

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

**ORDER F2020-R-01
(RECONSIDERATION OF ORDER F2017-54)**

January 7, 2020

ALBERTA EMERGENCY MANAGEMENT AGENCY

Case File Number 001496

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Summary: This Order is a reconsideration of Order F2017-54, which examined the response of the Alberta Emergency Management Agency (the Public Body) to an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act). On judicial review of that Order, the Court of Queen's Bench held that parts of the Order by which the previous adjudicator ordered disclosure of records to which section 24(1) had been applied was unreasonable.

In that inquiry, the records had not been provided for the Adjudicator's review as they were also withheld under a claim of privilege. The privilege claim was later withdrawn, and the Court directed that the records be provided to this Office for assessment by a different Adjudicator.

In this reconsideration, heard by a different adjudicator, the Public Body applied sections 17, 24(1) and 27(1)(b) and/or (c) to information in several pages of records.

The Adjudicator found that section 27(1)(b) did not apply to the records over which it had been claimed. Section 24(1) was found to apply to most of the information in those pages; the Adjudicator ordered the Public Body to redact the information over which section 24(1) applied, and provide the remainder of the information (such as background facts, dates, etc.) to the Applicant.

The Adjudicator found that section 27(1)(c) applied to all of the information over which it had been applied.

In the initial inquiry, the Public Body argued that six pages of records (pages 182-187) are excluded from the FOIP Act under section 4(1). The Adjudicator rejected this argument in Order F2017-54, and ordered the Public Body to respond to the Applicant with respect to these records, including the appropriate application of any exception in the Act. The Public Body complied with that part of the Order, and applied sections 27(1)(a), (b) and (c), as well as section 24(1), to the information in these pages.

A copy of these records had been provided to the adjudicator in the initial inquiry and was also before the Adjudicator in this reconsideration. The Adjudicator determined that solicitor-client privilege had been properly claimed over the information in these records.

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

Authorities Cited: **AB:** Decision F2014-D-01, Orders 96-006, 96-012, 97-007, F2004-026, 2007-013, F2010-007, F2007-014, F2008-008, F2010-007, F2010-036, F2012-06, F2012-08, F2012-10, F2013-13, F2014-R-01, F2014-38, F2017-54

Court Cases Cited: *Alberta (Municipal Affairs) v. Alberta (Information and Privacy Commissioner)*, 2019 ABQB 436 *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), *Solosky v. The Queen*, [1980] 1 SCR 821

I. BACKGROUND

[para 1] On April 20, 2015, the Applicant made an access request to Alberta Emergency Management Agency (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for information relating to the 2013 floods, and berms constructed. The Public Body provided some records and withheld information under sections 17, 24 and 27 of the Act. The Applicant requested an inquiry in October 2015. An inquiry was conducted, concluding with Order F2017-54, issued on June 16, 2017. The Public Body applied for a judicial review of that Order.

[para 2] In *Alberta (Municipal Affairs) v. Alberta (Information and Privacy Commissioner)*, 2019 ABQB 436 (*Municipal Affairs*), the Court of Queen's Bench quashed Order F2017-54 in part. The Court remitted to the Commissioner the decision of whether some of the information that had been withheld by the Public Body had been properly withheld under section 24 of the FOIP Act.

[para 3] The Public Body had withdrawn its claim of privilege over some of the records prior to the judicial review proceeding, applying sections 17(1), 24(1), 27(1)(b) and/or 27(1)(c) instead (pages 3-6, 7-9, 43-44, 62-68, 151-160, 163-172, 175-179 and 190-199). These pages were therefore not before the Court in the proceeding and not subject to the Court's decision. The application of sections 17(1), 24(1) and 27(1)(b) and

(c) to these pages is at issue in this reconsideration. Records 7-9, 43-44 and 175-179 are not at issue, as the Public Body withdrew its objection to the release of these records to the Applicant.

[para 4] In the initial inquiry the Public Body had argued that the information in pages 182-187 was excluded from the scope of the FOIP Act under section 4(1) of the Act. The adjudicator found that section 4(1) did not apply to those pages, but that other exceptions in the Act might. She ordered the Public Body to “include the records in its response to the Applicant under the FOIP Act. The Public Body is not precluded from applying exceptions to disclosure if it determines that such apply” (at para. 462 or Order F2017-54).

[para 5] Subsequent to that Order, the Public Body applied sections 24(1)(a) and 27(1)(a), (b) and (c) to the information in those pages; the Public Body’s application of those exceptions is at issue in this reconsideration.

[para 6] In his rebuttal submission to this reconsideration, the Applicant points to information received from another public body in response to a separate access request. He states:

What is conspicuously missing from the same submission is the high-water level readings from June 23, 2013 to July 1, 2013.

The final piece to this (and other ongoing inquiries) is to finally disclose the above noted (missing) water levels.

[para 7] While I cannot reveal the content of the records at issue, I can tell the Applicant that I cannot find references to the specified water levels in those records.

II. RECORDS AT ISSUE

[para 8] As explained above, the records at issue are pages 3-6, 62-68, 151-160, 163-172, 182-187 and 190-199.

III. ISSUES

[para 9] The Notice of Reconsideration, issued on September 13, 2019, lists the issues for the reconsideration as follows:

1. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?
2. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?
3. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

[para 10] I will consider the Public Body's application of sections 27(1), 24(1) and 17(1) in that order.

IV. DISCUSSION OF ISSUES

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

[para 11] Section 27(1) of the FOIP Act 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,

(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.

[para 12] In the first inquiry into this matter, the Public Body claimed privilege over many of the records at issue. Those records were not provided to the adjudicator for that inquiry. In Order F2017-54, the Adjudicator rejected the Public Body's claim of privilege, due to a lack of supporting evidence.

[para 13] After the Public Body applied for a judicial review of Order F2017-54 and before the day of the judicial proceeding, the Public Body withdrew its claim of privilege over some records. Those records were not before the Court in the proceeding. A copy of those records was provided to this Office for a review of other exceptions the Public Body had applied to those records.

[para 14] In the course of the judicial review of Order F2017-54, the Court reviewed the records that had not been provided to the adjudicator and that were not subsequently provided to this Office (i.e. the records over which the Public Body continued to claim

privilege). The Court found that the information in those records was subject to the claimed privilege. None of those records are at issue in this reconsideration.

[para 15] Pages 3-6, 62-68, 151-160, 163-172, and 190-199 are the records over which privilege had been claimed by the Public Body in the initial inquiry and from which the Public Body withdrew that claim of privilege. Pages 182-187 were considered in the initial inquiry only with respect to the application of section 4(1), which was rejected. The Public Body's application of section 27(1)(a) to pages 182-187, including a claim of privilege, is properly before me in this reconsideration.

[para 16] With respect to the other pages at issue in this reconsideration, the Public Body's initial submission states that it "objects to produce all records at issue [pages 3-6, 62-68, 151-160, 163-172, 182-187, and 190-199] pursuant to section 27(1). A description of the records at issue and the privilege claimed are found in the supporting Affidavit at Tab 2" (at para. 19).

[para 17] The affidavit provided by the Public Body was sworn by an "authorized representative" of the Public Body, who states that she was advised by counsel that the records listed in the schedule to the affidavit (the records at issue) are subject to solicitor-client privilege. The privileges claimed by the Public Body in the schedule are stated as "s. 27(1)(b)" and "s. 27(1)(c)". Section 27(1)(a) is not listed, except for pages 182-187.

[para 18] With the exception of pages 182-187, the Public Body's reference in its submission to solicitor-client privilege is puzzling. For the reasons that follow, I am interpreting the Public Body's submissions to mean that they are applying sections 27(1)(b) and (c) to the information in the records at issue, and not section 27(1)(a).

[para 19] First, the Public Body's submission states that it objects to producing the records. However, it provided those records to this Office for review in February 2019, prior to the judicial review proceeding. It did so for the reason that it was withdrawing its claim of privilege. Had the Public Body intended to continue to claim privilege over these pages, it seems very likely that it would have done so and provided the pages to the Court for the judicial review – as the Public Body did with all of the other pages of records over which it continued to claim privilege.

[para 20] Second, the Public Body did provide me with a working copy of these records at issue upon request, shortly after it provided its submission stating that it would not. It also provided an updated index of records that omits the reference to any claimed privilege, except over pages 182-187.

[para 21] Third, the Public Body has not applied section 27(1)(a) to information in pages 3-6, 62-68, 151-160, 163-172, and 190-199. Rather, it applies sections 27(1)(b) and (c).

[para 22] Section 27(1)(a) is an exception to access for information that is protected by a legal privilege. Sections 27(1)(b) and (c) apply to *different* types of information other

than privileged information (although these exceptions may have some overlap). As section 27(1)(a) applies to information protected by any legal privilege, it would be redundant to interpret sections 27(1)(b) or (c) as also being exceptions for information protected by legal privilege.

[para 23] I therefore interpret the Public Body's submission as meaning that it is applying sections 27(1)(b) and (c) to information in these pages. These exceptions require there to have been legal services to which the "information prepared" (section 27(1)(b)) or "information in correspondence" (section 27(1)(c)) relates. Presumably, the Public Body's submission means to indicate that the legal services in question were the provision of legal advice. In other words, I interpret the Public Body's argument to be that there was legal advice present in other records (as the Court concluded in *Municipal Affairs*), and the information in the records at issue in this reconsideration, to which section 27(1)(b) and (c) have been applied, is related to that legal advice. I will consider this argument below.

[para 24] The Public Body has not rescinded or withdrawn its affidavit in which the affiant swears, on advice from counsel, that all of the records in this reconsideration are protected by solicitor-client privilege. However, for the reasons already given, I will consider that affidavit only with respect to pages 182-187, over which privilege clearly continues to be claimed.

Section 27(1)(a)

[para 25] As noted earlier in this Order, the Public Body had initially argued that pages 182-187 were excluded from the scope of the FOIP Act under section 4(1). That argument was rejected in Order F2017-54. The adjudicator ordered the Public Body to include these pages in a new response to the Applicant, applying exceptions as appropriate. That issue was not part of the judicial review. The Public Body has applied section 27(1)(a), claiming solicitor-client privilege over the information in these pages.

[para 26] In *Solosky v. The Queen*, [1980] 1 SCR 821, Dickson J. (as he then was) speaking for the majority, stated the following criteria for establishing the presence of solicitor-client privilege:

As Mr. Justice Addy notes, 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. To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court. Finally, the privilege is aimed at improper use or disclosure, and not at merely opening.

[para 27] In its initial submission to the reconsideration, the Public Body states (at para. 11):

pages 182-187 consist of two separate letters from JSG; the first letter is to the Public Body with proposed approaches regarding arbitration; the second is to opposing counsel providing information and alternatives to opposing counsel's clients.

[para 28] In Order F2017-54, the adjudicator described these pages in a slightly different way (at para. 25, emphasis mine):

Records 180 – 181 are comprised of a letter from one member of the Executive Council to another member of the Executive Council. Records 182 – 185 consist of a legal opinion written by a lawyer for Alberta Justice and Solicitor General and addressed to the Public Body, and records 186 – 187 consist of a draft letter to be sent by legal counsel to parties in litigation. The legal opinion and the draft letter are attachments to the correspondence appearing on records 180 – 181.

[para 29] I agree with the above characterization. Pages 182-185 clearly consist of correspondence between counsel and client, the purpose of which is to provide legal advice on a matter. The confidential nature of such advice can be presumed, and there is nothing in the records or otherwise before me that would rebut the presumption of confidence.

[para 30] Regarding pages 186-187, the Public Body describes them as comprising a letter to opposing counsel; nothing on these pages themselves contradict this characterization. However, in light of the adjudicator's description of these pages in Order F2017-54 – that they are in fact a *draft* letter – I reviewed pages 180-181, which had been provided to this Office for the initial inquiry. Based on the content of pages 180-181, I conclude that pages 186-187 do constitute a *draft* of a letter.

[para 31] The distinction between a copy of a final letter sent to a third party adverse in interest to the client, and a draft of a letter created by counsel for the review of a client, is significant in this context. Correspondence sent to a third party adverse in interest often *cannot be* subject to solicitor-client privilege (with some exceptions, none of which appear to be relevant in this case). In contrast, the draft letter on pages 186-187 constitutes legal advice, because it was drafted by counsel for the client to illustrate counsel's advice as to how to proceed. Like the memo on pages 182-185, which the draft letter accompanies (per the content of pages 180-181), it meets the *Solosky* test and falls within section 27(1)(a).

[para 32] In this reconsideration, I had the records before me because they had been previously provided to this Office when the Public Body was not claiming privilege over the information in them. Had the Public Body not provided the records for my review, and had the Public Body's description of pages 186-187 been the only information before me about the records, I likely could not have upheld the claim of solicitor-client privilege. As noted, correspondence to a third party adverse in interest to the client often cannot be subject to solicitor-client privilege. In this case, the records themselves provided the necessary evidence to show that privilege was correctly claimed.

[para 33] This illustrates the importance of providing accurate and sufficient submissions regarding records over which privilege is claimed. This is especially the case where those records are not provided for review.

[para 34] As I have found that section 27(1)(a) applies to the information in pages 182-187, I do not need to consider the application of other exceptions to those pages.

Sections 27(1)(b) and (c)

[para 35] The Public Body has applied section 27(1)(b) to pages 3-6, and section 27(1)(c) to pages 62-68, 151-160, 163-172, and 190-199.

[para 36] Orders F2014-R-01 and F2014-38 both specify that sections 27(1)(b) and (c) require the information withheld under those provisions to reveal substantive information about the relevant legal services. Order F2014-R-01 states that “[i]nformation ‘prepared by or for an agent or lawyer of a public body’ within the terms of section 27(1)(b) is *substantive* information”. In other words, section 27(1)(b) applies to substantive information prepared by or for a person listed in that provision, about a matter involving the provision of a legal service. Similarly, section 27(1)(c) protects substantive information in correspondence between the persons listed in that provision, about a matter involving the provision of advice or other legal services (see Order F2014-R-01 at para. 69).

[para 37] Past Orders of this Office have made clear that where the Act says “by or for”, it means “by or on behalf of” (see Orders 97-007, at para. 29, F2008-008, at paras. 42-44). In other words, for section 27(1)(b) to apply, the information must have been “prepared by the lawyer or someone acting under the direction of the lawyer for the purpose that a lawyer will use the information in order to provide legal services to a public body (Order F2010-007, at para. 37).

[para 38] In its initial submission to this reconsideration, the Public Body has described pages 3-6 as:

a confidential briefing for the Deputy Minister of Executive Council regarding arbitration and an email to the Deputy Minister of Executive Council with additional information about proposed approaches and the government’s position (at para. 11)

[para 39] In order for section 27(1)(b) to apply, the briefing note would have to have been prepared by or on behalf of the Minister of Justice and Solicitor General, and agent or lawyer of that Minister, or an agent or lawyer of a public body. The Minister of Justice and Solicitor General did not author this briefing note. Having reviewed other records provide by the Public Body in relation to this or the initial inquiry, there is no indication that the individual who prepared the briefing note is a lawyer for any public body. The position title in the signature line of his email does not indicate that he is a lawyer or works as counsel; in fact, it indicates otherwise. The Public Body has not provided any information that could lead me to conclude that this individual is a lawyer for the Minister or another public body.

[para 40] The briefing note needn't be created *by* one of the individuals listed in section 27(1)(b) – it may also be created *on behalf of* one of those individuals. The position title of the author of the briefing note indicates that they have the authority and/or responsibility to create such briefing notes on their own initiative, rather than doing so on behalf of someone else. Nothing in the records themselves, and nothing in the submissions before me indicate that the author created the briefing note *on behalf of* counsel.

[para 41] The information and evidence before me supports only the finding that section 27(1)(b) does not apply to the information on pages 3-6. The Public Body has also applied section 24(1)(a) to those pages; I will consider that application in the next section of this Order.

[para 42] Section 27(1)(c) was applied to pages 62-68, 151-160, 163-172, and 190-199 in their entirety. The Public Body has not provided any specific arguments regarding these pages.

[para 43] Each group of pages consists of a one-page email, with attachments. The emails were sent to counsel who were providing legal services. The attachments are similar – subsequent emails contain updated versions of the attachment. It is clear in each case that the emails and attachments relate to the legal service provided by counsel. The content of the emails and attachments provide and discuss information that was relevant to the provision of legal advice by counsel.

[para 44] I agree that section 27(1)(c) applies to the information in these pages.

Exercise of discretion – section 27(1)(a) and (c)

[para 45] Section 27(1) is a discretionary exception to access, which means that after determining that the information at issue falls within the exception, the public body must then determine whether the information should nevertheless be disclosed.

[para 46] With respect to the exercise of discretion under section 27(1)(a), withholding information that is subject to solicitor-client privilege is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036). The adjudicator in Order F2012-08 stated (citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII)):

the public interest in maintaining solicitor-client privilege is such that it is unnecessary to balance the public interests in withholding records subject to this privilege and those in relation to disclosing them, as the public interest in withholding such records will always outweigh the interests associated with disclosing them.

[para 47] As I have found that the information in the records at issue is subject to solicitor-client privilege, I conclude that the Public Body properly exercised its discretion to withhold the information it withheld under section 27(1)(a).

[para 48] With respect to the exercise of discretion under section 27(1)(c), comments made by the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII) are relevant. These comments were made with respect to the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.

[para 49] 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 be 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 50] 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:

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)*. (At para. 104)

[para 51] The Public Body has described its exercise of discretion as follows (at paras. 12-13):

The Public Body exercised discretion by balancing the general principles of the *FOIP Act* to foster openness, accountability and transparency and to support an applicant's right of access to information with the fact that the records contain advice and recommendations, along with the substance of deliberations between government employees during the negotiating and decision-making phases of the arbitration.

The basis to withhold the information was deemed to outweigh the Applicant's right to the information.

[para 52] These factors relate primarily to the Public Body's exercise of discretion to withhold information under section 24(1). However, they are also relevant to the exercise of discretion relative to section 27(1)(c). This is because the information withheld under that provision also reveal the substance of deliberations among counsel and between counsel and client.

[para 53] In exercising discretion to withhold information, it is insufficient to state merely that the information falls within the scope of an exception. While the Public

Body's reasons for deciding to withhold the information are sparse, it did note that the advice and recommendations being withheld were made in the context of negotiations and decisions made during a negotiation process. As the Public Body has considered both the aims of the Act as a whole, and the particular context of the information being withheld, I find that it properly exercised its discretion.

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

[para 54] The Public Body applied section 24(1)(a) and (b) to pages 3-6, and section 24(1)(a) to pages 182-187, in their entirety. I have already found that pages 182-187 were properly withheld under section 27(1)(a); therefore, I need only consider the application of section 24(1) to pages 3-6.

[para 55] Sections 24(1)(a) and (b) 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 56] In previous orders, the former Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a) 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 57] In Order F2013-13, the adjudicator stated that the third arm of the above test should be restated as "created for the benefit of someone who can take or implement the action" (at paragraph 123).

[para 58] In Order F2012-06, the adjudicator concluded, citing former Commissioner Clark's interpretation of "consultations and deliberations", that a consultation occurs where individuals listed in section 24(1)(b) are asked for their views regarding a particular course of action. A deliberation occurs when those individuals discuss a decision they are responsible for and are in the process of making (at para. 115).

[para 59] In Order F2012-10, the adjudicator further clarified the scope of section 24(1)(b):

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. (At para. 37)

[para 60] Further, 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 61] 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 2007-013 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 paras. 31 and 37).

[para 62] Given these limits on the application of section 24(1), even where it applies to information on a page, it is often the case that portions of a page will be disclosed with discrete items of information withheld (i.e. more often than not, entire pages cannot be withheld under this provision). Public bodies must therefore conduct a line-by-line review of each page in order to apply section 24(1) appropriately.

[para 63] 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)); consultations or deliberations between specified individuals (section 24(1)(b)).

[para 64] I found above that section 27(1)(b) does not apply to the information on pages 3-6. The Public Body applied sections 24(1)(a) and (b) to that information.

[para 65] As noted above, the Public Body has described pages 3-6 as:

a confidential briefing for the Deputy Minister of Executive Council regarding arbitration and an email to the Deputy Minister of Executive Council with additional information about proposed approaches and the government's position (at para. 11)

[para 66] This briefing contains advice and recommendations for the Deputy Minister. While I noted that the author does not appear to be a lawyer (discussed at paragraphs 39-40 of this Order), the records show that it is part of his role to provide such advice and recommendations on the subject matter discussed at pages 3-6. Given the context of the records, the advice and recommendations were clearly expected, and were made with a view to take an action or make a decision. The test for section 24(1)(a) is met.

[para 67] That said, the entirety of pages 3-6 cannot be withheld under section 24(1)(a). Information that reveals only background facts or that reveals only the subject of the advice or recommendations (rather than the substance of the advice or recommendations) cannot be withheld under this provision.

[para 68] The first email (top half of page 3) does not reveal any substance of the advice or recommendations in the briefing. Part of the second email (bottom of page 3) reveals substantive information: all but the first sentence in the first paragraph (of three paragraphs) contains substantive information to which section 24(1)(a) applies. The second paragraph, consisting of one sentence) does as well.

[para 69] The last paragraph of the second email on page 3, also consisting of one sentence, does not appear to contain substantive information to which section 24(1)(a) can apply. Neither do the to/from/date fields in the email, or the signature lines. The subject line of the email reveals only the topic of discussion. It is clear from the submissions to this reconsideration that the topic is already public knowledge. Section 24(1)(a) does not apply to this information.

[para 70] Page 4 contains only the final signature line from the second email on page 3, as well as the standard form 'confidentiality' clause found at the end of public body emails. Section 24(1)(a) does not apply to this information.

[para 71] Pages 5 and 6 comprise the briefing note. The headers and date do not reveal substantive information and cannot be withheld under section 24(1)(a). The subject line reveals only the topic being discussed; for the same reasons relating to the subject line in the email at page 3, the subject and issue lines in this briefing note cannot be withheld.

[para 72] The background paragraph provides additional detail about the topic being discussed, but also does not reveal the advice being given about that topic. That paragraph cannot be withheld under section 24(1)(a).

[para 73] The bullet points on pages 5 and 6 all reveal the substance of the advice provided. Section 24(1)(a) applies to all bullet point on those pages.

[para 74] Section 24(1)(a) cannot be applied to the information *under* the last bullet point on page 6. That information consists of what appears to be part of a form (not yet filled in), as well as the name of the author and his contact information.

[para 75] The information identified as information to which section 24(1)(a) does not apply is also information to which I have found other exceptions do not apply. This information must be disclosed to the Applicant.

Exercise of discretion

[para 76] Section 24(1)(a) is a discretionary provision. The discussion regarding the Public Body's exercise of discretion with respect to section 27(1)(c) applies to the information that falls within section 24(1)(a) as well.

[para 77] I have discussed above, and accepted, the Public Body's explanation for exercising its discretion to withhold information under section 27(1)(c). Those same factors apply with respect to section 24(1)(a) and (b); therefore, my finding applies here as well.

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

[para 78] I have found that other exceptions were properly applied to the information withheld under section 17(1). Therefore, I do not need to consider the application of this provision.

V. ORDER

[para 79] I make this Order under section 72 of the Act.

[para 80] I find that section 27(1)(a) applies to the information in pages 182-187.

[para 81] I find that section 27(1)(b) does not apply to the information in pages 3-6.

[para 82] I find that section 24(1)(a) applies to some information on pages 3, 5 and 6 of the records, but not to the information on page 4, or the information on pages 3, 5 and 6 as described at paragraphs 68-75. I order the Public Body to disclose the information to which I found this provision does not apply.

[para 83] I find that section 27(1)(c) applies to the information at pages 62-68, 151-160, 163-172, and 190-199.

[para 84] I further order the Public Body to notify me in writing, within 50 days of its receipt of a copy of this Order, that it has complied with my Order.

Amanda Swanek
Adjudicator