundation upon which recommendations regarding the Public Body's position could be made.

[para 71] The Public Body's interpretation of section 24(1)(b) is at once both broader and more restrictive than that adopted in orders of this office.

[para 72] The Public Body suggests that section 24(1)(b) is intended to protect the decision making process until a decision is reached. Such an interpretation is narrower than that adopted in orders of this office, which hold that information such as advice, or consultations or deliberations may continue to fall under section 24(1) after the decision is made. (As the Public Body has withheld information under section 24(1)(b) even though it acknowledges that it has made its decision, it may not have intended to suggest that section 24(1)(b) protects information only until a decision is made.) Although section 24(1)(a) or (b) may continue to apply to advice, consultations, or deliberations once the decision is made, it may not be appropriate to exercise discretion to withhold this information if the substance of the advice, consultations or deliberations is inferable from the actions taken by a public body or the decision that was made.

[para 73] The Public Body suggests that all information used in the course of the deliberative process is subject to section 24(1)(b). This interpretation is broader than that adopted in previous orders of this office, given that this interpretation would include facts that were gathered for use in making a decision but did not otherwise reveal the substance of advice, proposals, recommendations, analyses or policy options within the terms of

section 24(1)(a), or consultations or deliberations within the terms of section 24(1)(b). Moreover, the Public Body's interpretation would have the effect of rendering section 24(1)(a) nugatory, given that the kinds of information falling within the scope of this provision are used to make decisions, and would be withheld under section 24(1)(b) by the Public Body following the interpretation it has stated to me. While I agree that there can be overlap between the provisions, as discussed above, there are also situations where section 24(1)(a) will apply, and 24(1)(b) will not apply. For example, if an employee prepares advice for a decision maker that was not sought by the decision maker, or if advice is prepared for the decision maker, but, in the end, is not provided to the decision maker, the advice may not reveal consultations or deliberations.

[para 74] In Order F2009-008, the Adjudicator reviewed previous decisions of this office that consider the application of section 24(1)(a) or (b) of the FOIP Act, and noted that these provisions do not apply to information created for the sole purpose of providing background facts or to information that reveals only the subject matter of advice, but not the advice itself. He said:

> Section 24(1)(a) does not apply to the bare recitation of facts or summaries of information; facts may only be withheld if they are sufficiently interwoven with other advice, proposals, recommendations, analyses or policy options 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 section 24(1)(b) (Order 96-006 at p. 10 or para. 50; Order F2004-026 at para. 78). Further, sections 24(1)(a) and (b) generally do not apply to information that merely reveals that advice, etc. was sought or given on a particular topic, or that consultations/deliberations on a particular topic took place (Order F2004-026 at para. 71).
>
> Given the foregoing principles, I considered whether the three to four introductory sentences that were withheld in each of Document 2 (memorandum), Document 3 (minutes) and Document 5 (e-mail) did not fall under section 24(1), on the basis that they merely reveal the topic under discussion or background factual information. I find that they reveal more than merely the topic under discussion, and that the background information is sufficiently interwoven with the advice, etc. or the consultations/deliberations, so as to fall under section 24(1).

[para 75] From the foregoing, I conclude that if information reveals the substance of advice, proposals, recommendations, analyses, policy options, consultations, or deliberations, then the information is subject to sections 24(1)(a) or (b); if the information reveals only background facts, or the topic on which advice was sought or given, without revealing anything substantive, then the information is not subject to section 24(1)(a) or (b).

[para 76] In Order F2012-06, I found that information such as instructions or directions to employees cannot be withheld under section 24(1). I said:

> That a draft may differ from a final version of a report does not transform the information in a draft into advice, proposals, recommendations, analyses, policy options, consultations or deliberations: information must have that character to begin with. I acknowledge that the differences between a draft version and a final version may allow a reader to determine what was changed and to speculate about the reasons for the changes. However, it does not follow from this possibility that any changes that were made are the result of information subject to section 24(1)(a) or (b), or that such information would be revealed by disclosing the draft

> version. Further, in many instances, where the records indicate the reasons for changes in the drafts, such as in emails discussing the reports, the changes appear to be the result of an instruction from the recipient of the report to the contracted creator of the report, rather than advice. Instructions to employees cannot be withheld under section 24(1)(a) or (b), not only because they are not information meeting the requirements of these provisions, but because section 24(2)(f) specifically prohibits applying section 24 to information of this kind.

Directing or instructing employees to perform tasks may result in the creation of information that will then be used to make a decision; however directions or instructions are not themselves subject to section 24(1), and are specifically excluded from its application by section 24(2)(f).

[para 77] I will discuss the records to which the Public Body applied section 24(1)(b), document by document, below. However, at this point, I note that the Public Body has applied section 24(1)(b) to information to which section 24(1)(a) would apply, and not section 24(1)(b).

[para 78] I also note that the Public Body refers at paragraph 39 of its submissions to the information it withheld as being advice in some instances:

> The Public Body submits that the records to which it applied Section 24 were created by individuals within the Public Body who were tasked with the responsibility of providing advice or direction from the perspective of their business unit. These deliberations, consultations and advice [were] then relayed to decision makers within the Public Body and formed part of the deliberative / consultative process to determine a course of action.

[para 79] Advice may be withheld under section 24(1)(a), but it cannot necessarily be withheld under section 24(1)(b). Moreover, the Public Body states that it withheld advice prepared for the use of decision makers who then relied on the advice to determine a course of action. If there is information of this kind in the records, then this information would be subject to section 24(1)(a), even though the Public Body has relied on section 24(1)(b) in its submissions.

[para 80] I also note that the affidavit of the executive assistant states:

> As part of my position, and in order to properly address an issue, I would gather advice, information, and recommendations from various business units within the Public Body through a consultative process.
>
> I would summarize the advice received, including any recommendations, and provide my own recommendations to a decision-maker so that he or she could determine an appropriate course of action. In general, this is the role of the Executive Assistants employed by the Public Body.

This passage also supports the position that the Public Body applied section 24(1)(b) to advice and recommendations.

[para 81] I note that there are some records which document that the affiant forwarded emails to others, or passed on advice to other business areas. However, this cannot be said of all the records to which the Public Body applied section 24(1)(b). As a

result, it is not always clear from evidence of the Public Body to what extent the advice or recommendations appearing in the records were provided to an individual responsible for making a decision. However, that does mean that such information is not advice developed for the Public Body under section 24(1)(a).

[para 82] In Order F2008-016, the Adjudicator was faced with a situation where a Public Body withheld information under one provision, but its arguments indicated that it had withheld information for reasons consistent with another discretionary exception to disclosure under the FOIP Act. She said:

> Although sections 27(1)(b) and 27(1)(c) were not explicitly referred to on the responsive documents or in the EPS' submissions, I find that the substance of the EPS submissions allows me to find that it took into consideration all appropriate elements of sections 27(1) (b) and 27(1)(c) when severing the records, even though the EPS ultimately decided to sever under a provision of the Act that was not correct. Since the principle the EPS used to withhold these records (the confidential seeking of advice or consultations with lawyers employed at the Ministry of Justice) fits within section 27(1)(c), I see no reason to deprive the EPS of its ability to apply section 27(1)(c) at this point.

Similarly, while the Public Body refers only to section 24(1)(b) in its index, arguments, and severing, its arguments and severing indicate that it applied section 24(1)(b) to information that is subject to section 24(1)(a).

[para 83] Each exception to disclosure recognizes that in some circumstances a public interest in withholding the information may outweigh the right of access. Section 24(1)(a) recognizes that there is a public interest in protecting a public body's ability to obtain frank advice and recommendations. I see no reason to deprive the Public Body from the protection created by section 24(1)(a), simply because it refers only to section 24(1)(b), when its reasons for applying section 24(1)(b) would support the application of section 24(1)(a).

[para 84] I will now review the Public Body's decisions to sever information under section 24(1)(b) on a record by record basis. I will consider whether section 24(1)(b) applies. If it does, I will then consider whether the Public Body has established that it properly exercised its discretion to withhold the information. I will also consider whether the Public Body has withheld information meeting the requirements of section 24(1)(a), and not (b) from the records, as it appears that the Public Body has withheld information under section 24(1)(b), for reasons that would support withholding information under section 24(1)(a).

[para 85] I considered asking the parties questions regarding the application of section 24(1)(a) to information in the records. However, on review of the submissions of both parties, I am unable to say that their arguments would be any different. Both parties have essentially made arguments that address both sections 24(1)(a) or (b). The Public Body, as noted above, argues that the information it withheld consists of advice and recommendations. The Applicant argues that the Public Body did not engage in a decision making process and argues that section 24(1)(b) does not apply for that reason.

If accepted, this argument would be a complete response in relation to section 24(1)(a) as well.

Records 83 – 84

[para 86] Records 83 – 84 contain an email written by the Manager, Urban Development. The Public Body severed a sentence appearing on the bottom of record 83 and which continues to the top of record 84. The Public Body also severed the email's concluding sentence from record 84.

[para 87] The first part of the email, which was not withheld from the Applicant, states:

> I wanted to fill you in on the meeting with Qualico. [Names of Qualico representatives] attend for Qualico. They said that they will not be doing any repairs on the retaining wall as the damage is due to the uphill landowners and the construction of the sandstone walls.
>
> We said that we have been contacted by the land owners and will be following up on the issue. [A Safety Code Officer] will be pulling the LU/OP and SB files to see what our conditions were. We let Qualico know what the requirements are for BPs and DP concerning retaining walls. **Can you pull the titles for the 2 uphill homes who have the sandstone walls to determine if DPs or BPs were issued on them.** BR will determine if orders need to be issued for the repair of the walls and if so they will be issued to the landowners. [emphasis in original]

[para 88] The sentence withheld by the Public Body, which appears at the bottom of record 83 and continues to the top of record 84, serves to explain the reasons for the direction to the email's recipient appearing in bold in the middle of the email. The severed sentence does not appear to deliberate a decision, or to consult others regarding it; rather, the sentence provides the author's reasons for the statement made in bold in the email and to explain to the recipient of the email what has been decided. The severed information is consistent with information intended to "fill" the recipient "in on the meeting", which is the purpose of the email, as indicated by the email's first sentence. There is nothing in the email to suggest that the information was intended as advice within the terms of section 24(1)(a), or as a means of seeking advice regarding a decision or to deliberate one, within the terms of section 24(1)(b).

[para 89] The Public Body did not withhold the following sentences from the second paragraph of the email, which appears on record 84:

> Qualico says they are in the process of applying for BPs for all the walls in Crestmont that are greater than 1m in height.
>
> We need to get all the information from the files so that we can move forward…

[para 90] The sentence withheld from the final paragraph explains the reasoning for the requirement to "get all the information from the files". I am unable to find that this last statement amounts to a deliberation by the author of the email, or as a consultation as to the views of the recipient of the email. The language used in the sentence, and the context in which it appears, argue against such a finding. Instead, the severed sentence is

consistent with an explanation of the reasons for directing employees to gather information. I therefore find that the severed sentence does not contain information falling within section 24(1)(b), or any other provision of section 24(1).

[para 91] I find that section 24(1) does not apply to the information withheld from records 83 – 84.

Record 85

[para 92] Record 85 contains a list of questions, directions, and statements. There are also handwritten notes on the record. The Public Body severed this record in its entirety. The affidavit of a Safety Codes Officer of the Public Body provides background regarding record 85. This affidavit states:

> Pages 85, 311, and 509 are questions that were developed for a meeting between the various Business Units. The Public Body needed to coordinate a response to the issues and concerns raised by the Third Parties.
>
> The questions were developed in order to facilitate discussions between the various Business Units. This was necessary in order to propose a course of action to the Public Body's decision makers so that the Public Body could respond to the homeowners. Handwritten notes from the internal meeting are found on pages 85 and 311.

[para 93] I accept that record 85 was prepared to facilitate discussion. However, it is unclear from the evidence before me, that the information in this record, or the discussions that this document was intended to facilitate, were ever presented to a decision maker. It may be the case that questions informed the draft response and the final response to the homeowners which appear later in the records. It is not readily apparent from record 85 whether the questions contained in record 85 were developed by a decision maker, in which case they might reflect questions from the decision maker as to what needed to be decided and what should be decided, or were developed by someone else to facilitate a discussion that would then be used to propose a course of action. If it is the former, then the questions would reveal consultations within the terms of section 24(1)(b), if it is the latter, then the information would not necessarily be subject to either section 24(1)(a) or (b), although it could be, depending on the information revealed by the questions.

[para 94] However, as the Public Body took the steps referred to in the questions, and addressed some of the issues raised by the questions in its response to the affected homeowners, I accept that the questions and statements reveal advice as to a course of action that the Public Body was considering. The information may therefore be viewed as falling under section 24(1)(a). The handwritten notes on the record can also be construed as advice within the terms of section 24(1)(a).

[para 95] While the information in record 85 may be viewed as falling under section 24(1)(a), it is unclear to me why the Public Body exercised discretion to withhold this record in its entirety. A great deal of the information in this record appears to have been disclosed in the Public Body's meetings and response to the homeowners, or through the

release of other records. Alternatively, some of it would be inferable through the actions of the Public Body, in the sense that when a public body takes an action, it can be inferred that it received advice to do so. I will discuss this issue more extensively when I address exercise of discretion.

Record 93

[para 96] Record 93 is a portion of an email sent by an executive assistant from the Office of the Director, Development and Building Approvals to an alderman who represents the ward in which the third party homeowners reside. The Public Body has disclosed portions of this email where the email contains a factual description of a meeting that took place between the author of the email and the Qualico representatives.

[para 97] The Public Body withheld a portion of this email that discusses the implications of information obtained from meeting with Qualico. This information, if it were developed for the purpose of assisting or guiding someone responsible for making a decision on behalf of the Public Body to make that decision, would be consistent with analysis within the terms of section 24(1)(a).

[para 98] The alderman, to whom the email is addressed, would have no ability or authority to make a decision or implement an action regarding the retaining wall. The email appears to have been provided to him for the sole purpose of keeping him informed regarding an issue in the ward he represents.

[para 99] There is nothing in the email to indicate that the information severed from the email was to be put to the City Council for the use of all the alderpersons in making decisions or was intended for anyone else to use in making a decision. Instead, the email, including the information severed from the email, is consistent with information intended to inform the alderman regarding an issue that had arisen in his ward, and to assist him to address the concerns of constituents.

[para 100] If the severed paragraph was intended to advise someone else who was responsible for making a decision, or was, alternatively, a consultation or deliberation of someone responsible for making a decision, the email does not indicate this. I am unable to find that the severed information was intended to advise a course of action, or to consult or deliberate one.

[para 101] I find that the information severed from record 93 is not subject to section 24(1)(a) or (b).

Records 137 – 138

[para 102] Record 137 contains three emails. The first email is from one employee of the Public Body to another. The purpose of the email is to forward a copy of a notification that was being sent to homeowners. The Public Body did not withhold this email.

[para 103] The second email is from the recipient of the first email, and appears intended to provide views regarding the notification. The Public Body did not withhold this email.

[para 104] The third email contains the draft document that was provided to the author of the second email on record 137 for comment. The heading of the email indicates that the author of the notification was seeking feedback from the author of the first and second emails regarding the terms of the notification. He provided a draft for the author of the second email to review. The Public Body did not withhold the subject line of the email, but only the contents of the draft letter. The draft letter carries over into record 138.

[para 105] I find that disclosing the third email, which was withheld by the Public Body, would reveal consultations and deliberations of the author of the third email, who was clearly considering responding to issues in a certain way and seeking advice regarding the contents of the response.

[para 106] I find that the information in the third email that was withheld by the Public Body is consistent with a consultation or deliberation under section 24(1)(b).

Record 139

[para 107] Record 139 is an email written to an alderman by the author of the notification referred to in records 137 and 138. The Public Body withheld a portion of the email under section 24(1)(b). The purpose of the email, as indicated by the information that the Public Body did disclose from record 139, is to inform the alderman of steps that have been taken or are being taken. At no point in the email does the author of the email seek advice from the alderman or discuss reasons for or against a decision he is responsible for making with the alderman.

[para 108] I find that section 139 does not contain information that would reveal consultations or deliberations within the terms of section 24(1)(b).

Record 142

[para 109] Record 142 contains two emails. The first email contains a request to a colleague to review the text of a draft letter. The second email contains an email from a homeowner. The draft letter was created to respond to the homeowner. The Public Body withheld the draft letter under section 24(1)(b).

[para 110] The draft response can be construed as revealing a course of action that an employee of the Public Body was considering taking in responding to issues that had arisen. I therefore find that this information is a deliberation within the terms of section 24(1)(b).

Records 188 and 189

[para 111] Record 188 contains two emails. The Public Body withheld a portion of a sentence from the first email under both sections 17 and 24(1)(b). The first email was created by a development servicing coordinator and written to a drainage control technician. A number of employees, including the executive assistant who swore the affidavit, were copied on this email. The second email was created by a "drainage control technician" employed by the Public Body and this email continues onto record 189. The Public Body severed all but the first sentence from the body of the second email.

[para 112] Record 189 contains the continuation of the second email on record 188 and another email. The second email was created by the "development servicing coordinator" and appears intended to have been created for the purpose of forwarding documents to the drainage control technician. The Public Body also severed this email.

[para 113] The sentence severed from the first email from record 188 contains an opinion as to how a decision might be perceived should it be made. I find that information severed from this sentence is consistent with analysis or advice within the terms of section 24(1)(a), and the act of copying the email to other employees, including the issues management area of the Public Body, indicates that the intent of the author was to communicate the analysis or advice to those responsible for making decisions on the issue.

[para 114] The second email on record 188 was created by the drainage control technician. It starts on record 188 and concludes on record 189, and contains some information that is consistent with analysis, within the terms of section 24(1)(a), given that it comments on the potential outcomes of actions that could be taken. Some of the analysis refers to the Public Body's policies; other analysis is technical in nature and discusses drainage principles. The email also contains factual information, such as references to actions that have been taken by the Public Body.

[para 115] In Order F2012-06, I rejected the view that scientific or technical analysis can be withheld under section 24(1)(a). I said:

> However, in my view, the scientific analysis or evaluation of physical data by the application of professional knowledge reaches what are in essence conclusions about physical facts, which in my view are not advice within the terms of sections 24(1)(a) and (b). Even if the conclusions might vary based on the knowledge of the analyst, they are still conclusions about physical facts. In my view, the "analysis" contemplated by section 24(1)(a) refers to the analysis of options or potential courses of action or decisions that have a subjective or opinion element, not to the application of scientific principles to physical data.
>
> I am supported in this view by a decision of the Ontario Information and Privacy Commissioner's office, which was upheld by the Ontario Divisional Court in Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner) [2004] O.J. No. 224 [affirmed [2005] O.J. No. 4047 (C.A.), application for leave to appeal dismissed, [2005] S.C.C.A.] . In Order PO-1993, the Adjudicator considered whether technical and objective evaluations of proposals made by experts applying their professional expertise constituted "advice or recommendations". In concluding that it did not, the Adjudicator stated:

> As I noted above, the purpose of the exemption in section 13(1) is to protect the free flow of advice or recommendations within the deliberative process. The importance of protecting this type of information is to ensure that employees do not feel constrained by outside pressures in exploring all possible issues and approaches to an issue in the context of making recommendations or providing advice within the deliberative process of government decision-making and policy-making. Ultimately, it is the recipient of the advice or recommendations who will make the decision and thus be held accountable for it.
>
> Support for this approach to the interpretation of section 13(1) can be found in Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) at p. 292:
>
> > A second point concerns the status of material that does not offer specific advice or recommendations, but goes beyond mere reportage to engage in analytical discussion of the factual material or assess various options relating to a specific factual situation. In our view, analytical or evaluative materials of this kind do not raise the same kinds of concerns as do recommendations. Such materials are not exempt from access under the U.S. act, and it appears to have been the opinion of the federal Canadian government that the reference to "advice and recommendations" in Bill C-15 would not apply to material of this kind.
> >
> > Similarly, the U.S. provision and the federal Canadian proposals do not consider professional or technical opinions to be "advice and recommendations" in the requisite sense. Clearly, there may be difficult lines to be drawn between professional opinions and "advice." Yet, it is relatively easy to distinguish between professional opinions (such as the opinion of a medical researcher that a particular disorder is not caused by contact with certain kinds of environmental pollutants, or the opinion of an engineer that a particular high-level bridge is unsound) and the advice of a public servant making recommendations to the government with respect to a proposed policy initiative. The professional opinions indicate that certain inferences can be drawn from a body of information by applying the expertise of the profession in question. The advice of the public servant recommends that one of a possible range of policy choices be acted on by the government.
>
> According to the Ministry, its evaluators are "Ministry staff with the requisite education and knowledge of the construction industry needed to evaluate the consultants' proposals". In conducting their review of the proposals submitted to the Ministry pursuant to RFP's, these individuals are, as I noted above, establishing the factual basis upon which advice and/or recommendations may ultimately be made.

The Court upheld the Adjudicator’s interpretation in that case. It agreed that an objective assessment of factual information is not, in itself, advice. In my view, there might be situations in which objective assessments implicitly suggest a particular decision or course of action, and if that is the case, arguably, that might constitute advice or analysis within the terms of section 24(1)(a). However, that is not the case here.

In the present case, the reports consist for the most part of objective, scientific, analysis or evaluations of factual information, consisting of environmental testing data. This does not, in my view, constitute the type of “analysis” contemplated in sections 24(1)(a) and (b), because it simply reveals an objective state of affairs; ultimately, someone might use this information to develop advice that is directed toward taking an action, but an objective state of affairs is not, in

> itself, within the terms of the test set by Commissioner Clark, "directed toward taking an action".

[para 116] There are 36 lines of text in the email appearing on records 188 – 189, excluding the greeting, the enclosure, and the signature line. I have numbered each of them and will refer to the line numbers where it is necessary to do so.

[para 117] The email appearing in records 188 and 189 contains information that is primarily objective, scientific analysis of facts, in keeping with the author's role as a drainage control technician. The beginning of line 15 (the beginning of the third paragraph appearing on record 189) until the sentence ending at line 21 (ending with the word "swale"), and the beginning of line 27 (the beginning of the fourth paragraph) until the end of the period in line 29 (ending with the word "water"), are examples of this kind of information appearing in these records. I find that this information is not "directed at taking an action", within the terms of the test developed by former Commissioner Clark, but rather, is information revealing a state of affairs from a scientific or technical perspective that may be used to develop advice subsequently.

[para 118] The information beginning at line 3 (the beginning of the second paragraph of the email) until the period appearing in line 9, (ending with the word "approval"), and beginning at line 11 and continuing to the end of line 14, and beginning at line 31 and continuing to line 36, are statements regarding actions that have been taken and decisions that have been made, or are simply statements. This information is not intended to advise a course of action but to provide information regarding the steps that have been taken or will be taken.

[para 119] With regard to the remaining information in the body of the email that the Public Body withheld under section 24(1)(b), I find that it is consistent with analyses within the terms of section 24(1)(a), as it evaluates courses of action that the Public Body might take from a policy perspective, as opposed to a purely technical perspective. I find that the information is not subject to section 24(1)(b) as the author of the email was not responsible for making a decision; rather, the email is clear that the recipient of the email was responsible for making a decision. The author of the email was not in a position to deliberate a decision, as he was not charged with making one, and he could not be taken to be consulting in relation to one, for the same reason.

[para 120] I find that the second email appearing on record 189 does not reveal consultations or deliberations within the terms of section 24(1)(b), or advice, proposals, recommendations, analyses or policy options within the terms of section 24(1)(a). This email was clearly created for the sole purpose of forwarding documents to another employee.

[para 121] For these reasons, I find that information appearing in lines 8 – 10, 22 – 26 and 29 – 30 of the email appearing on records 188 – 189 is subject to section 24(1)(a). As discussed above, I also find that the sentence withheld from the first email appearing on record 188 is subject to section 24(1)(a).

Records 206 – 207

[para 122] Record 206 contains three emails between the executive assistant to the general manager and the general manager. The Public Body withheld the second email on the basis of section 24(1)(b). I am unable to construe the second email as intended to do more than to provide information regarding a meeting.

[para 123] Record 207 contains an email created by the executive assistant to the general manager and sent to the general manager. The Public Body withheld three paragraphs from this email under section 24(1)(b). The first two paragraphs withheld by the Public Body analyze the outcomes of two possible actions. I find that this information fall within section 24(1)(a).

[para 124] With regard to the third paragraph that the Public Body withheld, (the fourth paragraph of the email), I find that it does not contain information falling within the terms of section 24(1)(a) or (b). The paragraph expresses a question that cannot be construed as intended to advise or to deliberate or consult. I say this because the question is asked so that the writer may find out what the decision is in regard to her question. The question reveals only the topic of the decision to be made, but not the advice or deliberations on which the decision is based.

[para 125] To summarize, I find that two paragraphs appearing on record 207 are subject to section 24(1)(a). However, I find that none of the other information the Public Body withheld from these records is subject to either section 24(1)(a) of (b).

Records 208 – 209

[para 126] Records 208 and 209 contain an email created by a "senior drainage technician" and sent to a "coordinator / business liaison". The Public Body withheld a portion of a sentence from record 209 on the basis of section 24(1)(b).

[para 127] I find that the information withheld from the record is not subject to either section 24(1)(a) or (b). The severed sentence anticipates that an action will take place in the future, but it does not advise or propose taking the action, or deliberate taking an action or ask whether taking the action is appropriate.

Records 216 – 222

[para 128] The affidavit supplied by the Public Body to assist the inquiry describes records 216 – 222 in the following terms:

> In order to facilitate the deliberations, and to provide a foundation upon which consultations could occur between the Business Units, the information contained in pages 216 – 222 was compiled. This record provided the necessary information, and identified the issues, that were deliberated on during the internal meetings.

Record 215, which contains the email that accompanied records 216 – 222 when these records were provided to employees of the Public Body, supports this description.

[para 129] Records 216 – 222 contain background facts which were compiled for discussion at a meeting that was to take place on July 21, 2010. From the information one can determine what would be the topic of discussion at the meeting and how the discussion would be organized. While I accept that this information was intended to facilitate discussions, and possibly was to be used to develop policies or make decisions, this alone would not bring the information within the scope of a provision of section 24(1).

[para 130] On record 220 is a heading entitled "next steps". It appears that the next steps consist of courses of action that the author of the email was considering taking. The email on record 215 supports finding that the author of the email wrote this portion of the email to generate discussion, and in doing so, obtain advice from other employees as to whether the next steps should be taken. As a result, I find that the information appearing after the heading "next steps" on record 220 until the end of record 222 is subject to section 24(1)(b).

[para 131] I find that the information on records 220 – 222 is subject to section 24(1)(b); however, I find that it has not been established that the information on records 216 – 219 is subject to section 24(1)(a) or (b).

Records 226 – 227

[para 132] Record 226 contains an email written by a general manager's executive assistant to the general manager. The email conveys advice received from an employee of the Public Body. The email also communicates information, including information about a decision that was made.

[para 133] I find that the first paragraph of this email reveals advice developed for the Public Body by one of its employees. I therefore find that section 24(1)(a) applies to this paragraph.

[para 134] I find that the second and third paragraphs do not contain information falling within the terms of either section 24(1)(a) or (b). These paragraphs are intended to communicate background information (the second paragraph) and information about a decision that was made and what it was (the third paragraph). The Public Body has provided no evidence or argument that would enable me to infer that the recipient of the email had a decision to make in relation the information contained in the final two paragraphs. As discussed in previous orders of this office (see Order F2008-028 at paragraph 179, F2008-031 at paragraph 87, F2012-06 at paragraph 130), while decisions may rely on the advice that led a decision maker to decide a matter in a certain way, and reveal advice in that sense, decisions themselves cannot be withheld under section 24(1).

[para 135] Record 227 is an email from an employee of the Public Body to the executive assistant to the general manager. This email contains advice, and the advice is the advice the executive assistant reported to the general manager in the first paragraph of record 226. I find that the three paragraphs the Public Body severed from this email reveal advice within the terms of section 24(1)(a).

Record 235

[para 136] Record 235 contains two emails. The first email can be characterized as a request for advice, or consultation, while the second email provides the requested advice. The Public Body did not withhold information from the first email. The Public Body withheld portions of the second email under section 24(1)(b). I am satisfied from my review of the portions of the second email that the Public Body withheld, that the information is advice within the terms of section 24(1)(a).

Records 237 – 240

[para 137] Records 237 – 240 contain a draft letter. From its content, I conclude that the letter was intended ultimately to decide issues and a draft was circulated to obtain comments from colleagues. The letter contains comments and tracked changes. Record 236 contains an email that serves to forward the draft letter to other employees and to request their advice regarding the content. I am satisfied that records 237 – 240 contain information that is consistent with a deliberation, as it is clear from the records that the author of the letter was considering responding to a situation in a particular way. The comments tracked on the letter appear to be the advice of one of the employees whose advice was sought regarding the content of the letter.

[para 138] I find that the letter in records 237 - 240 is subject to section 24(1)(b), while the comments tracked on the letter are consistent with advice within the terms of section 24(1)(a).

Record 246

[para 139] Record 246 contains an email from the author of the draft letter appearing in records 237 – 240. This email contains the considerations and reasons of the author in including certain content in the draft letter. I agree with the Public Body that the information it severed from the email is subject to section 24(1)(b) as it is a deliberation regarding a decision made by someone responsible for making the decision.

Record 256

[para 140] Record 256 is an email created by an employee of the Public Body and addressed to another employee of the Public Body. The information severed by the Public Body advises a course of action and was made to someone who could take the action. I find that section 24(1)(a) applies to this information.

Record 257

[para 141] The Public Body has applied section 27(1)(a) to withhold record 257, in addition to section 24(1)(b). As I find below that this record is subject to solicitor-client privilege, I need not address the Public Body's application of section 24(1)(b) to this record.

Records 259 – 263

[para 142] Records 259 – 263 contain a draft of a letter, the purpose of which is to communicate a decision. The draft contains comments from other employees, as to the proposed content. I am satisfied that the draft letter reveals the considerations for taking a particular course of action by a decision maker and is a deliberation within the terms of section 24(1)(b). It is also a consultation within the terms of that provision, given that the employee's colleagues were asked to comment on the draft. The comments appearing on the records are consistent with advice within the terms of section 24(1)(a).

[para 143] I find that the information withheld by the Public Body from these records falls under sections 24(1)(a) and (b).

Records 269 – 273

[para 144] Records 269 – 273 contain a later draft of the letter that appears in records 259 – 263. This draft has also been provided to other employees for comments. One can learn from the draft that the author was considering disposing of issues in a particular way and why. The draft letter is therefore a deliberation with the terms of section 24(1)(b).

Records 274 – 280

[para 145] The records indicate that information was severed from these records under section 24(1)(b); however, the Public Body's index indicates that the information severed from these records was also severed under section 27(1)(a). The Public Body's *in camera* affidavit indicates that it withheld information from records 277 and 278 under section 27(1)(a) where reference is made to legal advice that was received from the Public Body's solicitor.

[para 146] I note from my review of the records that there is one instance on record 277 where a lawyer is referred to and one on record 278 in which legal advice is described. I will also address these paragraphs when I address the Public Body's severing under section 27(1)(a).

[para 147] I find that the information the Public Body withheld from the emails appearing in these records is subject to section 24(1)(b), as I find that these emails are deliberations of employees, given that the emails document debates regarding the content

and wording of a decision that the employees were responsible for making and communicating.

Records 290 – 294

[para 148] The Public Body withheld records 290 – 294 on the basis of section 27(1)(a) in addition to section 24(1)(b). As I find below that these records are subject to solicitor-client privilege, I need not address whether they are also subject to section 24(1)(b).

Record 311

[para 149] Record 311 is a duplicate of record 85. However, it contains the notes of a different employee. As with record 85, I find that the information in this record is consistent with advice within the terms of section 24(1)(a).

Record 312

[para 150] Record 312 contains a series of bullet points under the heading "Crestridge Retaining Walls Status". The Public Body severed the final bullet point under section 24(1)(b). The Public Body has not provided evidence or argument pertaining specifically to its application of section 24(1)(b) to this record. It is unclear from the record itself who created it, and for what purpose.

[para 151] I find that the information severed by the Public Body is information that is consistent with the title of the document and the other bullets appearing in the record, in that the final bullet point provides a status update or background information. There is nothing to suggest that the record was created in order to consult regarding a decision or to deliberate one. In addition, I am unable to infer that this record was created in order to provide advice, or other information subject to section 24(1)(a), particularly given the heading of the document. As discussed above, information that merely provides information such as a status update is not information to which section 24(1) applies.

Records 319 – 322

[para 152] Records 319 – 322 are the draft speaking notes that an employee prepared for a meeting. Record 317 establishes that the employee who prepared the draft speaking notes exchanged them with her colleagues prior to the meeting. The affidavit of the Public Body indicates that the speaking notes were intended to advise the speakers at the meeting how to respond to questions, and what to say.

[para 153] Although I find the draft speaking notes to be advice as to what should be said and presented at a meeting, I note that the information appearing on record 319 does not appear to be as contentious as that appearing on records 320 – 322. It is unclear to me why the Public Body exercised discretion to withhold the entire document under section 24(1)(b), when the information it contains appears to have varying degrees of sensitivity,

i.e., some information appears to be potentially controversial, with the result that it would have been reviewed for content, while other information appears not to be sensitive or controversial at all, such as the introductions portion of the speaking notes. I will address this point more fully when I consider whether the Public Body properly exercised its discretion to withhold the information.

Records 323 – 324

[para 154] Records 323 – 324 are copies of an email prepared by the Public Body's counsel. As I find that this information is subject to solicitor-client privilege, I need not consider whether it is also subject to section 24(1)(b) and I will address them under section 27(1)(a) below.

Records 335 – 347

[para 155] The Affidavit supplied by the Public Body describes records 335 – 347 in the following terms:

> During the information session, employees of the Public Body made notes of some of the questions posed by the homeowners and some of the explanations provided. This was done in order to enable the Public Body to provide a full and detailed response at a later date to the issues raised at the information session.
>
> Some of the questions posed required further consultations with Business Units in order to prepare a response. The consultations and deliberations that occurred are set forth in pages 335 – 347, 381 – 383, and 404 – 406.

[para 156] Records 335 – 347 document the questions that were asked by homeowners at a meeting between the homeowners and the Public Body, and the responses of Public Body employees to the questions. The Public Body severed the answers it provided to the questions.

[para 157] I find that records 335 – 347 do not contain information falling within either section 24(1)(a) or (b) of the FOIP Act. The intent of these records was to record what was said at a meeting with homeowners. I accept that this was done so that employees could respond to the issues raised at the meeting at a later date. However, the information in these records does not reveal advice, consultations, or deliberations as to what a potential response should contain.

[para 158] I find neither section 24(1)(a) nor (b) of the FOIP Act applies to records 335 – 347.

Records 370 – 371

[para 159] Record 370 contains two emails. The Public Body severed a portion of the second email from record 370 on the basis of section 24(1)(b).

[para 160] The severed information proposes addressing two questions with the implication that these questions be addressed by the recipients of the email prior to taking any further action. I find that the severed information is advice within the terms of section 24(1)(a).

[para 161] The Public Body severed a portion of an email from record 371. The portion of the email severed by the Public Body is analysis and the implication of the analysis is that the recipients of emails should adopt a course of action.

[para 162] I find that the information severed by the Public Body from record 371 is analysis within the terms of section 24(1)(a).

Records 380 – 383

[para 163] Records 380 – 383 consist of a summary of questions from homeowners and the Public Body's answers to them from an August 25, 2010 meeting. The Public Body severed its answers from these records under section 24(1)(b).

[para 164] I find that the information severed from these records does not fall within the terms of either section 24(1)(a) or (b). The answers provided to the homeowners are not intended to advise or deliberate a course of action. Rather, the answers were intended to provide facts to assist the homeowners, and were then recorded to inform the Public Body's employees about what was said. I accept that this record may have been prepared for the Public Body's use in making decisions, or researching additional issues, but these reasons for creating records do not serve to bring the information they contain within the terms of section 24(1).

[para 165] I find that the information severed from records 380 – 383 is not subject to section 24(1).

Record 387

[para 166] The Public Body severed a portion of a sentence from an email appearing on record 387 under section 24(1)(b).

[para 167] The Public Body's index indicates that information was also severed from this record under section 27(1)(a); however, none of the records, including the updated records at issue that I requested and received from the Public Body, indicates that information was severed from record 387 under section 27.

[para 168] The email was created by counsel for the Public Body. The portion of the sentence that the Public Body did not sever recommends a course of action. The portion that was severed explains the circumstances in which the recommendation should be followed.

[para 169] I find that the portion of the sentence severed from record 387 is part of a recommendation falling within the terms of section 24(1)(a). While the Public Body exercised its discretion to disclose a portion of the recommendation, this does not mean that the sentence fragment it withheld falls outside section 24(1)(a), given that it reveals something about the course of action that was being recommended.

[para 170] I find that the portion of record 387 that was severed by the Public Body is subject to section 24(1)(a).

Records 396 – 398

[para 171] Record 396 contains an email created by an employee of the Public Body which was sent to other employees of the Public Body. The Public Body applied section 24(1)(b) to withhold a question raised by the employee and an answer she provided to a factual question.

[para 172] I find that the information severed by the Public Body under section 24(1)(b) from record 396 is not information to which this provision applies. The severed information does not reveal advice prepared for decision makers, or the consultations or deliberations of decision makers. One can learn from the information that questions had been asked about the application of regulations, but there is nothing to suggest that the questions were posed to obtain anything other than facts or technical information.

[para 173] Records 397 – 398 contain an email written by an employee to the employee's colleagues. The Public Body severed a portion of the email containing a proposed policy statement that the employee sent to his colleagues for review. I agree with the Public Body that this information falls within the scope of section 24(1)(b), given that I find that this information reveals a consultation within the terms of this provision.

Record 402

[para 174] The Public Body severed record 402 in its entirety. Record 402 contains an employee's analyses of a particular situation and the likely outcomes of certain of actions. I find that disclosing this record would have the effect of revealing "analyses" developed by or for the Public Body within the terms of section 24(1)(a).

Records 404 – 406

[para 175] Records 404 – 406 contain a draft of questions and answers developed for the Public Body. I find that the information in these records is intended to provide advice to the Public Body as to how to respond to various questions that might be asked or situations that might arise. I find that the information in these records is subject to section 24(1)(a).

Record 407

[para 176] The Public Body withheld record 407 in its entirety on the basis of section 27(1)(a), in addition to section 24(1)(b). As I find, below, that this record is subject to solicitor-client privilege and is therefore properly withheld under section 27(1)(a), I need not consider whether it is also subject to section 24(1)(b).

Records 408 – 411

[para 177] Records 408 – 411 consist of a draft document that the Public Body provided to its solicitor in order for the solicitor to provide advice regarding the document. The Public Body's index indicates that it withheld record 408 under section 24(1)(b), and records 409 – 411 under both sections 24(1)(b) and section 27(1)(a). However, the records the Public Body provided for my review indicate that only section 24(1)(b) was applied. The Public Body's *in camera* affidavit refers to applying solicitor client privilege to records 409 – 411 only.

[para 178] While I find below that record 408 would be subject to solicitor-client privilege, the Public Body did not apply section 27(1)(a) to withhold information from this record. I will therefore consider whether the information in this record is subject to section 24(1)(b).

[para 179] I accept that this email was created in order to obtain the advice of legal counsel regarding a proposed response to a situation. Disclosing the draft document that was severed from the email would reveal information about the Public Body's consultations and deliberations in relation to a course of action it was considering. I therefore find that the information withheld by the Public Body under section 24(1)(b) is subject to that provision.

Records 412 – 413

[para 180] The Public Body severed a portion of an email from record 412. The email was created by an employee in order to obtain comments regarding a proposed response to the issues raised by third party homeowners.

[para 181] I find that disclosing the information withheld from this record would have the effect of revealing information about the Public Body's consultations or deliberations. I therefore find that the information severed from record 412 is subject to section to section 24(1)(b).

[para 182] The Public Body withheld a portion of an email from record 413 under both sections 24(1)(b) and 27(1)(a). As I find that this email is subject to solicitor-client privilege, and the Public Body withheld this email under section 27(1)(a), I have addressed this email in my analysis of section 27(1)(a), below.

[para 183] The bottom of record 413 contains a portion of an email referring a draft response to counsel. This email is the same email that appears on record 408, although less of the email appears on record 413, with the result that less of the email is severed under section 24(1)(b), and more of the body of the email is severed under section 27(1)(a), given that the Public Body withheld records 414 – 417 under section 27(1)(a). As with the email appearing on record 408, the Public Body withheld the email appearing on record 413 under section 24(1)(b), rather than applying section 27(1)(a). For the reasons I provided in relation to record 408, I find that the email on the bottom of the page is subject to section 24(1)(b).

Record 460

[para 184] As I find, below, that record 460 is subject to section 27(1)(a), I need not consider whether it is also subject to section 24(1)(b).

Record 464

[para 185] Record 464 contains an email sent by an employee of the Public Body to other employees. The Public Body withheld a sentence from this email on the basis of section 24(1)(b).

[para 186] I find that the sentence withheld by the Public Body does not fall within the terms of section 24(1). The sentence provides information only, and is not intended to advise a course of action, or to consult or deliberate regarding one.

[para 187] I find that section 24(1) does not apply to the information withheld from Record 464.

Record 468

[para 188] Record 468 contains two emails. The Public Body withheld a portion of the email appearing at the top of the record under section 24(1)(b). The email recommends responding to parties in a particular way. The Public Body severed the portion of the email containing the recommended response.

[para 189] I find that the information severed from record 468 under section 24(1)(b) is subject to section 24(1)(a), as it is a recommendation within the terms of this provision.

Record 479

[para 190] As I find, below, that the information in this record to which the Public Body applied section 24(1)(b) is subject to section 27(1)(a), I need not address whether the information is also subject to section 24(1)(b).

Records 485 – 486

[para 191] As I find, below, that the information to which the Public Body applied section 24(1)(b) is subject to section 27(1)(a), I need not address whether the information is also subject to section 24(1)(b).

Record 509

[para 192] Record 509 contains the same list of questions and directions that appear in records 85 and 311. I have already found that records 85 and 311 are subject to section 24(1)(a) . It follows that I find that record 509 is also subject to section 24(1)(a).

Records 510 - 511

[para 193] Records 510 – 511 contain a "summary document", according to its heading. The purpose of the summary document is to outline a situation and to provide options.

[para 194] I find that the portion of the document that provides a summary of events and findings does not contain, or reveal, information subject to section 24(1). The summary portion of the document, which continues until halfway down record 511 provides a summary of background facts and events. As discussed above, background does not fall within the terms of section 24(1)(a) or (b).

[para 195] I find that disclosing the portion of record 511 that addresses options available to the Public Body would have the effect of disclosing policy options developed for the Public Body within the terms of section 24(1)(a).

Exercise of Discretion

[para 196] 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. The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

> 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 197] While the foregoing case was decided in relation to the law enforcement provisions in Ontario's legislation, it is clear from paragraphs 45 and 46 of this decision that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in freedom of information legislation in particular. The provisions of section 24(1) of Alberta's FOIP Act are discretionary.

[para 198] Applying the principles in *Ontario (Public Safety and Security)*, a finding that section 24(1)(a) or (b) applies means that the public interest in ensuring that public bodies obtain candid advice *may* trump public or private interests in disclosing the information in question. After determining that section 24(1)(a) or (b) applies, the head of a public body must then consider and weigh the public and private interests in disclosure and non-disclosure in making the decision to withhold or disclose the information.

[para 199] Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

> *72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*
>
> > *(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access…*

[para 200] I note that in many instances, the Public Body exercised discretion to disclose information to which sections 24(1)(a) or (b) arguably apply, such as emails created by employees in order to obtain advice from colleagues.

[para 201] With regard to the information the Public Body chose to withhold, the Public Body describes the process by which it exercised its discretion in the following terms:

> In response to mediation, a further review was undertaken and some pages that had been withheld were either severed and released or released entirely. In addition, consultations with program area staff were done to ascertain the sensitivity of some of the material.

[para 202] I accept that the Public Body followed the process in the foregoing excerpt; however, there are some instances where the information that was withheld does not appear to be contentious. For example, records 319 – 322, which are draft speaking notes created for use at a meeting, contain some information that is sensitive and some information that does not appear to be sensitive at all, such as introductory remarks and general topics for discussion.

[para 203] I also note that the Public Body states that section 24(1)(b) was applied to draft documents for the following reasons:

> Deliberations cannot occur in a vacuum. Draft documents were generated as part of the process of consultations and deliberations involving the officers and employees of the Public Body. The drafts provided the foundation upon which recommendations regarding the Public Body's position could be made.
>
> Given the advent of electronic communication, drafts of documents are created and these documents were then forwarded to various business units. The advice or recommendations were then documented within the record. Release of the draft documents would reveal the deliberative process that occurred as the draft documents contain information regarding contemplated courses of action. The final decisions of the Public Body have been released. (pages 285 – 286)
>
> What appears to be minor variations or punctuation changes to a document that are in fact a careful consideration of the impact that these changes would have on the ultimate reading of the record. Stray commas and poor punctuation can have dramatic impact on the interpretation and meaning of a document. The Public Body submits that these changes are part of the deliberative process as they involved a careful review of the document and involved the weighing of what a word or an edit had on the ultimate reading.

[para 204] In cases where changes made to a decision before it is released in its final form are substantive, such that a draft would reveal that a decision maker was considering taking other courses of action, then I agree with the Public Body that protecting such information, particularly if the matter is contentious, will usually outweigh public and private interests in disclosing the information. However, in cases where a draft differs from the final, public version of a decision, only with regard to punctuation and phrasing, then it is unclear how the interests in withholding the information would outweigh the right of access. When substantive information has already been made public, or is inferable from other information that has been made available to the public, there is little reason to withhold the information, even with respect to minor variations in grammar or punctuation.

[para 205] The Public Body states that it also considered the following when exercising its discretion to withhold information:

> The Public Body considered that the records are relatively recent making them more sensitive than records of a greater age.
>
> The Public [Body] considered that the records do not contain personal information of the Applicant. In this case, many of the documents in issue are in the custody or control of one of the parties to a lawsuit.
>
> The Public Body submits that the purpose of the Act is not to enable a litigant to use the Public Body, at the expense of the taxpaying public, to obtain records already available to it through the discovery and document production process under Part 5: Disclosure of Information under Alberta Rules of Court, AR 124/2010 as amended. This purpose is improper because it displaces the obligation, on the Applicant and the Third Parties to search for and produce documents, onto the Public Body. Although not specifically set out in the Act, the Public Body submits that this is a legitimate consideration, in the exercise of discretion to withhold documents, where there is a dispute as to whether an exception to disclosure applies.

[para 206] The Public Body argues that when records that are the subject of an access request and there is a dispute as to whether exceptions apply, the Public Body may exercise its discretion to withhold the information under the exception if the records are also producible under the discovery process. It is unclear to me how the existence of a parallel proceeding, such as a discovery, would authorize a Public Body to withhold information under an exception where it is unclear whether the exception applies. Neither the FOIP Act, nor the Alberta Rules of Court, Alberta Regulation 124/2010, which establishes the discovery process, authorize applying exceptions to disclosure to information that is the subject of an access request under the FOIP Act on the basis that a discovery process is underway.

[para 207] It may be the case that the Public Body means by this argument that when an exception to disclosure applies to information, discretion to withhold the information under the exception is properly exercised by considering that the records are producible in the discovery process and that the parties should restrict themselves to following the discovery process to obtain information.

[para 208] The purpose of the access provisions in the FOIP Act is set out in section 2(a). This provision states:

> *2 The purposes of this Act are*
>
> > *(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act,*

[para 209] The FOIP Act gives a right of access to any person; the Act does not exclude litigants who participate in a discovery process from the right of access to records in the custody or control of a public body. Moreover, the FOIP Act sets out a fee schedule to enable public bodies to recover some of the actual costs they incur in providing records, so it is not accurate to say that making an access request transfers the costs normally incurred in discoveries to tax payers.

[para 210] Section 3 of the FOIP Act states, in part

> *3 This Act*
>
> > *(a) is in addition to and does not replace existing procedures for access to information or records,*
> >
> > *[…]*
> >
> > *(c) does not limit the information otherwise available by law to a party to legal proceedings[…]*

[para 211] Section 3 of the FOIP Act establishes that the Act is in addition to, and does not replace existing procedures for obtaining access to information available to parties to legal proceedings. While the FOIP Act does not replace the discovery process, the FOIP Act acknowledges that the right of access creates an additional means by which parties to litigation may obtain disclosure of information.

[para 212] In Order F2007-029, former Commissioner Work commented on the relationship between an access request under the FOIP Act and the discovery process under the Rules of Court. He said:

> Records and information may be the subject of both the discovery process set out in the Rules of Court and an access request under the Act. Through the discovery process, a party may be granted the opportunity to view relevant documents. In contrast, the Act gives an individual the right to be provided a copy of responsive records in the custody or under the control of a public body, if the records can be reasonably reproduced, subject to the exceptions in the Act.

The former Commissioner noted at paragraphs 58 – 59 of that Order that the FOIP Act does not permit a public body to deny access to records on the basis that they are, or have at one time been, the subject of a discovery process or to exclude such records from a response to an access request under the FOIP Act.

[para 213] I agree that the fact that information is, or has been, the subject of a discovery process under the Alberta Rules of Court is not a reason for denying access to information under the FOIP Act. It follows that it is also not an appropriate reason to exercise discretion to deny access to information under the discretionary provisions of the FOIP Act.

[para 214] In Order F2004-026, former Commissioner Work said:

> In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case. I find support for this position in orders of the British Columbia Information and Privacy Commissioner. Orders 325-1999 and 02-38 include a list of factors relevant to the exercise of discretion by a public body. In addition to "the general purposes of the legislation (of making information available to the public) the list includes "the wording of the discretionary exception and the interests which the section attempts to balance". It strikes me as a sound approach that the public body must have regard to why the exception was included, and whether withholding the information in a given case would meet that goal.

As discussed above, the purpose of both section 24(1)(a) and (b) is to protect the ability of a public body to obtain frank advice. However, the Public Body appears to have withheld information under section 24(1) on the basis of its view that the Applicant should be required to obtain this information through the discovery process. If that is so, then the Public Body made the decision to deny access to information on the basis of a consideration irrelevant to the application of section 24(1)(a) or (b).

[para 215] That being said, I accept that the existence of litigation in relation to the decisions set out in the records supports the position that information is sensitive, current, and even contentious. Moreover, I agree that the sensitivity and currency of information are relevant to a decision to withhold information under section 24(1), if the sensitivity of the information is such that its disclosure could reasonably be expected to interfere with the processes by which a public body obtains or develops advice.

[para 216] I am unable to determine which information the Public Body has withheld under section 24(1)(a) or (b) on the basis that disclosure could interfere with its deliberative process, and that which it has withheld on the basis that disclosure would reveal minor changes in punctuation, grammar, or phrasing, or on the basis that it should be obtained through discoveries. I am therefore unable to confirm its exercise of discretion to withhold information under section 24(1)(a) or (b). I must therefore ask it to reconsider its decision to withhold the information to which I have found that section 24(1)(a) or (b) applies and to determine whether disclosing the information would reveal something substantive, sensitive, and not publicly known about the advice it has received or deliberations it has made, or whether it would reveal only minor grammatical changes, or information that is publicly known by virtue of its having been disclosed, in addition to any other relevant public and private interests in withholding or disclosing the information.

Conclusion

[para 217] To summarize, I find that section 24(1)(a) applies to the following information withheld by the Public Body:

1. Records 85, 311, and 509
2. A portion of a sentence withheld from the first email on record 188
3. Lines 8 – 10, 22 – 26, lines 29 – 30 from the second email on record 188 extending to record 189
4. The first two paragraphs from the email appearing on record 207
5. The first paragraph of the email on record 226
6. The three paragraphs severed from record 227
7. Portions of the second email appearing on record 235
8. The email contained in record 256
9. Records 259 – 263
10. Records 319 – 322
11. A portion of the second email appearing on record 370
12. A portion of an email severed from record 371
13. A portion of an email severed from record 387
14. Record 402
15. Record 404 – 406
16. The severed portion of the email appearing at the top of record 468
17. The portion of record 511 that addresses options available to the Public Body

[para 218] I find that section 24(1)(b) applies to the following information withheld by the Public Body:

1. The draft response from record 142
2. The letter contained in records 237 – 240
3. The email contained in record 246
4. Records 259 – 263
5. Records 269 – 273
6. Records 274 – 280
7. The email contained in records 397 – 398
8. Record 408
9. Information severed from record 412
10. The email located at the bottom of record 413

[para 219] As the Public Body has not established that it applied its discretion appropriately to withhold information under either section 24(1)(a) or (b), I must require it to reconsider its decision to withhold this information.

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

[para 220] Section 27(1) authorizes public bodies to withhold privileged information and other kinds of information prepared by lawyers and agents of a public body. It states, in part:

> *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.*

The Public Body applied section 27(1)(a) to withhold records it considers to be subject to solicitor-client privilege.

[para 221] The test for determining whether solicitor-client privilege applies to records is that set out in *Canada v. Solosky* [1980] 1 S.C.R. 821. According to this case, a record is subject to solicitor-client privilege if it is a communication between solicitor and client, which entails the seeking or giving of legal advice; and which is intended to be confidential by the parties.

Record 257

[para 222] Record 257 is an email created by an employee of the Public Body and sent to a solicitor for the Public Body. The intent of the email is clearly to seek legal advice. The context provided by the email establishes that the email was intended to be confidential.

[para 223] I find that record 257 is subject to solicitor-client privilege, and is therefore subject to section 27(1)(a).

Records 277 – 278

[para 224] The Public Body withheld a paragraph of an email from record 277 on the basis that it reveals legal advice provided to the employees who created the email by a solicitor. Although I note that the first name of a lawyer for the Public Body is referred to in this paragraph, I am unable to identify legal advice he provided that would be revealed by disclosure of record 277. However, as I have found that this information is subject to section 24(1)(b) in any event, I will not order disclosure of this information.

[para 225] I agree with the Public Body that disclosing the paragraph it withheld from record 278 would have the effect of disclosing a privileged communication. I say this because the paragraph quotes verbatim a portion of a legal opinion and indicates that the source of the quote is a legal opinion. The context provided by the email establishes that the legal opinion was intended to be confidential

[para 226] I find that the portion of record 278 that the Public Body withheld under section 27(1)(a) is subject to section 27(1)(a).

Records 290 – 294

[para 227] Records 290 – 294 is an email containing the comments and suggested changes of a solicitor for the Public Body to a document. The comments and suggested changes were provided at the request of an employee. I find that the comments and suggested changes are communications for the purposes of providing legal advice. The context provided by the email establishes that the email was intended to be confidential I find that these records are subject to solicitor-client privilege.

[para 228] I find that records 290 – 294 are subject to section 27(1)(a).

Records 323 – 324

[para 229] As I noted above, records 323 – 324 contain an email prepared by counsel for the Public Body. The purpose of the email is to provide legal advice to the Public Body. The context provided by the email establishes that the email was intended to be confidential. I find that these records are subject to solicitor-client privilege.

Record 348

[para 230] The severed version of record 348 indicates that information was severed from it on the basis of section 27(1)(c)(iii). The index provided by the Public Body also states that information was withheld from this record under section 27(1)(c)(iii). The Public Body's arguments and *in camera* affidavit do not address the information severed from this record.

[para 231] While the information severed from this record appears to be a request for legal advice within the terms of *Solosky*, I accept that the Public Body may have reasons for not withholding information from this record on the basis of solicitor-client privilege due to its knowledge of the circumstances in which this record was created. It has instead elected to withhold this record on the basis that it contains information in correspondence between a lawyer and another person as set out in section 27(1)(c).

[para 232] I find that the information in the record meets the requirements of section 27(1)(c). However, the Public Body has provided no argument or explanation to explain why it exercised its discretion to withhold information under this provision. I will address this issue further when I address the Public Body's exercise of discretion to withhold information under section 27(1).

Records 359 – 362

[para 233] The Public Body withheld information from records 359 – 362 on the basis that the information is subject to solicitor-client privilege.

[para 234] The emails contain discussions between employees of the Public Body and counsel for the Public Body regarding legal issues. I am satisfied that the information withheld from these emails was communicated for the purpose of giving and obtaining legal advice within the terms of the *Solosky* test. The context provided by the emails establishes that they were intended to be confidential.

[para 235] I find that the information withheld from records 359 – 362 is subject to solicitor-client privilege and is therefore subject to section 27(1)(a).

Record 378

[para 236] The Public Body withheld a portion of an email prepared by counsel for the Public Body from record 378. I find that the email was prepared by counsel for the

purpose of giving legal advice. The context provided by the records establishes that the email was intended to be confidential.

[para 237] I find that the information withheld from record 378 is subject to solicitor-client privilege and is therefore subject to section 27(1)(a).

Record 407

[para 238] Record 407 was prepared by counsel for the Public Body in response to a request for legal advice and contains legal advice. The context provided by the records establishes that record 407 was intended to be confidential.

[para 239] I find that record 407 is subject to solicitor-client privilege and is therefore subject to section 27(1)(a).

Records 408 – 411

[para 240] Records 408 – 411 contain an email sent to counsel for the Public Body requesting that counsel review a document that it had prepared. The Public Body exercised its discretion to disclose the portion of the email that indicates a document was being sent to counsel for her review. The Public Body withheld the document where it appears on record 408 under section 24(1)(b). The remaining pages of the document were withheld under section 27(1)(a). Although the Public Body applied only section 24(1)(b) to record 408, if I find that the information severed from records 409 – 411 is subject to solicitor-client privilege, then that finding would apply equally to the information appearing on record 408, as together, these records comprise one communication between the Public Body, as client, and its solicitor.

[para 241] The document sent to counsel for review is a communication made to the solicitor in that capacity for the purpose of seeking legal advice. The context provided by the records establishes that the email was intended to be confidential.

[para 242] I find that records 408 – 411 are subject to solicitor-client privilege. However, as the Public Body withheld only records 409 – 411 on the basis of solicitor-client privilege, I limit this finding to those records.

Record 413

[para 243] As I noted above, the Public Body withheld a portion of an email appearing on the top of record 413 on the basis of solicitor-client privilege. The email contains legal advice from counsel and was addressed to employees of the Public Body. The context provided by the records establishes that the email was intended to be confidential.

[para 244] I find that the information severed by the Public Body under section 27(1)(a) from record 413 is subject to section 27(1)(a).

Records 413 – 417

[para 245] Records 413 – 417 contain the same draft response as that appearing in records 408 – 411. The Public Body withheld only records 414 – 417 under section 27(1)(a). I find, for the same reasons that I found records 408 – 411 were subject to solicitor-client privilege, that records 414 – 417 are subject to this privilege.

[para 246] I find that the information withheld from records 414 – 417 is subject to section 27(1)(a).

Record 424

[para 247] The Public Body withheld an email from record 424 created by an employee of the Public Body seeking advice from counsel. The context provided by the records establishes that the email was intended to be confidential. I find that the email severed from record 424 is subject to solicitor-client privilege.

[para 248] I find that the email severed from record 424 is subject to section 27(1)(a).

Records 435 – 436

[para 249] Records 435 – 436 contain a summary of a meeting in which employees of the Public Body met with counsel. The summary was prepared by counsel and confirms the legal advice provided at the meeting. The context provided by the records establishes that the summary was intended to be confidential.

[para 250] I find that records 435 – 436 reveal information subject to section 27(1)(a).

Records 443 – 444

[para 251] The Public Body withheld an email that begins on record 443 and concludes on record 444 under section 27(1)(a). The email is prepared by counsel for the Public Body and is a communication sent to an employee of the Public Body for the purpose of providing legal advice to the employee. The context provided by the records establishes that the email was intended to be confidential.

[para 252] I find that records 443 – 444 are subject to solicitor-client privilege and are therefore subject to section 24(1)(b).

Record 460

[para 253] The Public Body withheld record 460 under section 27(1)(a). There is a fragment of an email appearing at the top of the record, which carries over from record 459, and a second email appears at the bottom of this record. Record 459 establishes that

the fragment appearing at the top of record 460 was sent to counsel for review and advice. (The Public Body exercised its discretion to disclose record 459.) The email appearing at the bottom of record 460 was created by an employee and sent to counsel in order to obtain legal advice. The context provided by the records establishes that this email was intended to be confidential.

[para 254] I find that record 460 is subject to solicitor-client privilege, and is therefore subject to section 27(1)(a).

Records 461– 462

[para 255] The Public Body severed a portion of an email from record 461 under section 27(1)(a). The email concludes on record 462. However, the Public Body did not withhold the portion of the email appearing on record 462. The email is a communication written by counsel and was created for the purpose of providing legal advice to the Public Body. The context provided by the records establishes that the email was intended to be confidential.

[para 256] I find that the email is subject to solicitor-client privilege and that the portion of the email withheld by the Public Body is subject to section 27(1)(a).

Records 476 – 477

[para 257] Record 476 contains three emails. The Public Body withheld a portion of the first email under section 27(1)(a). The email was created by counsel for the Public Body for the purpose of providing legal advice. The context provided by the records establishes that the email was intended to be confidential.

[para 258] Record 477 contains two emails. The Public Body severed portions of these emails under section 27(1)(a). The first email was created by counsel and sent to employees of the Public Body. The first email was created for the purpose of providing legal advice. The context provided by the records establishes that the email was intended to be confidential. I find that this email is subject to solicitor-client privilege.

[para 259] The second email was created by an employee of the Public Body and copied to counsel for the Public Body. The first email appearing on record 477 was created in response to this email. I find that the second email was copied to counsel so that counsel could provide legal advice regarding the course of action described in the email. The context provided by the records establishes that the email was intended to be confidential. I find that the second email was created for the purpose of seeking legal advice and is subject to solicitor-client privilege.

[para 260] I find that the information severed from record 476 on the basis of solicitor-client privilege is subject to section 27(1)(a).

Records 478 – 479

[para 261] The Public Body withheld records 478 – 479 in their entirety under section 27(1)(a). These records contain two emails. The first email was created by a solicitor for the purpose of providing legal advice to the Public Body. The context provided by the records establishes that the email was intended to be confidential. The second email is a duplicate of the second email appearing on record 477, which I have already found to be subject to section 27(1)(a).

[para 262] I find that the information severed from records 478 – 479 is subject to solicitor-client privilege.

Records 485 – 486

[para 263] Records 485 – 486 contain emails between employees of the Public Body and a solicitor for the Public Body. The Public Body withheld records 485 – 486 under section 27(1)(a). The emails were created by the employees for the purpose of obtaining legal advice, while the response of the solicitor for the Public Body was prepared for the purpose of giving legal advice. The context provided by the records establishes that the emails were intended to be confidential.

[para 264] I find that the emails withheld from records 485 – 486 are subject to solicitor-client privilege, and are therefore subject to section 27(1)(a).

Records 487 – 488

[para 265] Record 487 contains two emails prepared by a solicitor for the Public Body. Record 488 contains the conclusion of one of the emails from record 487 and an email prepared by an employee of the Public Body for the solicitor. The Public Body withheld record 487 in its entirety under section 27(1)(a), and severed portions of the emails appearing on record 488 under section 27(1)(a).

[para 266] I find that the employee created the email for the purpose of obtaining legal advice, while the email created by the solicitor for the Public Body was prepared for the purpose of giving legal advice. The context provided by the records establishes that the emails were intended to be confidential. I find that the information withheld from records 487 – 488 is subject to solicitor-client privilege, and therefore falls within the scope of section 27(1)(a).

Exercise of Discretion

[para 267] In *Ontario (Public Safety and Security)*, 2010 SCC 23, the Supreme Court of Canada discussed the extent to which decisions to withhold information under solicitor-client privilege should be reviewed. The Court said:

> 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. [Emphasis added; para. 35.]
>
> (See also Goodis, at paras. 15-17, and Blood Tribe, at paras. 9-11.)

[para 268] The Court held that the public interest in protecting solicitor-client privilege will almost always outweigh any competing interests in information that is subject to this privilege. As a result, exercising discretion to withhold information that is subject to solicitor-client privilege does not require balancing interests on a case-by-case basis.

[para 269] I note that in many cases the Public Body severed information from communications made for the purpose of giving or seeking legal advice and disclosed information it did not consider to be contentious. That is the Public Body's right, and is in keeping with the spirit of the FOIP Act, although it was unnecessary that it do so.

[para 270] As discussed above, I do not agree with some of the Public Body's stated reasons for withholding information under discretionary exceptions to disclosure. However, where the information is withheld under section 27(1)(a), and is subject to solicitor-client privilege, I consider that the public interest in withholding this information outweighs any competing interests in disclosing it. I therefore confirm the Public Body's decision to withhold the information I have found to be subject to section 27(1)(a).

[para 271] I turn now to the Public Body's decision to withhold information from record 348 under section 27(1)(c)(iii) of the FOIP Act. The Public Body has not explained why it exercised its discretion to withhold information under this provision. As discussed in Order F2013-03, below, and more recently in Order F2013-13, the purpose of section 27(1)(c) is not self-evident, and therefore decisions to withhold information under this provision require more explanation than do other discretionary exceptions. In Order F2013-03, the Adjudicator said:

> Principles regarding a public body's exercise of its discretion relative to a particular provision of the Act were set out earlier in this Order. While the Public Body explained why it chose to withhold information from the Applicant in reliance on section 19(2) of the Act, it provided no explanation as to why it chose to withhold information in reliance on section 27(1)(c)(iii). The reason for withholding information, on the basis that it is in correspondence between a lawyer of a public body and any other person in relation to a matter involving the provision of advice or other services by the lawyer, is not self-evident. Disclosure of some such information may hinder the ability of a public body to resolve legal or other matters with the assistance of its lawyer, while disclosure of other information may be quite innocuous, even though it nonetheless falls within the scope of the provision. Further, the purpose of section 27(1)(c) is to protect the substance of advice and services by a lawyer of a public body (Order F2009-018 at para. 47).

An earlier Order of this Office summarized as follows:

> Section 27(1)(c) [previously section 26(1)(c)] is a discretionary exception because it authorizes a public body to refuse access to information, but does not require a public body to do so. In Order 96-017, the Commissioner discussed the two-step decision-making process a public body must complete when claiming a discretionary exception. A public body must first provide evidence on how a particular exception applies; and second, on how the public body exercised its discretion. A public body must show that it took into consideration all the relevant factors when deciding to withhold information, including the purposes of the Act, one of which allows access to information.

(Order F2002-019 at para. 90)

> Because the Public Body has provided no submissions to explain why it withheld information from the Applicant in reliance on section 27(1)(c)(iii), I will order it to reconsider its exercise of discretion by bearing in mind the principles set out above. It may decide to give the Applicant access to some or all of the information, even though it falls within the scope of section 27(1)(c)(iii), and it may continue to withhold some or all of the information from the Applicant, provided that it gives an adequate explanation to her as to why it is withholding the information.

As was the case in Orders F2013-03 and F2013-13, no explanation has been provided as to why discretion was exercised to withhold information under section 27(1)(c)(iii). As a result, I must ask the Public Body to reconsider its decision to withhold information under this provision.

Conclusion

[para 272] With the exception of the information on record 277, which I have found to be subject to section 24(1)(b), I have found that section 27(1)(a) applies to the information the Public Body withheld under this provision. I have also confirmed the Public Body's decision to exercise its discretion to withhold information subject to solicitor-client privilege. I have found that section 27(1)(c)(iii) applies to the information withheld from record 348; however, I must ask the Public Body to reconsider its exercise of discretion to withhold this record.

V. ORDER

[para 273] I make this Order under section 72 of the Act.

[para 274] I confirm the decision of the Public Body to withhold the names and contact information of individual home owners under section 17(1).

[para 275] I require the Public Body to reconsider its decision to withhold

1. Records 85, 311, and 509
2. A portion of a sentence withheld from the first email on record 188
3. Lines 8 – 10, 22 – 26, lines 29 – 30 from the second email on record 188 extending to record 189
4. The first two paragraphs from the email appearing on record 207

5. The first paragraph of the email on record 226
6. The three paragraphs severed from record 227
7. Portions of the second email appearing on record 235
8. The email contained in record 256
9. Records 259 – 263
10. Records 319 – 322
11. A portion of the second email appearing on record 370
12. A portion of an email severed from record 371
13. A portion of an email severed from record 387
14. Record 402
15. Record 404 – 406
16. The severed portion of the email appearing at the top of record 468
17. The portion of record 511 that addresses options available to the Public Body

under section 24(1)(a). The new decision should take into consideration relevant public and private interests in disclosing and withholding the information.

[para 276] I require the Public Body to reconsider its decision to withhold

1. The draft response from record 142
2. The letter contained in records 237 – 240
3. The email contained in record 246
4. Records 259 – 263
5. Records 269 – 273
6. Records 274 – 280
7. The email contained in records 397 – 398
8. Record 408
9. Information severed from record 412
10. The email located at the bottom of record 413

under section 24(1)(b). The new decision should take into consideration relevant public and private interests in disclosing and withholding the information.

[para 277] I require the Public Body to reconsider its decision to withhold information from record 348 under section 27(1)(c)(iii). The new decision should take into consideration relevant public and private interests in disclosing and withholding the information.

[para 278] I confirm the decision of the Public Body to withhold information under section 27(1)(a), with the exception of the information severed from record 277.

[para 279] I order the Public Body to disclose the remaining information to the Applicant.

[para 280] 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.

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Teresa Cunningham
Adjudicator