ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2020-16

June 24, 2020

CITY OF CALGARY

Case File Number 005278

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Summary: An individual made a request to The City of Calgary (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for specific records relating to his property.

The Public Body located responsive records but withheld them in their entirety, citing sections 4(1), 16(1), 17(1), 21(1), 24(1), 25(1) and 27(1).

The Applicant requested an inquiry into the Public Body's response. Prior to and/or during the inquiry, the PB released additional records to the Applicant. The Public Body continues to rely on sections 17(1), 24(1) and 27(1) to withhold records.

The Adjudicator determined that the Public Body properly applied section 17(1) to information in the records except to one item of information.

The Adjudicator determined that the Public Body had properly applied section 24(1) to withhold information in most cases. However, the Public Body's submission regarding its exercise of discretion to withhold information under this provision was insufficient and the Adjudicator ordered the Public Body to exercise its discretion again.

The Adjudicator accepted the Public Body's claim of solicitor-client privilege and its claim of litigation privilege, based on a thorough affidavit of records provided by the Public Body.

The Adjudicator determined that the Public Body had properly applied section 27(1)(c) to information in the records. However, the Public Body's submission regarding its exercise of discretion to withhold information under this provision was insufficient and the Adjudicator ordered the Public Body to exercise its discretion again.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss.1, 6, 17, 24, 27, 71, 72, *Rules of Court* (Alta Reg 124/2010, ss. 5.6-5.8)

Authorities Cited: AB: Decision F2014-D-01, Orders 96-006, 96-012, 96-017, 99-013, F2004-026, F2007-013, F2007-014, F2007-021, F2008-028, F2010-007, F2010-036, F2012-08, F2013-13, F2013-20, F2017-04, F2018-14, F2018-75

Cases Cited: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39, *Canada v. Solosky*, [1980] 1 S.C.R. 821, *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), *Covenant Health v. Alberta (Information and Privacy Commissioner)*, 2014 ABQB 562, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *John Doe v. Ontario (Finance)*, 2014 SCC 36, *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), *North American Road Ltd. v. Hitachi Construction Machinery Co.*, 2005 ABQB 847 (CanLII), *Specialty Steels v. Suncor Inc.*, 1997 ABCA 338 (CanLII), *Witwicky v. Seaboard Life Insurance Co.*, [1998] A.J. No. 1468

I. BACKGROUND

[para 1] An individual made a request to the City of Calgary (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for:

> Emails, documents, records, maps, reports, communication with other government bodies, groups, organizations, corporations or businesses or persons, Planning Department records, meeting minutes referring to [named] Family, Water Resources records, Parks Department, Acquisitions and expropriation department, transportation department, environment department and office of the Mayor and Council records that pertain to us or our property, Caveat No. 951166031. Utility Right of Way No. 951280183

[para 2] The Public Body's response to the Applicant indicates it located 2226 pages of responsive records, providing some to the Applicant and withholding information citing sections 4(1), 17(1), 24(1), 25(1), 27(1) and 29.

[para 3] The Applicant requested a review of the Public Body's response. The Commissioner authorized an investigation to settle the matter. This did not resolve the issues between the parties and the Commissioner agreed to conduct an inquiry.

[para 4] Prior to and/or during the inquiry, the Public Body released additional records to the Applicant. The Public Body continues to rely on sections 17(1), 24(1) and 27(1) to

withhold records. It is no longer relying on sections 25(1) or 29 to withhold information. Some records also continue to be withheld as non-responsive.

II. RECORDS AT ISSUE

[para 5] The records at issue consist of the portion of the 1644 pages of records that have not been provided to the Applicant.

III. ISSUES

[para 6] The issues for this inquiry were set out in the Notice of Inquiry, dated June 10, 2019. Given the Public Body's new decisions regarding access, the issues have been amended; they are as follows:

1. Does section 17(1) of the Act (disclosure harmful to personal privacy) require the Public Body to sever information from the records?

2. Did the Public Body properly apply section 24(1)(a) and (b) of the Act (advice from officials) to information in the records?

3. Did the Public Body properly apply sections 27(1)(a), (b), and (c) (privileged information) to information in the records?

IV. DISCUSSION OF ISSUES

Preliminary issue – non-responsive information

[para 7] The Public Body withheld some records as not responsive to the Applicant's request. This issue is not listed the Notice of Inquiry as the Applicant did not raise it in his Request for Review or Request for Inquiry. The Applicant did not make an initial submission to the inquiry; however, after the submission schedule ended, the Applicant submitted a variation request to make a late submission (request dated September 4, 2019). In that request, he states:

> I felt that my original submission would either reveal to me all FOIP documents or a reference to the section of the act that permits redaction. Furthermore I assumed that this would include all documents that were neither provided nor referenced a section of the act.

[para 8] The Applicant also referred to a bookmark in the records he received from the Public Body, entitled "Mayor's Office Paper Records". He stated that "No section of the act was given as to why this section was redacted" and "Numerous other bookmarks refer to similar material not provided".

[para 9] By letter dated October 17, 2019, I asked the Applicant to clarify these statements. I asked:

> It appears that the Applicant is arguing that some of the information in the records was withheld without reference to a section of the Act. I note that the index of records is not entirely complete […]. The index also refers to records being "non-responsive" to the access request. Is the Applicant referring to the two incomplete entries in the Public Body's most current index of records (cited below), is he referring to the information withheld as "non-responsive", or to something else?

[para 10] Regarding the "Mayor's Office Paper Records", I asked the Applicant to specify what records he was referring to, and what he means by "bookmarks".

[para 11] In his reply, the Applicant did not address the first question about non-responsive information. In response to the questions about the Mayor's Office records and bookmarks, the Applicant provided a screenshot of the electronic version of the records provided by the Public Body. The screenshot shows an index or bookmarks for the records. The Applicant highlighted a bookmark relating to the Mayor's Office records.

[para 12] The version of the records at issue provided to me by the Public Body does not have this index or list of bookmarks.

[para 13] The Public Body confirmed that the bookmarks were part of the records provided to the Applicant. It also pointed to the page numbers for the records relating to the "Mayor's Office Paper Records" bookmark. I have reviewed the relevant records (starting at page 1218 of the most recent records provided by the Public Body in November 2019) and confirm they are records involving the Mayor or Mayor's Office. They have also been disclosed in their entirety to the Applicant.

[para 14] Possibly the Applicant noted the bookmark but did not know to which records it referred. In any event, as the Public Body has confirmed that the Applicant has received these records, that issue has been resolved.

[para 15] The Applicant's September 2019 variation request seemed to indicate an issue with the Public Body's classification of records as non-responsive; however, the Applicant did not respond to my questions asking for clarification on this point. I can only assume that they have been answered or the Applicant decided not to pursue them further. As such, there are no additional issues to be added to the inquiry, outside the issues listed in the third heading of this Order.

1. Does section 17(1) of the Act (disclosure harmful to personal privacy) require the Public Body to sever information from the records?

[para 16] 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.*
>
> …

[para 17] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 18] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 19] Section 1(n) defines personal information under the Act:

> *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 20] The Public Body describes the information withheld under section 17(1) in its initial submission (para. 19):

> The Public Body submits that the information in the Records reveals personal information of third parties. Records 208, 310, 321, 396, 449, 451, 457, 466-467, 918, 943, 945, 947, 965, 1752, 1753, 1759, 1760, 1766, 1771-1772, 1777-1778, 1783-1784, 1789, 1790, 1795, 1801, 1802, 1806-1807, 1811, 1816, 1820, 1824, 1828-1829 contain references to the Public Body's employees' personal schedules such as planned or potential time off, illness and appointments. Records 407, 588, 895, 977, 979 contain the Public Body's employees' personal mobile phone numbers. Records 415, 624-628, 666, and 861 contain employees' opinions and impressions about third parties. Record 492-493 contains a photograph of an individual and related information. Records 861, 922,

> 924-925, 927-928, 968-969, 971-974, 981, 1142 and 1376 contain the personal information of third parties such as name, address and personal email.

[para 21] Previous orders from this Office have found that section 17 does not apply to personal information that reveals only that the individual was acting in a formal, representative, professional, official, public or employment capacity, unless that information also has a personal dimension (Order F2008-028, para. 54).

[para 22] Where this provision was applied to business contact information (such as work phone numbers of public body employees or business employees), it is not information to which section 17(1) can apply. In this case, the Public Body applied section 17(1) to cell phone numbers of Public Body employees. However, the Public Body states that it conducted a search of Public Body cell phone numbers in its corporate directory and via employee profiles on the Public Body intranet. It could not locate these cell phone numbers, which indicates that the numbers were not assigned to the employees by the Public Body (i.e. the numbers appear to be *personal* cell phone numbers of the employees). The Public Body notes that in each case, the cell phone number was entered by the Public Body employee in "free text", and not as part of the employee's usual signature line.

[para 23] I have reviewed the records in which the withheld cell phone numbers appear and I agree with the Public Body's assessment that they are likely personal cell phone numbers of Public Body employees, with one exception (discussed below). I note that the Public Body *did not* withhold cell phone numbers of other Public Body employees where they appear in signature lines of those employees. I find that the cell phone numbers that were withheld are personal information of the relevant employees, to which section 17(1) may apply.

[para 24] I note that in one instance in which a Public Body employee's personal cell phone number was redacted, the number appeared in an email that had been sent to the Applicant. From the context of that email, it appears that the employee provided this cell phone number to address an exceptional circumstance (as opposed to the employee regularly using this cell phone number in conducting his work duties). For this reason, I agree that this number retains its personal dimension such that section 17(1) may apply.

[para 25] The exception to my finding above is the cell phone number withheld in the body of the email on page 895. It was entered in "free text" in the email, but it matches the cell phone number in that employee's signature line, which was disclosed numerous times throughout the records. Section 17(1) does not apply to that phone number.

[para 26] The Public Body has also withheld other personal information about employees, such as vacation schedules and medical absences. This is information has a personal dimension such that section 17(1) may apply.

[para 27] The Public Body has also withheld opinions of Public Body employees about other third party individuals. This falls within the definition of personal information cited above (section 1(n)(viii)). Other information contains names and contact information of

third parties who provided information and opinions to the Public Body in a personal capacity. Opinions provided by an individual are their personal information except insofar as the opinions are about someone else (section 1(n)(ix)). In this case, the opinions provided are not about other individuals; therefore, they are the personal information of the individuals who provided them.

[para 28] One record also contains a photograph of an identifiable individual, which is clearly their personal information.

[para 29] Section 17(2) lists circumstances in which disclosure of personal information is not an unreasonable invasion of privacy. The Public Body states that none of the circumstances apply in this case and I agree.

[para 30] Section 17(4) lists circumstances in which disclosure is presumed to be an unreasonable invasion of privacy. The Public Body has argued that section 17(4)(g) applies to all of the third party personal information. This section creates a presumption against disclosure of information consisting of a third party's name when it appears with other personal information about that third party, or where the name alone would reveal personal information about the third party. This section clearly applies to all of the personal information withheld by the Public Body where the names were not disclosed.

[para 31] This provision also applies where the Public Body disclosed the names of Public Body employees but withheld personal statements (relating to medical absences etc.), as well as to the photograph in the records that does not have a name directly attached.

[para 32] In Order F2017-04 the Adjudicator addressed the application of section 17(4)(g) to photographs in records that do not also contain the names of the individuals in the photograph. She said (at para. 29):

> I also find that the images of individuals are their personal information within the terms of section 17(4)(g), even though their names do not appear in the records. In Order F2014-12, I commented on the application of section 17(4)(g) in situations where an individual appears in video or photographs, but the individual's name is not contained in the video or photograph. I said:
>
> > Section 17(4)(g) makes specific reference to the name of a third party. Neither the photograph nor the video at issue contains the names of the inmates who appear in it. However, in some cases, where the inmates look straight at the camera, their faces are clear enough to be recognizable to someone who knows them. To anyone who knows the inmates and could identify them on viewing the video or the photograph, the name would be available. Essentially, the name of an individual is associated with the individual when the individual is identifiable, as an individual's name is part of the individual's identity.
> >
> > As discussed above, anyone who views the video or the photograph and knows an inmate who appears in the video or photograph would also know the name of the individual and would be able to learn that the individual was an inmate at

> > the Edmonton Remand Centre on June 28, 2011. The name of the individual is therefore associated with the images in the video and the photograph, in association with the fact that the individual was incarcerated in the Edmonton Remand Centre on a given day. I therefore find that section 17(4)(g) applies, as the information in the photograph and the video would effectively reveal to some persons the name of the individual in addition to other personal information about the individual.
>
> This reasoning would apply to the pictures of people that appear in the records at issue. The information that could be determined from the photographs by someone who knows the individuals would be the location and activities of the individual at the time the photographs were taken. As a result, section 17(4)(g) applies.

[para 33] I agree with this analysis, and find that it applies to the photograph in the records.

[para 34] I also find that this analysis applies where the Public Body has disclosed the name of employees but withheld personal comments. Therefore, this provision weighs against disclosure of the personal information of Public Body employees in the records.

[para 35] The Public Body has not argued that any other factors under section 17(4) apply and from the records themselves, none seem to. The Public Body has also not argued that any factors in section 17(5) apply.

[para 36] The Applicant's submissions to this inquiry are minimal, and consist of:

- the Request for Review form, with his original access request to the Public Body and related correspondence attached;
- the Request for Inquiry form stating that the Public Body "failed to provide requested documents on initial FOIP request and has failed to respond at all to Privacy Commissioner of Alberta requests for documents necessary for mediation"
- an initial submission relying on the above Requests;
- the variation request discussed under the "Preliminary issue" section of this Order.

[para 37] Nothing in the materials provided by the Applicant relates to personal information of third parties in the records, or to circumstances that would weigh in favour of disclosing the personal information (for example, that disclosure is necessary for public scrutiny, per section 17(5)(a)).

[para 38] The Public Body has told me that the organization partly owned by the Applicant has brought a civil claim against the Public Body; this claim appears to relate to the subject of the access request. However, the Applicant has not told me whether the records that the Public Body continues to withhold are required for this claim such that section 17(5)(c) might apply (information relevant to a fair determination of the applicant's rights). It is not clear that the personal information withheld by the Public

Body could be relevant to the civil claim, or that the claim relates to the Applicant's rights.

[para 39] On page 981, a Public Body employee provided what appears to be his personal cell phone number to the Applicant via email, in order to set up a meeting. Given the Public Body's submission that the cell phone numbers entered by employees as 'free text' are not numbers assigned by the Public Body, it appears that the employee in this particular case provided his personal number to address an exceptional circumstance (as opposed to the employee regularly providing that cell phone number for work purposes).

[para 40] I have noted that one Public Body employee cell phone number was provided in an email to the Applicant (discussed at para. 24 of this Order). The Public Body withheld the cell phone number in the records at issue, but clearly this number has already been provided to the Applicant in that email. This circumstance might weigh in favour of disclosure. However, it has been about five years since that number was provided by the employee to the Applicant, and it was provided in a 'transitory' type of email sent to set up a future meeting (as opposed to being provided in an "official" document that the Applicant would likely have retained). Therefore, disclosing the phone number again may be more akin to disclosing it anew. In my view, if this factor weighs in favour of disclosing that cell phone number, it has only minimal weight.

[para 41] As noted, the Applicant has not made submissions expressing an interest at all in obtaining the third party personal information in the records at issue. Nor has he provided any information that would indicate that factors weigh in favour of disclosure. As the burden is his to show that the personal information should be disclosed, and because at least one presumption against disclosure applies (section 17(4)(g)), I find that the Public Body is required to continue to withhold that information.

[para 42] This finding does not apply to the cell phone number withheld on page 895, as discussed above (at para. 25).

2. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?

[para 43] The Public Body applied section 24(1)(a) and (b) to information in the records at issue. These sections state:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body*
>
> *(ii) a member of the Executive Council, or*

(iii) the staff of a member of the Executive Council,

…

[para 44] A "consultation" occurs when the views of one or more officers or employees are sought as to the appropriateness of particular proposals or suggested actions; a "deliberation" is a discussion or consideration, by persons described in section 24(1)(b), of the reasons for and/or against an action (Orders 96-006 at p. 10; Order 99-013 at para. 48, F2007-021, at para. 66).

[para 45] The test for sections 24(1)(a) and (b), as stated in past Orders, is that the advice, recommendations etc. (section 24(1)(a)) and/or the consultations and deliberations (section 24(1)(b)) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action. (See Order 96-006, at p. 9)

[para 46] In Order F2013-13, the adjudicator stated that the third arm of the above test was overly restrictive with respect to section 24(1)(a). She restated that part of the test as "created for the benefit of someone who can take or implement the action" (at paragraph 123).

[para 47] The Public Body has pointed out that the third arm of the above test was also found to be overly restrictive with respect to section 24(1)(b) if it is interpreted to mean that one of the persons participating in the consultation or deliberation must have authority to take or implement an action (*Covenant Health v. Alberta (Information and Privacy Commissioner)*, 2014 ABQB 562, at para. 143, footnote 87). This finding is consistent with the adjudicator's comments in Order F2013-13: the person with authority to take an action or implement a decision needn't necessarily have received the advice or been part of every consultation or deliberation for either section 24(1)(a) or (b) to apply. The advice or consultations must be aimed at some action or decision but needn't necessarily hit the mark.

[para 48] The Public Body also argues that the tests enunciated in past Orders of this Office are overly restrictive. It cites the Supreme Court of Canada case, *John Doe v. Ontario (Finance)*, 2014 SCC 36, in which the Supreme Court overturned a finding of the Ontario Information and Privacy Commissioner on the Ontario legislation's equivalent of section 24(1)(a). The Court found that it was unreasonable for the Ontario Commissioner to require evidence that advice had been communicated in order for the provision to be properly applied. Rather, the provision can also apply to drafts of advice (see paras. 50-51).

[para 49] I addressed this argument from this Public Body in Order F2018-14. I said (at paras. 65-67):

Section 24(1) of the FOIP Act is broader than the equivalent exception in Ontario's Act, insofar as section 24(1) is not limited to advice and recommendations; it also includes proposals, analyses and policy options. Evidence that advice had actually been communicated is not a requirement for the application of section 24(1)(a). In fact, in Order F2013-13, the adjudicator specifically found that requiring that advice be made to the decision-maker is overly restrictive. She said (at para. 123, emphasis in original):

> The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. This purpose would not be achieved if information otherwise falling under section 24(1)(a) were automatically producible prior to the decision maker actually receiving it, or in cases where a public body elected to follow another course and the advice did not ultimately reach the decision maker. So long as the information described in section 24(1)(a) is developed by a public body or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a) regardless of whether the individual or individuals ultimately responsible for making a decision receives it. The third arm of the test should therefore be restated as "created for the benefit of someone who can take or implement the action" to better accord with the language and purpose of section 24(1)(a), and I will review the information to which the Public Body has applied section 24(1)(a) with that in mind.

The adjudicator's analysis above, from a 2013 Order of this Office, is consistent with the Supreme Court's finding in *John Doe*. (It was also presented to the Supreme Court as part of the factum of this Office as intervener in the *John Doe* case.)

The Public Body noted the change to the third part of the test for section 24(1)(a) at paragraph 104 of its initial submission. It is therefore unclear why the Public Body continues to argue that the test for applying section 24(1)(a) remains overly restrictive, citing *John Doe*. If the Public Body believes the test to be overly restrictive for reasons other than those discussed in *John Doe*, it hasn't said so.

[para 50] In its initial submission to this inquiry the Public Body again noted the change to the third part of the test for section 24(1)(a) used by this Office (cited at para. 46 above), at paragraph 44 of its submission. It remains unclear to me why the Public Body continues to argue that the test applied by this Office is overly restrictive on these grounds. Given this, and as the Public Body has made arguments based on the tests I have cited above, I will review the information withheld under sections 24(1)(a) and (b) in accordance with these tests.

[para 51] In addition to the requirements in those tests, sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held on a particular topic (and not the *substance* of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

[para 52] Bare recitation of facts or summaries of information also cannot be withheld under sections 24(1)(a) or (b) unless the facts are interwoven with the advice, proposal, recommendations etc. such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48). As well, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at para. 31).

[para 53] The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (which I will refer to as "advice etc.", section 24(1)(a)); and consultations or deliberations between specified individuals (section 24(1)(b)).

Application of sections 24(1)(a) and (b) to the records

[para 54] The Public Body states that the information withheld under section 24(1)(a) includes (at para. 51):

(1) Recommendations and policy options regarding a Notice of Motion given by a Public Body employee (City Planner) to City Councillors

(2) Recommendations and advice to and from Public Body employees regarding Providence wetland drainage matters and a Notice of Motion;

(3) Recommendations and analyses regarding the Providence Area Structure Plan;

(4) Draft agenda items and options;

(5) Recommendations regarding the history and timelines of the Providence Area Structure Plan;

(6) Advice and recommendations regarding area structure plan development processes;

(7) Advice regarding a Providence Area Structure Plan hearing; and

(8) Speaking notes.

[para 55] The Public Body submits that area structure plans are long-range documents requiring input from various business areas. The Public Body states that the employees involved in the discussions were doing so as part of their job duties. It also states that the advice was directed toward individuals with the authority to make the relevant decisions and implement the actions.

[para 56] The Public Body's initial submission states that it applied section 24(1)(b) to:

> …email exchanges between the Public Body's employees discussing how to address various issues regarding the Providence ASP as well as a biophysical inventory. These are also issues that the Public Body had to address, either at the time of the consultation or in the future. Moreover, consulting on these issues are matters that the Public Body employees would reasonably be expected to discuss, and also have a responsibility to discuss by virtue of their employment duties and responsibilities. Finally, these consultations were directed towards taking an action. (At para. 59)

[para 57] The Public Body states that it also applied this exception to communications regarding the "development and impact of the Providence Area Structure Plan" (at para. 60).

[para 58] Having reviewed all of the information, I agree with the Public Body's characterizations of the information, and agree that the information to which section 24(1) has been applied constitutes advice or consultations. The topics discussed clearly required input from several employees in several program areas. Many of the records at issue consist of email conversations between several Public Body employees on topics identified by the Public Body. Many different people were involved in the email conversations; as such, many of the records contain duplicate emails from different inboxes of Public Body employees. This is a primary reason there are so many records responsive to the Applicant's request.

[para 59] That said, in a few cases I will require the Public Body to re-review its application or severing, for the reasons I will discuss later.

[para 60] In some cases the email conversations reveal advice given; more often they reveal the consultations and deliberations that led to the advice. In many cases advice and recommendations (section 24(1)(a)) are intertwined with consultations and deliberations (section 24(1)(b)). For ease of reference I will refer to the information withheld under sections 24(1)(a) and/or (b) as advice or consultations.

[para 61] In some emails, a prior consultation is reiterated to an employee who wasn't involved, but who is involved in other aspects of the same project or issue. Read separately, such emails may appear to contain only background facts; however, in the context of the records as a whole, those updates reveal the prior advice or consultations and also fall within the scope of section 24(1).

[para 62] A few records contain draft and finalized meeting minutes. Having reviewed the records I am satisfied that the meeting discussion would fall within the scope of section 24(1) and so the minutes reflecting the discussion of the meeting do as well.

[para 63] The Public Body has applied section 24(1) to recommendations for speaking notes contained in the records at issue. It states (initial submission, at para. 54):

> These recommendations inform and advise the speaker on the relevant points discussed by the speaker. Further when these recommendation were provided, the speaker had not yet determined the specific information and points to present.

[para 64] The Public Body also cites Order F2008-028, in which the adjudicator found (at para. 260):

> In my view, however, a draft speech or speaking notes prepared by someone other than the speaker constitutes advice or recommendations as to what the individual should or may wish to say – regardless of the substance of the draft speech. I accordingly find, in this context, that the draft speaking notes fall under section 24(1)(a).

[para 65] I agree with the analysis in Order F2008-028. Having reviewed the recommendations for speaking notes, I agree that they constitute advice or recommendations under section 24(1). In these pages, any background facts or similar information cannot be separated from the recommendations; as such, section 24(1) applies to these pages in their entirety.

[para 66] Pages 713-714 are described as a draft memo to City Council and were withheld in their entirety. The memo to Council – whether draft or final – contains advice to Council. However, a final version would be subject to a requirement to undertake a line-by-line review, and the Public Body would be required to disclose information that does not reveal the substance of the advice. That this memo is a draft version does not change this requirement. For example, the header, to, and subject lines are not information to which section 24(1) can apply. Page 714 contains only a placeholder for the author's name and contact information; this also is not information to which section 24(1) applies. There may be additional information on page 713 that does not reveal the substance of the advice given on that page. I will order the Public Body to conduct a line-by-line review of pages 713-714 and sever only what reveals the substance of the advice given. The Public Body has done this properly in almost every other case where it applied section 24(1) and should follow those decisions in severing these pages.

[para 67] Pages 436-446 are described as a draft Terms of Reference document that was sent to several employees for comment. As this is the subject of consultation, I agree that section 24(1)(b) applies. However, there is information on page 436, which introduces the draft but is not itself part of the draft nor does it reveal information contained in the draft. The author, date, and subject line, and introductory paragraph on page 436 is not information to which section 24(1) can apply. I will order the Public Body to disclose this information.

[para 68] In a few cases, the Public Body has withheld information under section 24(1) when identical information on other pages was disclosed. Pages 509-564 are described in the index of records as 'public hearing information' and were disclosed in their entirety. Pages 570-572 and 613-615 are identical, and are described as an unsigned letter from a Public Body employee to a third party. Information on these pages was withheld under section 24(1). However, these pages are identical to pages 556-558, which were disclosed. There is no apparent distinction between these records (for example, there is no indication that the withheld versions are drafts; all appear identical). Therefore, even if the information in pages 570-572 and 613-615 is advice or consultations, disclosing that information would no longer *reveal* advice or consultations as it has already been

revealed by disclosing pages 556-558. As such, section 24(1) cannot apply to pages 570-572 and 613-615 and I will order the Public Body to disclose that information to the Applicant.

[para 69] Pages 1020 and 1027 are both described in the index as emails between Public Body employees about a particular topic; the index indicates that information on both was withheld under section 24(1)(b). I agree that this provision applies to the information withheld on page 1020. I also agree that it applies to the first item withheld under section 24(1) on page 1027 (the second email from the top). However, the remaining information on page 1027 that was withheld under section 24(1) was disclosed on page 1020. I agree with the Public Body's decision on page 1020 that the information disclosed is not information to which section 24(1) applies. However, even if that exception did apply, the Public Body already revealed the information on page 1020 and so cannot withhold it on page 1027. I will order the Public Body to disclose the information on page 1027 that was already disclosed on page 1020.

[para 70] The information on page 896 is quite similar to the information disclosed on page 897. From the information disclosed on page 896 it is clear that the withheld information on that page consist of questions sent from one Public Body employee to another. I agree that section 24(1)(b) applies to this information. However, this information is also similar to (but not the same as) the information disclosed on page 897. It is unclear why the Public Body exercised its discretion to withhold the information on page 896 and disclose it on page 897. I will address this in the next section regarding the Public Body's exercise of discretion more generally.

Exercise of discretion

[para 71] Section 24(1) is a discretionary exception. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.

[para 72] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

[para 73] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's

exercise of discretion had been treated in past orders of this Office. She concluded (at para. 104):

> In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*.

[para 74] The Public Body explained the factors it considered in exercising its discretion at paragraphs 110-115 of its initial submission. The points relevant to the application of section 24(1) are:

- that the general purpose of the Act which is to which is to provide information subject to limited and specific exceptions;
- that the purpose of section 24 of the Act which is to allow full and frank deliberations and discussions to occur by employees of the Public Body, as well as the public's interest in having its public servants conduct these discussions.

[para 75] The Public Body further states (at para. 114 of its initial submission):

> The Public Body considered whether the information in the Records could be severed and severed such Records where such severing would not reveal information subject to at least one exception of the Act and would not defeat the purpose of the exceptions applied by the Public Body.

[para 76] Regarding this last point, considering whether information could be severed is a requirement under section 6 of the Act, which requires a Public Body to sever a record where it can reasonably be done (section 6(2)). Exercising this duty under section 6, is not the same as exercising discretion to withhold or disclose information to which an exception applies.

[para 77] In her affidavit, a Public Body analyst responsible for reviewing the responsive records also states that she considered "whether there is a compelling public interest in having the information in the public domain and concluded there wasn't one" (at para. 50).

[para 78] Order F2018-75, addresses a similar explanation for a public body's exercise of discretion. It states (at paras. 140-141):

> By merely stating the purpose of section 24(1), it appears that the Public Body may be applying that exception in a 'blanket' manner, rather than on a case-by-case basis. Therefore, I will order the Public Body to exercise its discretion to withhold the limited amount of information to which section 24(1) applies.
>
> One of the factors to consider is whether the purpose of section 24(1) is fulfilled by withholding information. In other words, would disclosing *each item* of information inhibit full and frank discussion? The Public Body has applied section 24(1) to items of information that, while falling within the scope the provision, appear innocuous. It is difficult to see, from my point of view, what harm could result from disclosing some of

> the information withheld by the Public Body. That said, the Public Body is familiar with these records, the context in which they were created, and the possible effect of disclosure of particular information to an extent that I am not. For this reason, the Public Body has the final decision to withhold or disclose information to which a discretionary exception applies. However, in making that decision, the Public Body must exercise its discretion fairly, and in consideration of all (and only) the appropriate factors, in every instance it is applying section 24(1).

[para 79] Noting the purposes of the Act in general and the purpose of the exception in particular, is not a sufficient explanation. Aside from determining there was no public interest in disclosure, the Public Body did not indicate whether it considered whether other factors weigh in favour of disclosure, such as the Applicant's interest in the information. It seems to me that the Applicant has in interest in the subject matter as he is involved in an ongoing legal proceeding with the Public Body on this topic. Whether that interest outweighs factors against disclosure is for the Public Body to determine, but it must consider *all relevant interests in disclosure*, including the Applicant's. General public interest in disclosure is relevant but not the only factor that weighs in favour of disclosure in any given case.

[para 80] Further, the Public Body seems not to have distinguished between different kinds of information to which it applied section 24(1). Much of the information consists of 'frank' discussions between Public Body employees on various topics, but some information does not. For example, the draft terms of reference on pages 436-446, while being the subject of a consultation, do not contain any comments of other employees, frank or otherwise. It is therefore not entirely clear what the Public Body is protecting by exercising its discretion to withhold that information. Additionally, it is not clear why the Public Body exercised its discretion to withhold the information on page 896 that is very similar to information disclosed on page 897.

[para 81] I will order the Public Body to reconsider its exercise of discretion to withhold information under section 24(1). If the Public Body continues to exercise its discretion to withhold information, I will order it to provide both me and the Applicant with its reasons. It might be helpful for the Public Body to address its exercise of discretion relative to the different types of records, such as email consultations between Public Body employees, advice to Council, draft documents, etc.

[para 82] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII) (*EPS*), the Court provided detailed instructions for public bodies exercising discretion to withhold information under the Act. This decision was issued after the Public Body provided its submissions to this inquiry. However, it might be helpful for the Public Body to review the discussion.

[para 83] The Court said (at para. 416)

> What *Ontario Public Safety and Security* requires is the weighing of considerations "for and against disclosure, including the public interest in disclosure:" at para 46. The relevant interests supported by non-disclosure and disclosure must be identified, and the

> effects of the particular proposed disclosure must be assessed. Disclosure or non-disclosure may support, enhance, or promote some interests but not support, enhance, or promote other interests. Not only the "quantitative" effects of disclosure or non-disclosure need be assessed (how much good or ill would be caused) but the relative importance of interests should be assessed (significant promotion of a lesser interest may be outweighed by moderate promotion of a more important interest). There may be no issue of "harm" in the sense of damage caused by disclosure or non-disclosure, although disclosure or non-disclosure may have greater or lesser benefits. A reason for not disclosing, for example, would be that the benefit for an important interest would exceed any benefit for other interests. That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

[para 84] It further explained the weighing of factors at paragraph 419:

> …If disclosure would enhance or improve the public body's interests, there would be no reason not to disclose. If non-disclosure would benefit the public body's interests beyond any benefits of disclosure, the public body should not disclose. If disclosure would neither enhance nor degrade the public body's interests, given the "encouragement" of disclosure, disclosure should occur. Information should not be disclosed only if it would run counter to, or degrade, or impair, that is, if it would "harm" identified interests of the public body.

[para 85] Lastly, the Court described burden of showing that discretion was properly exercised (at para. 421):

> I accept that a public body is "in the best position" to identify its interests at stake, and to identify how disclosure would "potentially affect the operations of the public body" or third parties that work with the public body: EPS Brief at para 199. But that does not mean that its decision is necessarily reasonable, only that it has access to the best evidence (there's a difference between having all the evidence and making an appropriate decision on the evidence). The Adjudicator was right that the burden of showing the appropriate exercise of discretion lies on the public body. It is obligated to show that it has properly refrained from disclosure. Its reasons are subject to review by the IPC. The public body's exercise of discretion must be established; the exercise of discretion is not presumptively valid. The public body must establish proper non-disclosure. The IPC does not have the burden of showing improper non-disclosure.

3. Did the Public Body properly apply sections 27(1)(a), (b), and (c) (privileged information) to information in the records?

[para 86] The Public Body applied section 27(1)(a) to many records at issue, often in conjunction with other provisions. The Public Body did not provide me with an unredacted copy of records over which privilege was claimed under section 27(1)(a). Where the Public Body applied section 27(1)(b) to information in the records, it also applied section 27(1)(a), so I do not have a copy of the records over which section 27(1)(b) was applied. As such, I will not make a decision regarding the Public Body's application of section 27(1)(b); rather I will consider the application of section 27(1)(a) first.

[para 87] Where the Public Body applied section 27(1)(c), this was the only provision that was applied, and I have a copy of the records to decide the issue.

[para 88] Section 27 of the Act states:

> *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,*
>
> *(b) information prepared by or for*
>
> *(i) the Minister of Justice and Solicitor General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services, or*
>
> *(c) information in correspondence between*
>
> *(i) the Minister of Justice and Solicitor General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor 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 Solicitor General or by the agent or lawyer.*

Section 27(1)(a) – Solicitor-client privilege

[para 89] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821. The Court said:

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

[para 90] The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 91] Section 71(1) of the Act states:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 92] Therefore, the burden of proof lies with the Public Body to prove that section 27(1)(a) of the Act applies to the records at issue.

[para 93] Where a public body elects not to provide a copy of the records over which solicitor-client or litigation privilege is claimed, the public body must provide sufficient information about the records, in compliance with the civil standards set out in the *Rules of Court* (Alta Reg 124/2010, ss. 5.6-5.8). These standards were clarified in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*). *ShawCor* states that a party claiming privilege must, for each record, state the particular privilege claimed and provide a brief description that indicates how the record fits within that privilege (at para. 36 of *ShawCor*).

[para 94] The Public Body claimed solicitor-client privilege only, with respect to 70 records, and in conjunction with litigation privilege with respect to 7 other records. Some records are comprised of single pages and some are multiple pages.

[para 95] The Public Body provided an affidavit sworn by the Analyst who responded to the Applicant's request and who has reviewed the records at issue. Attached to this affidavit is a Schedule of the records over which privilege has been claimed. In each case, the Public Body provided a record number, the associated page numbers in the records at issue, a brief description of the record, the specific privilege claimed, and how the privilege applies. This Schedule was provided in the Public Body's initial submission so I can reproduce an excerpt here:

Record Number	FOIP Records Page Numbers	Brief Description of Record	Legal Privilege Asserted (s.27(1))	How Legal Privilege Applies to the Record
7.	375-376	Email chain between a City lawyer and clients following up on and including legal advice regarding Providence ASP drainage issues.	Solicitor-client privilege	A continuum of communication between a lawyer and client providing and relating to the provision of legal advice.
8.	380	Email between City employees describing advice provided by a City lawyer to a client regarding Providence ASP drainage issues.	Solicitor-client privilege	The severed portion of this record reveals the content of legal advice contained in a communication between a lawyer and a client.

[para 96] The information provided by the Public Body in the affidavit and schedule is sufficient to meet the standard for asserting privilege set out in *ShawCor*. Most of the records over which solicitor-client privilege alone has been claimed are described as emails between Public Body counsel and employees containing or discussing legal advice on the topics discussed in the other records at issue. Some emails are not to or from

counsel, but were between employees discussing the advice. A few emails are described as also containing handwritten notes of counsel.

[para 97] I have had the benefit of reviewing most of the records at issue so I am familiar with the topics discussed and the various employees who were involved in the email discussions. I am satisfied, on a balance of probabilities, that the topics discussed are such that it would be reasonable to obtain legal advice at various points. The records provided to me also mention matters having been referred to counsel.

[para 98] I am also satisfied that the employees involved in the email discussions were involved in requesting and receiving the legal advice as part of their work duties such that sharing the advice with these employees did not undermine the intention to maintain confidentiality.

[para 99] Several records have been described as internal notes of counsel regarding the topics discussed elsewhere in the records at issue, including notes of counsel on documents that would otherwise not have been privileged. For example, record 86 (pages 1924-1968) is described as a statutory declaration and exhibits filed by an opposing party to a legal proceeding involving the Public Body. This record is also described as containing handwritten notes of the Public Body counsel; the Public Body states that revealing these notes would reveal the issues "considered by [the] lawyer in the course of providing legal advice to a client" (Schedule 1 attached to affidavit at Tab 1b of Public Body's initial submission).

[para 100] In Order F2013-20, I accepted that "notes of counsel prepared for a proceeding – i.e. that reflect the preparation of the Public Body's strategy – are protected under solicitor-client privilege. Such notes would be a continuation of counsel's advice to the Public Body regarding its approach to the proceeding" (at para. 74). This followed previous Orders concluding that working papers of counsel that are directly related to the giving or seeking of legal advice meet the criteria for solicitor-client privilege (Order 96-017, cited by the Public Body).

[para 101] The notes and working papers must be directly related to the giving and seeking of legal advice. As discussed in *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39 (*Blank*), the purpose of solicitor-client privilege is to allow free and frank communications between a client and counsel, to allow full and ready access to legal advice (see paras. 26 and 28). Notes and working papers of counsel that reveal the legal advice being formulated or given must also fall within the scope of the privilege.

[para 102] The Public Body's description of the records in the Schedule indicate is it reasonable to conclude that counsel's notes on those records relate to the giving and receiving of legal advice.

Section 27(1)(a) – Litigation privilege

[para 103] The Public Body claimed litigation privilege alone to nine records: Records 21, 25-29, and 32-34.

[para 104] Litigation privilege was discussed in the Supreme Court of Canada decision *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52. The Court said (at para. 19):

> Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at pp. 1009-10.

[para 105] The Public Body states that "[t]he Litigation Privilege Records were prepared for the dominant purpose of litigation, specifically the Claim filed by [the Applicant's organization]. This litigation is active and ongoing" (at para. 81).

[para 106] One record over which litigation privilege alone is claimed is described as a screenshot made for the dominant purpose of litigation (Record 21). Record 34 is described as counsel's note and reminder relating to the Claim, created for the dominant purpose of litigation. Records 27-29 and 32-33 are described as emails between counsel and Public Body employees (including the Claims Division and legal assistants) made for the dominant purpose of litigation. Litigation privilege was applied to only a portion of the information on Record 32 (page 1493). The remaining information (withheld under section 24(1) but provided to me) relates to the litigation proceeding. Similarly, the pages around Record 33 (page 1495) indicates that it also relates to the litigation proceeding.

[para 107] Given the ongoing litigation involving the Public Body, and the clear connection between the litigation and topics discussed in the records at issue, I am satisfied on a balance of probabilities that the records described above are protected by litigation privilege.

[para 108] That said, I had questions regarding the application of litigation privilege over Records 25 and 26 (pages 1407-1411 and 1414-1425). Both records are described in the affidavit of records as specified types of records (internal notes, photographs of property) created by the City Claims Division regarding an investigation of a complaint about a blocked culvert. The affidavit further states that these records were provided to the Law Department when the statement of claim was filed.

[para 109] By letter dated March 18, 2020, I explained my concerns to the Public Body and asked for additional information. I reviewed the case law regarding litigation privilege: that the dominant purpose for the creation of the record must be for use in litigation that is ongoing or reasonably contemplated. It is not sufficient for litigation to be *one* of the purposes for the preparation of the record. Further, litigation must be the purpose for the *creation* of the record, not the purpose for which it was later obtained

(*ShawCor*). In *ShawCor*, the Court of Appeal considered whether records created for the purpose of an investigation were protected by litigation privilege after litigation was contemplated. More specifically, the records were created for an investigation that would have been completed even if litigation had never been contemplated. The Court stated that "the purpose behind the creation of a record does not change simply because the record is forwarded to, or through, in-house counsel" (at para. 87). In other words, where a record is created for an investigation, and that record will be completed for the purpose of the investigation regardless of whether litigation is anticipated, the dominant purpose of that record might be for the investigation even if it is later used in the litigation.

[para 110] In *Witwicky v. Seaboard Life Insurance Co.*, [1998] A.J. No. 1468, the Court found that the dominant purpose for a letter requested by an insurance claimant from his physician was to provide additional information to the insurance company about the claim, and not for the litigation that the claimant subsequently initiated (see esp. paras. 11-21).

[para 111] In *North American Road Ltd. v. Hitachi Construction Machinery Co.*, 2005 ABQB 847 (CanLII), the Court rejected the argument that records over which litigation privilege was being claimed by an insurance company were created for the purpose of determining an insurance claim, not the later litigation. The Court came to this conclusion based on the fact that the insurance company had retained an expert who would not have been retained for a claim where litigation had not been contemplated.

[para 112] In *Specialty Steels v. Suncor Inc.*, 1997 ABCA 338, the Alberta Court of Appeal concluded that the relevant time for assessing the dominant purpose of a record is at the time it was created (completed), rather than the time it was requested. A record may have been requested for one purpose (e.g. an investigation) but another purpose (e.g. for use in litigation) may become the dominant purpose prior to the creation/completion of that record (see paras. 8-9).

[para 113] As noted above, records 25 and 26 are described in the affidavit of records as specified types of records (internal notes, photographs of property) created by the City Claims Division regarding an investigation of a complaint about a blocked culvert. The affidavit further states that these records were provided to the Law Department when the statement of claim was filed.

[para 114] In its submission, the Public Body has stated that "[a]s such complaints often lead to litigation (as this one did), the Public Body's Claims Adjustor's investigation and file are created in contemplation of litigation" (at para. 82).

[para 115] In my letter to the Public Body, I said that the description of records 25 and 26 in Schedule 1 to the sworn affidavit indicate that these records could have been created for the purpose of responding to a complaint, rather than for the *dominant* purpose of litigation. *ShawCor* indicates that it is not sufficient for *one of the purposes* of a record to be for litigation; litigation must be the *dominant* purpose. Further, the relevant purpose is the purpose for which the record was created, not later obtained.

[para 116] In its response, dated April 7, 2020, the Public Body clarified the circumstances of the creation of records 25 and 26. It said that the Claims Division is a section in the Law Department, responsible for handling all claims against the Public Body. It states that individuals not satisfied that their claim was resolved will often file litigation against the Public Body. Other areas of the Public Body handle different kinds of complaints; however, the types of claims handled by the Claims Division are often a first step in subsequent litigation.

[para 117] The Public Body states that litigation was contemplated from the outset of the claim to which records 25 and 26 relate.

[para 118] In his April 16, 2020 response, the Applicant raised concerns about the Public Body's claim of litigation privilege over records 25 and 26. He Applicant provided logs from the Public Body regarding his complaint about the culvert. These logs include photographs, presumably taken by the Public Body. The dates of these logs are prior to the date the Applicant says he made his *claim* regarding damage relating to the culvert.

[para 119] As the Applicant had raised a reasonable objection, I asked the Public Body to address it. By letter dated April 17, 2020, I said:

> The logs provided by the Applicant appear to relate to his *complaint* about the culvert, made to an area other than the Claims Division, and prior to the *claim* being made. Can the Public Body confirm whether any of these logs and/or photographs are the same as information contained in Records 25 or 26? If so, it seems that these documents were created before a claim was filed by the Applicant. In that case, can those Records be said to have been *created* for the dominant purpose of litigation? In other words, how does litigation privilege apply? Please be clear about records created to respond to the *complaint* in comparison to records created in contemplation of litigation (in response to the *claim*). In addition to this issue of timing, please also address the fact that the Applicant has copies of these logs already.
>
> If these logs and/or photographs are *not* the same information contained in Records 25 and 26 please explain.

[para 120] The Public Body's response, dated May 5, 2020, states that the logs provided by the Applicant are Service Requests, and confirmed that they are not the same as the information in records 25 and 26.

[para 121] The Public Body notes that of the three Service Requests documents provided by the Applicant, one relates to a call made by an individual with concerns about a wetland. It doesn't reference the culvert. The other two documents are copies of one Service Request, which relates to the culvert. The Public Body notes that the Service Request relating to the culvert was initiated by a call made in February 2015. Most of the activities logged in the Service Request occurred in March – May 2015. The Service Request was closed in November 2015. I agree with these facts.

[para 122] The Public Body explains that Service Requests are documented in a different information system than that used by Claims. The Claims Adjustor was not involve in creating the Service Request, nor did the Adjustor take the photographs in the Service Request.

[para 123] The Public Body also states that the role of its Water Services Department (which responded to the initial complaint) is different from that of the Claims department. The former area responded by unblocking the culvert; the latter area investigated the claim to determine liability. Therefore, the Service Requests, created by the Water Services Department, serve a different function than records 25 and 26 created by the Claims department.

[para 124] The Public Body points to the copy of the Applicant's claim made to the Public Body, dated October 23, 2015, which occurs in the records at issue, as well as the Claims Adjustor's 'without prejudice' response and the Applicant's subsequent letter (November 3, 2015), indicating a civil action was imminent. The Public Body states that this supports its argument that litigation was contemplated from the outset of the Applicant's claim. It also states that the different items in records 25 and 26 were all created after the date of the Applicant's claim.

[para 125] In his final response, the Applicant asked whether the records over which privilege is claimed "involve unauthorized access (trespass) to the [Applicant's property] by a claims adjustor acting for the city?" He also states:

> I would also like to confirm whether legal privilege (Section 27 FOIP act Exceptions pg 203) has been waived by the public body by previous disclosure to outside parties who are not the public bodies' lawyers. I would further like to argue that the city would have created at least some of these records regardless of litigation. Are previously disclosed public body documents acknowledging liability considered privileged? We feel the city has adopted a very liberal interpretation of the term "legal privilege" in order to redact both legal and non-legal opinions. I would like to request that the Privacy Commissioner be allowed to review the withheld documents to judge whether there are documents or portions of documents that can be disclosed without violating the FOIP Act.

[para 126] I don't know what "pg 203" refers to in the above citation; page 203 of the records at issue was provided to the Applicant.

[para 127] I also do not know whether the Applicant is questioning all of the Public Body's claims of privilege for the above reasons. The Applicant had an opportunity in his initial and rebuttal submissions to question the Public Body's claim of privilege. His sparse submissions did not address privilege at all. It was not until I asked the Public Body specific questions about records 25 and 26 that the Applicant made specific comments regarding the Public Body's claim of privilege. My questions, and the Public Body's responses to those questions, relate only to records 25 and 26; it is too late in the process for the Applicant to make arguments on the Public Body's privilege claims generally. Those arguments ought to have been made in his initial submission, or in his

rebuttal submission where he had the opportunity to respond to the Public Body's initial submission.

[para 128] The Applicant questions whether some information over which privilege has been claimed was previously disclosed to third parties and/or possibly to him. However, he does not provide support for this possibility. The Public Body has explained that while the Applicant's complaint and later claim were regarding the same or similar issues, the Public Body withheld only information created for the claim as privileged. Specifically, the Public Body explained that the Service Request records created in response to the Applicant's *complaint* are separate from the records created in response to the Applicant's *claim*. I accept this explanation.

[para 129] From the Public Body's April 7, 2020 and May 5, 2020 responses, I understand that the creation of records 25 and 26 is more akin to the circumstances in *North American Road Ltd. v. Hitachi Construction Machinery Co.* than *Witwicky v. Seaboard Life Insurance Co.*

[para 130] I accept that litigation was contemplated at the outset of the claim such that records 25 and 26 were created for the dominant purpose of litigation.

[para 131] In his last response, the Applicant requested that I be permitted to review the requested records. Presumably, he is asking that I be able to review the records over which legal privilege has been claimed, as I have copies of the remaining records. The Public Body has elected not to provide me with records over which it has claimed litigation and solicitor-client privilege. Following *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), I cannot compel production of those records.

[para 132] Because of this limitation, the Court of Queen's Bench in *EPS*, cited earlier in this Order, explained that the role of this Office in reviewing information over which solicitor-client privilege and/or litigation privilege is claimed is different from our role in reviewing other exceptions applied. It said (at para. 83):

> The IPC manifestly has some authority respecting the review of solicitor-client privilege claims but that authority is not equivalent to the authority that might be exercised respecting other types of exceptions from disclosure.

[para 133] The Court described the role of this Office at paragraphs 103-105 of that decision. I understand the Court to say in that decision that my role in reviewing the Public Body's claim of privilege is to ensure that the Public Body's assertion of privilege meets the requirements set out in *ShawCor*, and that the information provided in support of that assertion is consistent with the relevant tests for the cited privilege.

[para 134] I have accepted the affidavit and other information provided by the Public Body with respect to its claims of privilege. I understand that the Applicant might be more confident in this finding if I had reviewed the records.

Section 27(1)(a) – Both Solicitor-client and Litigation privilege claimed

[para 135] Both solicitor-client and litigation privilege were claimed over seven records in the Schedule. These include a memo and litigation report from the Public Body Claims Division to counsel regarding a claim (Record 23), two memos from counsel to the Claims Division regarding the claim (Records 24 and 37). These memos are described as communications for the purpose of giving and receiving legal advice, as well as communications made for the purpose of impending litigation.

[para 136] The remaining records (Records 30, 31, 35 and 36) are described as emails between counsel and Public Body employees and counsel's notes regarding the claim.

[para 137] I am satisfied, on a balance of probabilities, that the records described here fall within either or both solicitor-client privilege or litigation privilege for the same reasons given earlier in this Order.

Section 27(1)(a) – Exercise of discretion

[para 138] Past Orders of this Office have found that once solicitor-client privilege has been established, withholding the information is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036, and F2012-08 citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* (cited above, at para. 71).

[para 139] I agree and given the Supreme Court of Canada's recent discussion of litigation privilege in *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, I would extend this rationale to information protected by litigation privilege.

Section 27(1)(c)

[para 140] Section 27(1)(c) applies to information in correspondence between the persons listed in that provision, about a matter involving the provision of advice or other legal services. The Public Body applied this exception to pages 1718-1738.

[para 141] In its initial submission, the Public Body states (at para. 105):

> These Records contain email communications between the Public Body's lawyers and external parties. These matters relate directly to legal services provided by the Public Body's lawyers, and the communications contemplated that the lawyers were providing legal services (specifically, litigation filed against the Public Body regarding the Providence ASP.)

[para 142] Having reviewed these pages, I agree with the Public Body's description. Because these pages consist of email chains, the same messages are often repeated. I agree that section 27(1)(c) applies to the information in these pages.

Section 27(1)(c) – Exercise of discretion

[para 143] This provision is discretionary and does not apply to claims of legal privileges. Therefore, the discussion of the proper exercise of discretion under section 24(1) (at paras. 71-85 of this Order) apply here as well.

[para 144] Regarding its exercise of discretion, the Public Body states that it considered the general purpose of the Act, as well as the purpose of section 27(1)(c). It states (at para. 113 of its initial submission):

> The Public Body considered the public's interest in its public servants being able to more consistently and effectively conduct litigation and provide legal advice. The Public Body also considered that disclosing the Public Body's confidential communications would discourage these communications and harm the Public Body's ability to effectively prepare for litigation and provide legal services to the Public Body.

[para 145] As was the case with the Public Body's exercise of discretion under section 24(1), the Public Body's explanation here does not address the particular information withheld under section 27(1)(c) but rather addresses the application of that exception in a blanket manner.

[para 146] In her affidavit, the Analyst said (at paras. 45-46):

> Upon reviewing the Records to which Section 27(1)(c) had been applied I determined that Records 1718-1738 would continue to withheld pursuant to this exception however other Records to which this exception had been applied could be provided to the Applicant.
>
> 1 determined that information contained in Records 1718-1738 were communications between the Public Body's lawyers and third parties that were related directly to legal services provided by the Public Body's lawyers, and the communications contemplated that the lawyers were providing legal services.

[para 147] The Analyst did not explain why she had determined that pages 1718-1738 would be withheld while other information to which section 27(1)(c) applied could be disclosed to the Applicant. Perhaps the fact that the communications at pages 1718-1738 involved third parties weighed against disclosure. This would be one among many factors to consider.

[para 148] The Public Body may have considered all relevant factors in exercising its discretion to apply section 27(1)(c) but it has not provided a sufficient description of the factors considered. I will order the Public Body to reconsider its exercise of discretion to withhold information under section 27(1)(c). If the Public Body continues to exercise its discretion to withhold information, I will order it to provide both me and the Applicant with its reasons. The Public Body should consider the discussion with respect to its exercise of discretion under section 24(1) here as well (see paras. 71-85 of this Order) for the present purposes as well.

V. ORDER

[para 149] I make this Order under section 72 of the Act.

[para 150] I find that section 17(1) applies to the information withheld under that provision, except the cell phone number on page 895, discussed at paragraph 25 of this Order. As no other exception applies to that information, I order the Public Body to disclose it to the Applicant.

[para 151] I find that section 24(1) applies to the information withheld under that provision, except the information described at paragraphs 67-69 of this Order. As no other exception applies to that information, I order the Public Body to disclose the information to which section 24(1) does not apply, per paragraphs 67-69.

[para 152] I find that section 27(1)(a) applies to the information withheld under that provision.

[para 153] I find that section 27(1)(c) applies to the information withheld under that provision.

[para 154] I order the Public Body to exercise its discretion to withhold information under sections 24(1) and 27(1)(c), per the directions at paragraphs 71-85 and 143-148 of this Order.

[para 155] I further order the Public Body to notify me and the Applicant in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator