

ALBERTA
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

ORDER F2004-021

May 9, 2005

ALBERTA HEALTH AND WELLNESS

Review Number 2859

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* to Alberta Health and Wellness for access to records regarding the *Alberta Health Information Act*. The access request included a request for information regarding specific section numbers, definitions, amendments and Order H2002-003. At inquiry there were 573 pages at issue. Alberta Health and Wellness cited a number of exceptions as its authority to withhold the records.

The Adjudicator partially upheld the decision by Alberta Health and Wellness. The Adjudicator found that a portion of the records were non-responsive to the access request and that some of the records were excluded from the application of the *Freedom of Information and Protection of Privacy Act* as being records of an officer of the Legislature (section 4(1)(d)) and records sent between Executive Council or MLAs (section 4(1)(q)). The Adjudicator also found that the Public Body properly applied the provisions concerning advice, consultations or deliberations, information relating to legal services or legal privilege (sections 24(1)(a), 24(1)(b), 27(1)(b) and 27(1)(a) respectively) of the *Freedom of Information and Protection of Privacy Act* to a number of records and properly exercised its discretion in that regard. The Adjudicator ordered some of the records to be disclosed to the Applicant, which he found did not meet the criteria for withholding under the FOIP Act.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000 c. F-25, ss. 1(m), 1(q), 4(1)(d), 4(1)(q), 16, 17, 21, 22, 24(1)(a), 24(1)(b), 24(1)(g), 27(1)(a), 27(1)(b), 72

Authorities Cited: AB: Orders 96-006, 96-012, 96-013, 96-017, 96-020, 97-007, 97-008, 97-013, 97-020, 98-006, 99-001, 99-018, 2000-010, 2000-013, 2001-002, 2001-037; **ON:** Order P-489 (1993)

Cases Cited: *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054 (Fed. T.D.); *Solosky v. The Queen* [1980] 1 S.C.R. 821; *Balabel v. Air India*, [1988] 2 All E.R. 246 [C.A.]

I. BACKGROUND

[para 1] On June 5, 2003, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) to Alberta Health and Wellness (the “Public Body”). The access request was for the following:

Access to records, including, but not limited to, notes, minutes, submissions, briefings, policy documents, internal and external correspondence and Emails in the custody or under the control of the Ministry, including the Minister’s office, related to:

The inclusion and interpretation of health service provider information in the definition of health information in the Alberta Health Information Act, and the policy rationale for this, the effect of, and expected operation of section 37 of the Alberta Health Information Act, and the consequences caused by the Alberta Information and Privacy Commissioner Order #H2002-003; and

The consideration of the amendment of section 37, including, but not limited to, as part of Bill 10, the Health Information Act.

The time period covered by this request is from April 25, 2001, the proclamation date of the Alberta Health Information Act, until the present.

Provide other records released on these above subjects under FOIP.

[para 2] On September 29, 2003, the Public Body responded to the Applicant’s request. The Public Body fully disclosed 79 of 724 pages at issue but withheld, either partially or entirely, 645 pages of records. The Public Body also withheld page 80 of “Record 1” as it was still under consideration.

[para 3] On October 17, 2003, the Public Body sent a letter to the Applicant regarding page 80 of “Record 1”. The Public Body informed the Applicant that it had decided to withhold this page in its entirety.

[para 4] On November 3, 2003, the Applicant requested a review of the Public Body’s decision. Mediation was authorized.

[para 5] During mediation, the Public Body disclosed a number of other pages. However, mediation was ultimately unsuccessful in resolving all of the issues and the matter was set down for a written inquiry.

[para 6] The Public Body submitted an initial submission. The Applicant and the Affected Party did not make a submission.

II. RECORDS AT ISSUE

[para 7] At the date of the inquiry, there are 573 pages of records at issue. Of these, 531 pages of records were withheld in their entirety, while 42 pages of records were partially withheld.

III. ISSUES

[para 8] There are 11 issues identified in the inquiry notice:

- A) Are the records/information responsive to the Applicant's access request?
- B) Are the records/information excluded from the application of the FOIP Act by section 4(1)(d)?
- C) Are the records/information excluded from the application of the FOIP Act by section 4(1)(q)?
- D) Does section 16 of the FOIP Act (business interests) apply to the records/information?
- E) Does section 17 of the FOIP Act (personal information) apply to the records/information?
- F) Did the Public Body properly apply section 21 of the FOIP Act (intergovernmental relations) to the records/information?
- G) Does section 22 of the FOIP Act (Cabinet confidences) apply to the records/information?
- H) Did the Public Body properly apply section 24(1)(a) of the FOIP Act (advice) to the records/information?
- I) Did the Public Body properly apply section 24(1)(b) of the FOIP Act to the records/information?

- J) Did the Public Body properly apply section 24(1)(g) of the FOIP Act to the records/information?
- K) Did the Public Body properly apply section 27(1)(a) of the FOIP Act (privileged information) to the records/information?

IV. PRELIMINARY ISSUE

A) Should I accept sections 21(1)(b) and 27(1)(b) of the FOIP Act as issues in this inquiry?

[para 9] On August 30, 2004, the Public Body sent a letter informing this Office that the Public Body had inadvertently omitted a reference to section 21(1)(b) from its written submission. In that letter the Public Body requested that I nevertheless continue to consider section 21(1)(b) as an issue in this inquiry.

[para 10] In addition, in the Public Body's written submission, the Public Body also applied section 27(1)(b) to several pages of records. Section 27(1)(b) had not been identified as an issue in the inquiry notice when the inquiry was set down.

[para 11] After a review of the Public Body's request, I agreed to accept sections 21(1)(b) and 27(1)(b) as issues in this inquiry. On September 2, 2004, I wrote to the parties to inform them of my decision. I also provided the Applicant and the Affected Party with the opportunity to make a supplemental written submission regarding the application of these two sections. Neither the Applicant or the Affected Party submitted a supplemental written submission.

V. DISCUSSION

A) Are the records/information responsive to the Applicant's access request?

[para 12] The Public Body states that the following pages of records are non-responsive to the access request:

Record #1: 89, 90, 197, 198, 209-215, 227-229, 230, 231,

Record #2: 187-202, 406-457

[para 13] In addition, after a review of the records, I have decided to address whether pages 180, 181, 183-186 of Record #2 are also non-responsive to the request.

[para 14] In Order 97-020, the Commissioner said that information or records will be responsive to an access request if they are reasonably related to the request.

[para 15] I find that the Public Body properly withheld pages 89, 90, 227- 229, 230 and 231 of Record #1 and pages 187-202, 406-457 of Record #2 as non-responsive to the access request. These records predate the request or are otherwise not reasonably related to the request.

[para 16] In addition, I find that pages 180, 181, 183-186 of Record #2 are also non-responsive to the access request as they also predate the request period.

[para 17] However, I find that pages 197, 198 and 209-215 of Record #1 are responsive to the access request as they reasonably relate to the request. I find that the Public Body did not properly withhold these records as non-responsive.

B) Are the records/information excluded from the application of the FOIP Act by section 4(1)(d)?

[para 18] If a record falls under section 4(1), the FOIP Act does not apply to the record and I have no jurisdiction over that record. An applicant cannot obtain access to that record under the Act.

[para 19] The Public Body states that the following pages fulfill the requirements of section 4(1)(d):

Record #1: 93-95, 142, 251

Record #2: 89

[para 20] In addition, after a review of these pages of records, I have also decided to address whether pages 39, 40, 90, 203-211 of Record #2 fall under this section.

[para 21] Section 4(1)(d) reads:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

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

[para 22] In Order 97-008, the Commissioner discussed the interpretation of section 4(1)(d). In that Order, the Commissioner said that for a record to be excluded under section 4(1)(d), the following three criteria must be met:

- (i) The documents must constitute a record;

(ii) The records must be created by, or be in the custody of, or under the control of an officer of the Legislature; and

(iii) The records must relate to that officer's functions under an Act of Alberta.

1) Do the documents constitute a “record”?

[para 23] The term “record” is defined under section 1(q) of the FOIP Act. This section states:

1 In this Act,

(q) “record” means a record of information in any form and includes notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records;

[para 24] After reviewing the documents, I find that each page constitutes a “record” under the FOIP Act.

2) Are the records created by, or in the custody of, or under the control of an officer of the Legislature?

[para 25] Section 1(m) of the FOIP Act defines “officer of the Legislature” to mean the Auditor General, the Ombudsman, the Chief Electoral Officer, the Ethics Commissioner or the Information and Privacy Commissioner.

[para 26] In this case, the Officer of the Legislature at issue is the Alberta Information and Privacy Commissioner.

[para 27] In order to fulfill this criterion, the record must be either a) created by b) in the custody, or c) under the control of the Information and Privacy Commissioner.

[para 28] I find that the following pages of records were created by the Information and Privacy Commissioner or his delegate:

Record #1: 93-95, 251

Record #2: 39, 40, 90 (original e-mail), 203 (typed portion), 204, 205, 206, 207 (typed portion), 208 (typed portion), 209 (typed portion), 210 (typed portion), 211

[para 29] I find that these pages fulfill this criterion.

[para 30] However, I find that page 142 of Record #1 does not fulfill this criterion. Page 142 consists of a file copy of a letter which was authored by the Minister and addressed to the Office of the Information and Privacy Commissioner. However, a notation on this letter indicates that it was not sent to this Office. As such, I find that page 142 of Record #1 was not created by the Information and Privacy Commissioner nor is it in the custody or control of the Information and Privacy Commissioner, since it was never sent to the Information and Privacy Commissioner.

[para 31] In addition, I find that page 89 of Record #2 does not fulfill this criterion. Page 89 consists of a copy of an e-mail sent from the Public Body's lawyer to a lawyer at this Office regarding the deadline for submissions in a prior inquiry. I find that this page was not created by this Office, nor is it in the custody or control of this Office.

3) Do the records relate to that officer's functions under an Act of Alberta?

[para 32] After a review of the pages at issue under section 4(1)(d), it is my opinion that all of the pages of records relate to the Information and Privacy Commissioner's functions under the Alberta *Health Information Act* (the "HIA").

4) Conclusion

[para 33] I find that the following pages fulfill all three criteria under section 4(1)(d):

Record #1: 93-95, 251

Record #2: 39, 40, 90 (original e-mail) 203 (typed portion), 204, 205, 206, 207 (typed portion), 208 (typed portion), 209 (typed portion), 210 (typed portion), 211

[para 34] These pages constitute a "record" under the Act. In addition, these pages were created by the Office of the Information and Privacy Commissioner or his delegate and relate to the Commissioner's functions under the Act. As such, these pages are excluded from the application of the FOIP Act and I have no jurisdiction over those pages.

[para 35] However, I find that page 142 of Record #1 and page 89 of Record #2 do not fulfill the three criteria. Although each of these pages constitute a "record" under the Act and relate to the exercise of the Commissioner's functions under the Act, these pages were not created by, or in the custody of or under the control of the Information and Privacy Commissioner. As such, section 4(1)(d) does not apply to these pages of records.

[para 36] I note that in the Public Body's submission, the Public Body stated that it will disclose the pages at issue under section 4(1)(d) if the Alberta Information and Privacy Commissioner were to consent to the disclosure.

[para 37] The consent of the Commissioner is irrelevant to the application of section 4(1)(d) in regards to the records at issue in this inquiry. If the pages fulfill the requirements of section 4(1)(d) they are thereby excluded from the FOIP Act. The Public Body does not need the consent of the Commissioner to disclose these pages. By the same token, if the records fall under section 4(1)(d), the Applicant does not have a right to access these records under the FOIP Act.

C) Are the records/information excluded from the application of the FOIP Act by section 4(1)(q)?

[para 38] The Public Body states that the following pages fulfill the requirements under section 4(1)(q):

Record #1: 15A, 15B, 17, 18, 20-22, 24, 25-27, 30, 44-47, 51-55, 57, 58, 59, 60

[para 39] The Public Body states that the pages consist of communications between Members of the Executive Council and Members of the Legislative Assembly or, in the alternative, consist of communications between Members of the Legislative Assembly.

[para 40] Section 4(1)(q) reads:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

(q) a record created by or for

(i) a member of the Executive Council,

(ii) a Member of the Legislative Assembly, or

(iii) a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly

that has been sent or is to be sent to a member of the Executive Council, a Member of the Legislative Assembly or a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly;

[para 41] In Order 97-007, the Commissioner discussed the interpretation of section 4(1)(q). The Commissioner said that in order for a record to fall outside the FOIP Act by reason of section 4(1)(q), the record must be created by or for any of those classes of persons listed in section 4(1)(q)(i) to (iii). The Commissioner interpreted the word “for” to mean “on behalf of”, and said that “for” did not mean “intended to go to” or “destined

for” because that interpretation would allow a record created by anyone in the world to be excluded from the application of the FOIP Act.

[para 42] In that Order, the Commissioner also said that the concluding part of section 4(1)(q) requires that the record “has been sent or is to be sent” to one of the same three classes of persons listed in section 4(1)(q)(i) to (iii). Therefore, section 4(1)(q) is intended to exclude from the application of the FOIP Act communications among only those persons listed in section 4(1)(q)(i) to (iii).

[para 43] In Order 96-020, the Commissioner said that if a record is created by a person who acts on behalf of one of the classes of persons listed in section 4(1)(q)(i) to (iii), either the record must indicate that the individual is acting on that person’s behalf, or it must be evident in some other way.

[para 44] In Order 2000-013, the Commissioner said that an attachment must individually fulfill the requirements found in this section. The Legislature did not intend that any record could be shielded simply by attaching it to a record exempt under section 4(1)(q).

[para 45] I find that pages 15A, 15B, 17, 18, 20-22, 24, 25-27, 30, 44-47, 51-55, 57, 59 of Record #1 fall within section 4(1)(q) as these pages fulfill the criteria under section 4(1)(q). As such, these pages are excluded from the application of the FOIP Act and I have no jurisdiction over those pages.

[para 46] I find that pages 58 and 60 of Record #1 do not fall within this section. These pages were attached to pages 57 and 59 respectively. However, they were not created by or for one of the parties listed in section 4(1)(q), and therefore do not fulfill the requirements of this section.

D) Does section 16 of the FOIP Act (business interests) apply to the records/ information?

[para 47] The Public Body applied section 16 to the following pages:

Record #1: 2, 5, 8, 9, 11-14, 29, 31, 33, 36, 37, 38, 41-43, 58, 60, 62-65, 67, 68, 69, 74-76, 77, 80, 82, 84, 86, 89, 90, 91, 92, 93-95, 124, 140, 195, 196, 206, 207, 216, 218-219, 220A, 220B, 223-226, 230, 231, 234-237, 239, 242, 243, 247-250, 251, 254-256, 258-260, 261-264, 265

[para 48] The records that remain at issue under section 16 are as follows:

Record #1: 2, 5, 8, 9, 11-14, 29, 31, 33, 36, 37, 38, 41-43, 58, 60, 62-65, 67, 68, 69, 74-76, 77, 80, 82, 84, 86, 91, 92, 124, 140, 195, 196, 206, 207, 216, 218-219, 220A, 220B, 223-226, 234-237, 239, 242, 243, 247-250, 254-256, 258-260, 261-264, 265

[para 49] In addition, I will address page 52 of Record #2 as this record is a duplicate of page 82 of Record #1.

[para 50] Section 16(1) reads as follows:

16(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, explicitly or implicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[para 51] Section 16(1) is a mandatory exception. This means that if a head of a public body determines the information falls within the exception, the head must refuse access.

[para 52] For information to fall under section 16(1), the Public Body must satisfy the following three-part test:

Part 1: The information must reveal the trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party (Section 16(1)(a));

Part 2: The information must be supplied, explicitly or implicitly, in confidence (Section 16(1)(b)); and

Part 3: The disclosure of the information must reasonably be expected to bring about one of the outcomes set out in section 16(1)(c).

[para 53] In this inquiry, the Affected Party is the “Third Party” for the purposes of section 16.

1) Does the information reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party (section 16(1)(a))?

[para 54] The Public Body states that the pages at issue under section 16 consist of commercial information. The Public Body states that the information relates directly to the Third Party’s business of purchasing and selling information and the provision of commercial services (e.g. providing information analysis reports) or alternatively, information related to the commercial operation of its business.

[para 55] The Public Body also states that the information contained in these pages is not available in the public domain. Therefore, disclosure would “reveal” confidential Third Party commercial information.

[para 56] In Orders 96-013 and 97-013, the Commissioner adopted part of Ontario Order P-489 (1993) which defined commercial information as that “... which relates to the buying, selling, or exchange of merchandise or services...”. In these Orders, the Commissioner held that this type of information included Third Party associations, past history, references, and insurance policies.

[para 57] In Order 98-006, the Commissioner held that simply because records are authored by a commercial enterprise does not, of itself, mean that they are of a commercial nature. If this were the case, any document written on company letterhead would be considered “commercial”. Consideration must be given to the content of the record. Furthermore, the Commissioner held that presentation documents and letters written to the Public Body which either: provide general information; detail the Third Party’s views and opinions; or request the Public Body take a certain policy action or direction did not constitute “commercial information”. In Order 2001-002 the Commissioner specifically held that records, consisting of presentation documents and letters submitted by or to a public body by an affected party which requested amendments to a piece of legislation, did not consist of commercial information.

[para 58] After a review of the pages of records at issue and the submission of the Public Body, I find that the pages do not contain commercial information nor would they otherwise reveal commercial information of the Third Party.

[para 59] The following pages consist of fax coversheets, briefing notes and other documents which address Investigation H0036, outline the Third Party's request for an amendment to the HIA, the reasons for an amendment, background information regarding an amendment, implications of amending or not amending the HIA and recommendations regarding the Public Body's response to the request and expected actions by the Public Body regarding this issue:

- Record #1: 2, 5, 8, 9, 11, 12, 13, 14, 29, 31, 33, 36, 37, 38, 41, 42, 43, 58, 60, 62, 63, 64, 65, 67, 68, 69, 74, 75, 76, 77, 80, 82, 84, 86, 91, 92, 124, 140, 195, 196, 206, 207, 216, 218, 219, 220A, 220B, 223-226, 234, 235, 236, 237, 239, 242, 243, 247, 248, 249, 250, 254, 255, 256, 258, 259, 260, 261, 262, 263, 264, 265
- Record #2: 52

[para 60] I find that the above information does not contain nor would it otherwise reveal commercial information as defined within section 16 of the FOIP Act.

2) Was the information supplied, explicitly or implicitly in confidence (section 16(1)(b))?

[para 61] In Orders 99-018 and 2000-010, the Commissioner stated that in order to fulfill the confidentiality requirements under section 16(1)(b), a third party must, from an objective point of view, have a reasonable expectation of confidentiality in regard to the information that was supplied. Furthermore, it is necessary to consider all the circumstances of the case including whether the information was:

- a) communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
- b) treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body;
- c) not otherwise disclosed or available from sources to which the public has access; or
- d) prepared for a purpose which would not entail disclosure.

[para 62] The Public Body states that the pages of records were submitted in confidence. In support, the Public Body referred to two letters which were sent to the Public Body from the Third Party dated August 21, 2003 and September 8, 2003 and an e-mail from the Third Party dated September 17, 2003. In these pieces of correspondence, the Third Party states that the information was submitted in confidence. I did not, however, have the benefit of a submission from the Third Party in this inquiry.

[para 63] I have reviewed all of the pages at issue under section 16. Pages 263 and 264 of Record #1 contain a heading entitled “confidential”. I agree that this heading supports the Public Body’s position that these two pages were submitted explicitly in confidence.

[para 64] Pages 8 and 262 of Record #1 consist of fax coversheets which contain a boilerplate clause stating that the information in the document is “legally confidential”. However, I do not find that this boilerplate clause is a strong indicator of confidentiality. Similar boilerplate clauses appear on most fax coversheets sent today. In addition, the wording of this clause indicates that its primary function is to ensure that information which is misrouted is not misused. I do not agree the clause, of itself, is a strong indicator that the information sent under the fax coversheet was supplied in confidence.

[para 65] As for the remaining pages of records, there is insufficient evidence before me that the information was supplied either explicitly or implicitly in confidence. Although the Third Party’s letters state the information was supplied implicitly in confidence, the Public Body did not supply sufficient evidence and there is nothing on the face of the records to support this assertion. In order to establish that the records were supplied in confidence, it is not enough for the Public Body to simply make this assertion. Evidence must be provided to support such an assertion.

3) Could the disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

[para 66] The Public Body states that sections 16(1)(c)(i) (significant harm to competitive position) and 16(1)(c)(iii) (undue financial loss or gain) apply to the records. The Public Body states that it applied this section to the records based on the correspondence from the Third Party.

[para 67] Section 16(1)(c)(i) of the FOIP Act states that the head of a public body must refuse to disclose information if the disclosure could reasonably be expected to significantly harm the competitive position or interfere significantly with the negotiating position of a third party.

[para 68] In Order 96-013, the Commissioner emphasized that the harm under section 16(1)(c)(i) must be “significant”. In that Order, the Commissioner also said that in order for a public body to meet the “harm” test under section 16(1)(c)(i),

“... [The] evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue.” (*Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054 (Fed. T.D.))

[para 69] In that Order, the Commissioner also stated that a public body must provide evidence of the following to prove significant harm or interference:

- (i) the connection between disclosure of the specific information and the harm which is alleged;
- (ii) how the harm constitutes “damage” or “detriment” to the matter; and
- (iii) whether there is a reasonable expectation that the harm will occur.

[para 70] Section 16(1)(c)(iii) states that the head of a public body must refuse to disclose information if it could reasonably be expected to result in undue financial loss or gain to any person or organization. In Order 96-013, the Commissioner emphasized that in order to fulfill this criterion the financial loss or gain must be “undue”.

[para 71] I find that Part 3 of the test under section 16(1) is not fulfilled. There is insufficient evidence before me that the disclosure of the information at issue could reasonably be expected to significantly harm the competitive position of the Third Party or interfere with the negotiating position of the Third Party. I also find that there is insufficient evidence before me that the disclosure of the information could reasonably be expected to result in undue financial loss or gain to the Third Party. Neither the Public Body nor the Third Party provided sufficient evidence in this regard. In order to establish one of the outcomes under section 16(1)(c), it is not enough to simply make assertions and expect a similar finding at inquiry. Evidence must be provided to support these assertions.

4) Conclusion

[para 72] I find that all the pages of records at issue under section 16 do not fulfill the three-part test under that section. I find that these pages do not contain nor would they otherwise reveal commercial information under section 16(1)(a), nor could the disclosure of this information reasonably be expected to result in one of the harms listed in section 16(1)(c). I also find that, with the exception of pages 263 and 264 of Record #1, the pages were not supplied in confidence under section 16(1)(b).

[para 73] Furthermore, as there are no mandatory exceptions that apply and the Public Body did not claim any further discretionary exceptions, I intend to order the Public Body to disclose the following pages of records to the Applicant:

Record #1: 8, 9, 29, 33, 36, 41, 42, 43, 58, 60, 67, 68, 74, 75, 76, 92, 124, 216, 218, 219, 220A, 220B, 223, 224, 225, 226, 239, 242, 243, 247, 248, 249, 250, 254, 255, 256, 258, 259, 260, 261, 262, 265

[para 74] However, as the Public Body applied section 24(1)(a), 24(1)(b) and/or 24(1)(g) to the following records, I will address these pages of records under those sections:

Record #1: 2, 5, 11, 12, 13, 14, 31, 37, 38, 62, 63, 64, 65, 69, 77, 80, 82, 84, 86, 91, 140, 195, 196, 206, 207, 234, 235, 236, 237, 263, 264

[para 75] In addition, as page 52 of Record #2 is a duplicate of page 82 of Record #1, I will address this page under section 24(1)(a) and 24(1)(b). Furthermore, since the Public Body applied section 27(1)(a) and 27(1)(b) to page 52, I will also address this page under those sections.

E) Does section 17 of the FOIP Act (personal information) apply to the records/information?

[para 76] In the Public Body's submission, the Public Body states that it is no longer claiming section 17 as an exception to page 66 of Record #1. As such, I do not find it necessary to address whether section 17 applies to this page.

F) Did the Public Body properly apply section 21 of the FOIP Act (intergovernmental relations) to the records/information?

[para 77] This issue consists of two sub issues:

i) Did the Public Body properly apply section 21(1)(a)(i) to the records/information?

ii) Did the Public Body properly apply section 21(1)(b) to the records/information?

1) Did the Public Body properly apply section 21(1)(a)(i) to the records/information?

[para 78] The Public Body applied section 21(1)(a)(i) to pages 197-198 and 209-215 of Record #1. The Public Body states that disclosure of this information would harm intergovernmental relations as other provinces may withhold information if they are not given considerable assurances of confidentiality. Section 21(1)(a)(i) reads:

21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:

(i) the Government of Canada or a province or territory of Canada

...

(2) The head of a public body may disclose information referred to in subsection 1(a) only with the consent of the Minister in consultation with the Executive Council.

[para 79] There are two criteria under section 21(1)(a)(i):

(a) the parties involved must consist of the Government of Alberta or its agencies and the Government of Canada or a province or territory; and

(b) the disclosure must reasonably be expected to harm relations between the parties.

[para 80] I find that the first criterion is fulfilled. The pages at issue consist of e-mails between the Government of Alberta and the governments of other provinces or territories.

[para 81] However, I find that the second criterion is not fulfilled. Although the Public Body stated in its submission that the disclosure of information would harm intergovernmental relations, the Public Body did not provide evidence to support the claim. I find that the disclosure of the information could not reasonably be expected to harm relations between the Government of Alberta and the governments of other provinces or territories.

[para 82] However, as the Public Body applied section 21(1)(b) to the records, I will address these records under that section.

2) Did the Public Body properly apply section 21(1)(b) to the records/information?

[para 83] The Public Body applied section 21(1)(b) to pages 197-198 and 209-215 of Record #1.

[para 84] Section 21(1)(b) reads:

21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

(b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.

[para 85] Section 21(3) and (4) are also relevant:

21(3) The head of a public body may disclose information referred to in subsection (1)(b) only with the consent of the government, local government body or organization that supplies the information, or its agency.

21(4) This section does not apply to information that has been in existence in a record for 15 years or more.

[para 86] There are four criteria under section 21(1)(b) (see Order 2001-037):

- a) the information must be supplied by a government, local government body or an organization listed in clause (a) or its agencies;
- b) the information must be supplied explicitly or implicitly in confidence;
- c) the disclosure of the information must reasonably be expected to reveal the information; and
- d) the information must have been in existence in a record for less than 15 years.

[para 87] After a review of the records and the Public Body's submission, I find that the records at issue under this section do not fulfill all of the criteria under section 21(1)(b).

[para 88] I find that the information at issue under section 21(1)(b) was supplied by a government listed in clause (a) of section 21(1) and that the disclosure of the information would reasonably be expected to reveal the information supplied. I also find that the information has been in existence in the record for less than 15 years. However, I find that there is insufficient evidence that this information was supplied in confidence. It is not enough for the Public Body to simply assert that the information was supplied in confidence. Evidence must be provided in order to fulfill this criterion. There is nothing on the face of the records nor is there any evidence within the Public Body's submission that indicates that this information was supplied in confidence. Rather, the fact that the information on those pages was sent by e-mail supports a finding to the contrary. E-mail is generally not considered to be a secure method to transmit confidential information. I find that the mode of transmission weighs against the Public Body's argument and supports the finding that the information was not submitted in confidence.

[para 89] Furthermore, as there are no mandatory exceptions that apply to pages 197-198 and 209-215 of Record #1 and the Public Body did not claim any further discretionary exceptions to these pages, I intend to order the Public Body to disclose these pages the Applicant.

G) Does section 22 of the FOIP Act (Cabinet confidences) apply to the records/information?

[para 90] In the Public Body's submission the Public Body states that it is no longer claiming section 22 as an exception in this inquiry. As such, I do not find it necessary to address the application of this section in this inquiry.

H) Did the Public Body properly apply section 24(1)(a) of the FOIP Act (advice) to the records/information?

[para 91] Section 24(1)(a) reads:

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,

[para 92] The Public Body applied section 24(1)(a) to the following pages of records:

Record #1: 1-4, 5, 6, 11-14, 31, 32, 37, 38, 62-65, 69, 70, 77, 78, 80, 81, 82, 83, 84, 85, 86, 87, 91, 96, 97, 98, 140, 142, 147, 148-162, 166, 167, 195, 196, 206, 207, 208, 233-237, 263, 264

Record #2: 89

[para 93] In addition, I will also address whether section 24(1)(a) applies to pages 52 and 53 of Record #2 as these pages are duplicates of pages 82 and 83 of Record #1.

[para 94] In Order 96-006, the Commissioner set out the criteria for "advice" (which includes advice, proposals, recommendations, analyses or policy options) under section 24(1)(a).

[para 95] The advice should:

(a) be sought or expected, or be part of the responsibility of a person by virtue of that person's position;

(a) be directed toward taking an action; and

(b) be made to someone who can take or implement the action.

[para 96] In Order 99-001, the Commissioner held that section 24(1)(a) does not apply to a bare recitation of facts or summaries of information. The information must relate to a suggested course of action that will ultimately be accepted or rejected by its

recipient during the deliberative process. Facts may only be withheld if the facts are sufficiently interwoven with other advice, proposals, recommendations, analyses or policy options so that they cannot reasonably be considered separate or distinct.

[para 97] In Order 96-012, the Commissioner held that section 24(1)(a) contemplates protecting information generated during the decision-making process and not information generated after the decision has been made.

[para 98] Section 24(1)(a) is a discretionary exception. Consequently, even if this section applies to the information in the records, a public body may nevertheless decide to disclose the information. In Order 96-017, the Commissioner stated that a public body exercises its discretion properly when: (1) it considers the objects and purposes of the legislation in question, and (2) it does not exercise its discretion for an improper or irrelevant purpose.

[para 99] The Public Body states that all of the pages of records listed above fulfill the section 24(1)(a) criteria. The Public Body states that the advice was sought or expected from various government officials or employees who had the responsibility to monitor and assess the impact of the HIA as well as considering, deciding and acting upon implementation of legislative changes. The Public Body also states that the advice was directed toward an action and to the Minister who could implement the action. The Public Body states that the advice consisted of an assessment regarding the implementation of the HIA and proposed legislative changes to the HIA. The Public Body states that this type of advice must be protected in order to ensure that government employees and officers are permitted to consult freely regarding future policy initiatives and legislative amendments.

[para 100] The Public Body also made a specific reference to pages 91, 263 and 264 of Record #1. The Public Body states that although these pages were created by the Affected Party they also fulfill section 24(1)(a). The Public Body states that the information in these pages resulted from discussions and/or meetings between the Minister and the Affected Party regarding the HIA. Therefore, the information provided by the Affected Party in those pages of records was clearly “sought” by the Minister. The Public Body states that it is reasonable to expect that the Affected Party’s officials, as representatives of an affected stakeholder, would provide the Minister and/or department with a written outline of their understanding of the discussions and ideas exchanged between the parties. The Public Body also states that the information related to the implementation of an action and was directed toward the Minister who had authority to implement the action.

[para 101] After a review of the pages of records I find that the following pages of records or portions of records fulfill the section 24(1)(a) criteria:

Record #1: 2 (2nd severed part), 3(1st and 2nd severed part except heading), 4, 6 (2nd severed part except heading), 11 (2nd severed part), 31 (2nd and 3rd severed part), 32 (1st severed part), 37 (3rd severed part), 38 (3rd

severed part), 62 (2nd severed part), 70 (1st and 2nd severed part), 78 (1st and 2nd severed part), 80, 81, 83 (severed part except heading), 85 (2nd severed part except heading), 86 (2nd and 3rd severed parts), 87 (severed part except heading), 147, 159-162, 234 (body of memo under heading), 235, 236 (body of memo under heading), 237

Record #2: 53 (except heading, name, phone number and date)

[para 102] I also find that the Public Body properly exercised its discretion to withhold these records. As such, I uphold the decision of the Public Body to withhold these records under this section.

[para 103] I find that the following pages of records do not fulfill the section 24(1)(a) criteria:

Record #1: 1, 2(1st severed part), 3 (heading), 5, 6 (1st severed part and heading under second severed part), 11 (1st severed part), 12, 13, 14, 31 (1st severed part), 32 (2nd & 3rd severed part), 37 (1st and 2nd severed part), 38 (1st, 2nd, 4th and 5th severed part), 62 (1st severed part), 63, 64, 65, 69, 70 (3rd severed part), 77, 78 (3rd severed part), 82, 83 (heading), 84, 85 (1st severed part and heading of 2nd severed part), 86 (1st severed part), 87 (heading), 91, 96, 97, 98, 140, 142, 148- 158, 166, 167, 195, 196, 206, 207, 208, 233, 234 (heading; severed part above heading; signature line), 236 (heading; severed part above heading; signature line and notations below), 263, 264

Record #2: 89

[para 104] However, as the Public Body applied section 24(1)(b) and/or 24(1)(g) to all of the above pages, I will address these pages under those sections.

[para 105] In addition, I find that pages 52, 53 (heading, name, phone number and date) of record #2 do not fulfill the section 24(1)(a) criteria. However, because these pages are duplicates of pages 82 and 83 of Record #1, I will address them under section 24(1)(b). In addition, as the Public Body applied sections 27(1)(a) and 27(1)(b) to these pages, I will also address these records under those sections.

I) Did the Public Body properly apply section 24(1)(b) of the FOIP Act to the records/information?

[para 106] The Public Body applied section 24(1)(b) to the following pages of records:

Record #1: 1-4, 5, 6, 11-14, 31, 32, 37, 38, 62-65, 69, 70, 77, 78, 80, 81, 82, 83, 84, 85, 86, 87, 91, 96, 97, 98, 140, 142, 147, 148-162, 166, 167, 195, 196, 206, 207, 208, 233-237, 263, 264

[para 107] In addition, as pages 52 and 53 of Record #2 are duplicates of pages 82 and 83 of Record #1, I addressed pages 52 and 53 under section 24(1)(b).

[para 108] The pages of records that remain at issue under section 24(1)(b) are as follows:

Record #1: 1, 2(1st severed part), 3 (heading), 5, 6 (1st severed part and heading under second severed part), 11 (1st severed part), 12, 13, 14, 31 (1st severed part), 32 (2nd & 3rd severed part), 37 (1st and 2nd severed part), 38 (1st, 2nd, 4th and 5th severed part), 62 (1st severed part), 63, 64, 65, 69, 70 (3rd severed part), 77, 78 (3rd severed part), 82, 83 (heading), 84, 85 (1st severed part and heading of 2nd severed part), 86 (1st severed part), 87 (heading), 91, 96, 97, 98, 140, 142, 148- 158, 166, 167, 195, 196, 206, 207, 208, 233, 234 (heading; severed part above heading; signature line), 236 (heading; severed part above heading; signature line and notations below), 263, 264

Record #2: 52, 53 (heading, name, phone number and date)

[para 109] Section 24(1)(b) reads:

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

(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 110] The purpose of section 24(1)(b) is to shield consultations or deliberations that occurred during the decision-making process. In Order 96-006, the Commissioner said that a “consultation” occurs when the views of one or more officers or employees is sought as to the appropriateness of a particular proposal or suggested action. The Commissioner defined a “deliberation” as a discussion or consideration by the persons described in the section of the reasons for or against an action.

[para 111] I find that the following pages fulfill the requirements of section 24(1)(b):

Record #1: 140, 195, 196, 206, 207, 208, 233(except original e-mail message)

[para 112] I also find that the Public Body properly exercised its discretion to withhold these records. As such, I uphold the decision of the Public Body to withhold these records under this section.

[para 113] I find that the following pages do not fulfill the requirements under section 24(1)(b):

Record #1: 1, 2(1st severed part), 3 (heading), 5, 6 (1st severed part and heading under 2nd severed part), 11 (1st severed part), 12, 13, 14, 31 (1st severed part), 32 (2nd & 3rd severed part), 37 (1st and 2nd severed part), 38 (1st, 2nd, 4th and 5th severed part), 62 (1st severed part), 63, 64, 65, 69, 70 (3rd severed part), 77, 78 (3rd severed part), 82, 83 (heading), 84, 85 (1st severed part and heading of 2nd severed part), 86 (1st severed part), 87 (heading), 91, 96, 97, 98, 142, 148- 158, 166, 167, 233 (original e-mail message), 234 (heading; severed part above heading; signature line), 236 (heading; severed part above heading; signature line and notations below), 263, 264

Record #2: 52; 53 (heading, name, phone number and date)

[para 114] Furthermore, as there are no mandatory exceptions that apply to the following pages and the Public Body has not claimed any other discretionary exceptions in regard to these pages, I intend to order the Public Body to disclose these pages to the Applicant:

Record #1: 1, 5, 6 (1st severed part and heading under second severed part), 11 (1st severed part), 12, 13, 14, 62 (1st severed part), 63, 64, 65, 69, 77, 82, 83 (heading), 84, 85 (1st severed part and heading of 2nd severed part), 86 (1st severed part), 91, 96, 97, 142, 166, 233 (original e-mail message), 234 (heading; severed part above heading; signature line), 236 (heading; severed part above heading; signature line and notations below), 263, 264

[para 115] However, as the Public Body applied section 24(1)(g) to the following pages, I will address these pages under that section:

Record #1: 2 (1st severed part), 3 (heading), 31 (1st severed part), 32 (2nd & 3rd severed part), 37 (1st and 2nd severed part), 38 (1st, 2nd, 4th and 5th severed part), 70 (3rd severed part), 78 (3rd severed part), 87 (heading), 98, 167

[para 116] In addition, as the Public Body has applied section 27(1)(a) to pages 148-158 of Record #1 and sections 27(1)(a) and (b) to pages 52 and 53 (heading, name, phone number and date) of Record #2, I will address those pages under those sections.

J) Did the Public Body properly apply section 24(1)(g) of the FOIP Act to the records/information?

[para 117] The Public Body applied section 24(1)(g) to the following pages of records:

Record #1: 2-4, 31, 32, 37, 38, 70, 78, 80, 81, 87, 98, 167

Record #2: 89

[para 118] The records that remain at issue under section 24(1)(g) are as follows:

Record #1: 2 (1st severed part), 3 (heading of 2nd severed part), 31 (1st severed part), 32 (2nd & 3rd severed part), 37 (1st and 2nd severed part), 38 (1st, 2nd, 4th and 5th severed part), 70 (3rd severed part), 78(3rd severed part), 87(heading), 98, 167

Record #2: 89

[para 119] Section 24(1)(g) reads:

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

(g) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision

[para 120] The Public Body states that these pages of records contain information that relate to pending policy decisions regarding possible future amendments to the HIA as well as the Public Body's plan on how to handle some of these issues.

[para 121] After a review of the pages of records at issue, I find that the information on the pages do not fulfill the section 24(1)(g) criteria. Furthermore, as there are no mandatory exceptions that apply to the following pages and the Public Body did not apply any other discretionary exceptions to these pages, I intend to order the Public Body to disclose these pages to the Applicant:

Record #1: 2 (1st severed part), 3 (heading of 2nd part), 31 (1st severed part), 32 (2nd & 3rd severed part), 37 (1st and 2nd severed part), 38 (1st, 2nd, 4th and 5th severed part), 70 (3rd severed part), 78(3rd severed part), 87(heading), 98, 167

[para 122] I also find that the information on page 89 of Record #2 does not fulfill the requirements of the section. However, as the Public Body applied sections 27(1)(a) and 27(1)(b) to page 89 of Record #2, I will address this page under those sections.

K) Did the Public Body properly apply section 27(1)(b) of the FOIP Act to the records/information?

[para 123] The Public Body applied section 27(1)(b) to the following pages of records:

Record #1: 143-145

Record #2: 1, 3-31, 35-42, 50-55, 81-85, 87, 88, 89, 90-97, 99, 101-457

[para 124] The pages of records that remain at issue under section 27(1)(b) are as follows:

Record #1: 143-145

Record #2: 1, 3-31, 35-38, 41, 42, 50-52, 53(heading, name, phone number and date), 54, 55, 81-85, 87-88, 89, 90 (follow-up e-mail) 91-97, 99, 101- 179, 182, 203(notation), 207 (notation), 208 (notation), 209 (notation), 210 (notation), 212-405

[para 125] In addition, I will also address pages 148-158 of Record #1 as these pages are duplicates of pages 111-121 of Record #2.

[para 126] Section 27(1)(b) reads:

27(1) The head of a public body may refuse to disclose to an applicant

...

(b) information prepared by or for

(i) the Minister of Justice and Attorney General,

(ii) an agent or lawyer of the Minister of Justice and Attorney General, or

(iii) an agent or lawyer of a public body,

in relation to a matter involving the provision of legal services

[para 127] Section 27(1)(b) gives the Public Body the discretion to refuse to disclose information which is prepared by or for an agent or lawyer of the Minister of Justice and Attorney General or a public body in relation to a matter involving the provision of “legal services”.

[para 128] In Order 96-017, the Commissioner held that the term “legal services” should be given its ordinary dictionary meaning, and would include any law-related service performed by a person licensed to practice law.

[para 129] I find that the following pages of records fulfill the criteria under section 27(1)(b):

Record #1: 143, 148-158

Record #2: 1, 3, 4, 30, 31, 42, 50, 87, 88, 91, 92, 93, 94, 95, 96, 107, 109-146, 148, 149, 150, 151, 156, 157, 158, 159, 160, 161, 162, 163, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178 (Reply email), 182, 235-283, 396-405

[para 130] In addition, I find that the notations on the following pages of Record #2 fulfill section 27(1)(b):

Record #2: 24, 99, 152, 164-167, 203, 207, 208, 209, 210, 213, 214, 216, 223, 224, 230, 232, 233, 290, 291, 292, 293, 295, 296, 304, 305, 306, 307, 308, 313, 314, 315, 318, 323, 328, 334, 344, 347, 364, 371, 372, 389, 392, 393

[para 131] Furthermore, I find that the Public Body properly exercised its discretion to withhold these records. As such, I uphold the Public Body’s decision to withhold the above records from the Applicant.

[para 132] However, I find that the following pages of records do not fulfill the criteria under section 27(1)(b):

Record #1: 144, 145

Record #2: 5-23, 25-29, 35-38, 41, 51, 52, 53 (heading, name, phone number and date), 54, 55, 81-85, 89, 90 (subsequent e-mail), 97, 101-106, 108, 147, 153, 154, 155, 168, 178 (original e-mail) 179, 212, 215, 217, 218, 219, 220, 221, 222, 225, 226, 227, 228, 229, 231, 234, 284, 285, 286, 287, 288, 289, 294, 297, 298, 299, 300, 301, 302, 303, 309, 310, 311, 312, 316, 317, 319, 320, 321, 322, 324, 325, 326, 327, 329, 330, 331, 332, 333, 335, 336, 337, 338, 339, 340, 341, 342, 343, 345, 346, 348-363, 365-370, 373-388, 390, 391, 394, 395

[para 133] In addition, I find that the typed portion (without notations) of the following pages of records does not fulfill the criteria under section 27(1)(b):

Record #2: 24, 99, 152, 164-167, 213, 214, 216, 223, 224, 230, 232, 233, 290, 291, 292, 293, 295, 296, 304, 305, 306, 307, 308, 313, 314, 315, 318, 323, 328, 334, 344, 347, 364, 371, 372, 389, 392, 393

[para 134] However, as the Public Body applied section 27(1)(a) to all these pages of records, I will address these pages under that section.

L) Did the Public Body properly apply section 27(1)(a) of the FOIP Act (privileged information) to the records/information?

[para 135] Section 27(1)(a) reads:

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

[para 136] The Public Body applied section 27(1)(a) (solicitor-client privilege) to the following pages of records:

Record #1: 143-145, 148-162

Record #2: 1, 3-31, 35-42, 50, 51-55, 81-85, 87, 88, 89, 90-97, 99, 101-457

[para 137] The Public Body states that the pages within “Record 2” consist of pages that were part of its solicitor’s file and are therefore subject to solicitor-client privilege under section 27(1)(a).

[para 138] The pages of records that remain at issue under section 27(1)(a) are as follows:

Record #1: 144, 145

Record #2: 5-23, 25-29, 35-38, 41, 51, 52, 53 (heading, name, phone number and date), 54, 55, 81-85, 89, 90 (subsequent e-mail), 97, 101-106, 108, 147, 152 (letter without notation), 153, 154, 155, 168, 178 (original e-mail) 179, 212, 215, 217, 218, 219, 220, 221, 222, 225, 226, 227, 228, 229, 231, 234, 284, 285, 286, 287, 288, 289, 294, 297, 298, 299, 300, 301, 302, 303, 309, 310, 311, 312, 316, 317, 319, 320, 321, 322, 324, 325, 326, 327, 329, 330, 331, 332, 333, 335, 336, 337, 338, 339, 340, 341, 342, 343, 345, 346, 348-363, 365-370, 373-388, 390, 391, 394, 395

Record #2 (typed portions without notations):

24, 99, 164-167, 213, 214, 216, 223, 224, 230, 232, 233, 290, 291, 292, 293, 295, 296, 304, 305, 306, 307, 308, 313, 314, 315, 318, 323, 328, 334, 344, 347, 364, 371, 372, 389, 392, 393

[para 139] In Order 96-017, the Commissioner said that in order for a record to be subject to solicitor-client privilege, the Public Body must meet the common law criteria set out in *Solosky v. The Queen* [1980] 1 S.C.R. 821. In that case, the Supreme Court of Canada stated that solicitor-client privilege must be claimed document by document and each document must meet the following criteria:

- (i) it must be a communication between solicitor and client;
- (ii) that entails the seeking or giving of legal advice; and
- (iii) which is intended to be confidential by the parties.

[para 140] In Order 96-020, the Commissioner held that where a communication between a solicitor and a client constitute a continuum of advice, such communication is privileged. In that order the Commissioner cited *Balabel v. Air India*, [1988] 2 All E.R. 246 [C.A.] at 254:

There will be a continuum of communications between solicitor and client... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.

[para 141] After a review of the pages of records, I find that the following records fulfill the criteria for solicitor-client privilege under section 27(1)(a) and that the Public Body properly exercised its discretion in this regard:

Record #1: 144, 145

Record #2: 51, 82, 104, 105, 106, 108, 147, 164 (typed portion), 165(typed portion), 166 (typed portion), 167 (typed portion), 168, 178 (original e-mail), 179

[para 142] I uphold the decision of the Public Body to withhold these records from the Applicant.

[para 143] However, I find that the information remaining at issue under section 27(1)(a) does not fulfill the requirements of this section. The Public Body states that many of the records at issue constitute a continuum of advice. The Public Body states that this information includes a) articles or other documents of relevance or importance, b) information provided by other stakeholders or other involved parties and c) information regarding discussions with third party stakeholders. After a review of the remaining records I find that the majority of the records, on their face, do not show that

they were exchanged between the Public Body and its solicitor. In addition, there is no evidence that the records which did originate from the Public Body were sent to the solicitor for the purpose of seeking advice. In order to show that there is a continuum of advice in regard to these pages of records, it is not enough to simply make this assertion at inquiry. Evidence must be provided to support these assertions.

[para 144] I find that the following pages of records do not fulfill the criteria under section 27(1)(a):

Record #2: 5-23, 25-29, 35-38, 41, 52, 53 (heading, name, phone number and date), 54, 55, 81, 83-85, 89, 90 (subsequent e-mail), 97, 101-103, 152 (letter without notation), 153, 154, 155, 212, 215, 217, 218, 219, 220, 221, 222, 225, 226, 227, 228, 229, 231, 234, 284, 285, 286, 287, 288, 289, 294, 297, 298, 299, 300, 301, 302, 303, 309, 310, 311, 312, 316, 317, 319, 320, 321, 322, 324, 325, 326, 327, 329, 330, 331, 332, 333, 335, 336, 337, 338, 339, 340, 341, 342, 343, 345, 346, 348-363, 365-370, 373-388, 390, 391, 394, 395

[para 145] I also find that the typed portion (without notations) of the following pages does not fulfill the criteria under section 27(1)(a):

Record #2: 24, 99, 213, 214, 216, 223, 224, 230, 232, 233, 290, 291, 292, 293, 295, 296, 304, 305, 306, 307, 308, 313, 314, 315, 318, 323, 328, 334, 344, 347, 364, 371, 372, 389, 392, 393

[para 146] Furthermore, as there are no mandatory exceptions that apply to the above records and the Public Body did not claim any other discretionary exceptions in regard to these records, I intend to order the Public Body to disclose these records to the Applicant.

VI. ORDER

[para 147] I make the following Order under section 72 of the FOIP Act:

A) Are the records/information responsive to the Applicant's access request?

[para 148] I find that the Public Body properly withheld the following pages of records as non-responsive:

Record #1: 89, 90, 227-229, 230 and 231

Record #2: 180, 181, 183-186, 187-202, 406-457

[para 149] However, I find that the Public Body did not properly withhold the following pages of records as non-responsive to the access request:

Record #1: 197-198, 209-215

B) Are the records/information excluded from the application of the FOIP Act by section 4(1)(d)?

[para 150] I find that the following pages of records fulfill the section 4(1)(d) criteria:

Record #1: 93-95, 251

Record #2: 39, 40, 90 (original e-mail), 203 (typed portion), 204, 205, 206, 207 (typed portion), 208(typed portion), 209 (typed portion), 210 (typed portion), 211

[para 151] As such, these pages are excluded from the application of the FOIP Act and I do not have jurisdiction over these pages.

[para 152] I find that the following pages of records do not fulfill the section 4(1)(d) criteria:

Record #1: 142

Record #2: 89

[para 153] As such, these records are subject to the application of the FOIP Act.

C) Are the records/information excluded from the application of the FOIP Act by section 4(1)(q)?

[para 154] I find that the following pages of records fulfill the section 4(1)(q) criteria:

Record #1: 15A, 15B, 17, 18, 20-22, 24, 25-27, 30, 44-47, 51-55, 57, 59

[para 155] As such, these pages are excluded from the application of the FOIP Act and I have no jurisdiction over these pages.

[para 156] However, I find that pages 58 and 60 of Record #1 do not fulfill the section 4(1)(q) criteria. As such, these records are subject to the application of the FOIP Act.

D) Does section 16 of the FOIP Act (business interests) apply to the records/information?

[para 157] I find that all of the pages at issue under section 16 do not fulfill the three-part test under section 16.

[para 158] Furthermore, as there are no mandatory exceptions that apply, and the Public Body did not claim any further discretionary exceptions to the following pages of records, I order the Public Body to disclose these pages to the Applicant:

Record #1: 8, 9, 29, 33, 36, 41, 42, 43, 58, 60, 67, 68, 74, 75, 76, 92, 124, 216, 218, 219, 220A, 220B, 223, 224, 225, 226, 239, 242, 243, 247, 248, 249, 250, 254, 255, 256, 258, 259, 260, 261, 262, 265

[para 159] However, as the Public Body applied section 24(1)(a), 24(1)(b) and/or 24(1)(g) to the following pages of records, I have addressed these pages under those sections:

Record #1: 2, 5, 11, 12, 13, 14, 31, 37, 38, 62, 63, 64, 65, 69, 77, 80, 82, 84, 86, 91, 140, 195, 196, 206, 207, 234, 235, 236, 237, 263, 264

[para 160] Lastly, as page 52 of Record #2 is a duplicate of page 82 of Record #1, I have addressed this page under section 24(1)(a) and 24(1)(b). Furthermore, since the Public Body applied section 27(1)(a) and 27(1)(b) to this page, I also addressed this page under those sections.

E) Does section 17 of the FOIP Act (personal information) apply to the records/information?

[para 161] In the Public Body's submission, the Public Body states that it is no longer claiming section 17 as an exception for page 66 of Record #1. As such, I do not find it necessary to address whether section 17 would apply to this page.

F) Did the Public Body properly apply section 21 of the FOIP Act (intergovernmental relations) to the records/information?

[para 162] The Public Body applied section 21(1)(a)(i) and section 21(1)(b) to pages 197-198 and 209-215 of Record #1. I find these sections do not apply to these pages. Furthermore, as there are no mandatory exceptions that apply to these pages and the Public Body did not claim any further discretionary exceptions in regard to these pages, I order the Public Body to disclose these pages to the Applicant.

G) Does section 22 of the FOIP Act (Cabinet confidences) apply to the records/information?

[para 163] In the Public Body's submission, the Public Body states that it is no longer claiming section 22 as an exception in this inquiry. As such, I do not find it necessary to address this section in this inquiry.

H) Did the Public Body properly apply section 24(1)(a) of the FOIP Act (advice) to the records/information?

[para 164] I find that the Public Body properly applied section 24(1)(a) to the following pages of records and properly exercised its discretion in that regard:

Record #1: 2 (2nd severed part), 3(1st and 2nd severed part except heading), 4, 6 (2nd severed part except heading), 11 (2nd severed part), 31 (2nd and 3rd severed part), 32 (1st severed part), 37 (3rd severed part), 38 (3rd severed part), 62 (2nd severed part), 70 (1st and 2nd severed part), 78 (1st and 2nd severed part), 80, 81, 83 (severed part except heading), 85 (2nd severed part except heading), 86 (2nd and 3rd severed parts), 87 (severed part except heading), 147, 159-162, 234 (body of memo under heading), 235, 236(body of memo under heading), 237

Record #2: 53 (except heading, name, phone number and date)

[para 165] As such, I uphold the decision of the Public Body to withhold these pages of records from the Applicant.

[para 166] I find that the following pages of records do not fulfill the section 24(1)(a) criteria:

Record #1: 1, 2(1st severed part), 3 (heading), 5, 6 (1st severed part and heading under second severed part), 11 (1st severed part), 12, 13, 14, 31 (1st severed part), 32 (2nd & 3rd severed part), 37 (1st and 2nd severed part), 38 (1st, 2nd, 4th and 5th severed part), 62 (1st severed part), 63, 64, 65, 69, 70 (3rd severed part), 77, 78 (3rd severed part), 82, 83 (heading), 84, 85 (1st severed part and heading of 2nd severed part), 86 (1st severed part), 87 (heading), 91, 96, 97, 98, 140, 142, 148- 158, 166, 167, 195, 196, 206, 207, 208, 233, 234 (heading; severed part above heading; signature line), 236 (heading; severed part above heading; signature line and notations below), 263, 264

Record #2: 89

[para 167] However, as the Public Body applied section 24(1)(b) and/or 24(1)(g) to the all of the above pages, I addressed those pages under those sections. In addition, as pages 52 and 53 (heading, name, phone number and date) of record #2 are duplicates of pages 82 and 83 of Record #1, I addressed those pages under section 24(1)(b). In addition, as the Public Body applied sections 27(1)(a) and 27(1)(b) to pages 52 and 53 of Record #2, I addressed those pages under those sections.

I) Did the Public Body properly apply section 24(1)(b) of the FOIP Act to the records/information?

[para 168] I find that the Public Body properly applied section 24(1)(b) to the following pages of records and properly exercised its discretion in that regard:

Record #1: 140, 195, 196, 206, 207, 208, 233(except original e-mail message)

[para 169] As such, I uphold the Public Body's decision to withhold these pages of records from the Applicant.

[para 170] I find that the following pages do not fulfill the requirements under section 24(1)(b):

Record #1: 1, 2(1st severed part), 3 (heading), 5, 6 (1st severed part and heading under 2nd severed part), 11 (1st severed part), 12, 13, 14, 31 (1st severed part), 32 (2nd & 3rd severed part), 37 (1st and 2nd severed part), 38 (1st, 2nd, 4th and 5th severed part), 62 (1st severed part), 63, 64, 65, 69, 70 (3rd severed part), 77, 78 (3rd severed part), 82, 83 (heading), 84, 85 (1st severed part and heading of 2nd severed part), 86 (1st severed part), 87 (heading), 91, 96, 97, 98, 142, 148- 158, 166, 167, 233 (original e-mail message), 234 (heading; severed part above heading; signature line), 236 (heading; severed part above heading; signature line and notations below), 263, 264

Record #2: 52, 53 (heading, name, phone number and date)

[para 171] Furthermore, as there are no mandatory exceptions that apply to the following pages and the Public Body has not claimed any other discretionary exceptions in regard to these pages, I order the Public Body to disclose these pages to the Applicant:

Record #1: 1, 5, 6 (1st severed part and heading under second severed part), 11 (1st severed part), 12, 13, 14, 62 (1st severed part), 63, 64, 65, 69, 77, 82, 83 (heading), 84, 85 (1st severed part and heading of 2nd severed part), 86 (1st severed part), 91, 96, 97, 142, 166, 233 (original e-mail message), 234 (heading; severed part above heading; signature line), 236 (heading; severed part above heading; signature line and notations below), 263, 264

[para 172] However, as the Public Body applied section 24(1)(g) to the following pages, I addressed these pages under that section:

Record #1: 2 (1st severed part), 3 (heading), 31 (1st severed part), 32 (2nd & 3rd severed part), 37 (1st and 2nd severed part), 38 (1st, 2nd, 4th and 5th

severed part), 70 (3rd severed part), 78 (3rd severed part), 87 (heading), 98, 167

[para 173] In addition, as the Public Body has applied section 27(1)(a) to pages 148-158 of Record #1 and sections 27(1)(a) and (b) to pages 52 and 53 (heading, name, phone number and date) of Record #2, I addressed those pages under those sections.

J) Did the Public Body properly apply section 24(1)(g) of the FOIP Act to the records/information?

[para 174] I find that the Public Body did not properly apply section 24(1)(g) to the following pages of records:

Record #1: 2 (1st severed part), 3 (heading of 2nd part), 31 (1st severed part), 32 (2nd & 3rd severed part), 37 (1st and 2nd severed part), 38 (1st, 2nd, 4th and 5th severed part), 70 (3rd severed part), 78(3rd severed part), 87(heading), 98, 167

[para 175] Furthermore, as there were no mandatory exceptions that apply to the pages and the Public Body did not apply any other discretionary exceptions to these pages, I order the Public Body to disclose these pages to the Applicant.

[para 176] In addition, I find that the Public Body did not properly apply section 24(1)(g) to page 89 of Record #2. However, as the Public Body applied sections 27(1)(a) and 27(1)(b) to this page, I addressed this page under those sections.

K) Did the Public Body properly apply section 27(1)(b) of the FOIP Act to the records/information?

[para 177] I find that the Public Body properly applied section 27(1)(b) to the following pages of records and properly exercised its discretion in that regard:

Record #1: 143, 148-158

Record #2: 1, 3, 4, 30, 31, 42, 50, 87, 88, 91, 92, 93, 94, 95, 96, 107, 109-146, 148, 149, 150, 151, 156, 157, 158, 159, 160, 161, 162, 163, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178 (reply email), 182, 235-283, 396-405

[para 178] I also find that Public Body properly applied section 27(1)(b) and properly exercised its discretion in regard to the notations on the following pages:

Record #2: 24, 99, 152, 164, 165, 166, 167, 203, 207, 208, 209, 210, 213, 214, 216, 223, 224, 230, 232, 233, 290, 291, 292, 293, 295, 296, 304,

305, 306, 307, 308, 313, 314, 315, 318, 323, 328, 334, 344, 347,
364, 371, 372, 389, 392, 393

[para 179] As such, I uphold the Public Body's decision to withhold this information from the Applicant.

[para 180] However, I find that the following pages of records do not fulfill the criteria under section 27(1)(b):

Record #1: 144, 145

Record #2: 5-23, 25-29, 35-38, 41, 51, 52, 53 (heading, name, phone number and date), 54, 55, 81-85, 89, 90 (subsequent e-mail), 97, 101-106, 108, 147, 153, 154, 155, 168, 178 (original e-mail) 179, 212, 215, 217, 218, 219, 220, 221, 222, 225, 226, 227, 228, 229, 231, 234, 284, 285, 286, 287, 288, 289, 294, 297, 298, 299, 300, 301, 302, 303, 309, 310, 311, 312, 316, 317, 319, 320, 321, 322, 324, 325, 326, 327, 329, 330, 331, 332, 333, 335, 336, 337, 338, 339, 340, 341, 342, 343, 345, 346, 348-363, 365-370, 373-388, 390, 391, 394, 395

[para 181] I also find that the typed portion of the following pages of records (without the notations) do not fulfill the criteria under section 27(1)(b):

Record #2: 24, 99, 152, 164-167, 213, 214, 216, 223, 224, 230, 232, 233, 290, 291, 292, 293, 295, 296, 304, 305, 306, 307, 308, 313, 314, 315, 318, 323, 328, 334, 344, 347, 364, 371, 372, 389, 392, 393

[para 182] However, as the Public Body applied section 27(1)(a) to all of the above pages of records, I will address these pages under that section.

L) Did the Public Body properly apply section 27(1)(a) of the FOIP Act (privileged information) to the records/information?

[para 183] I find that the Public Body properly applied section 27(1)(a) (solicitor-client privilege) to the following records and properly exercised its discretion that regard:

Record #1: 144, 145

Record #2: 51, 82, 104, 105, 106, 108, 147, 164 (typed portion), 165 (typed portion), 166 (typed portion), 167 (typed portion), 168, 178 (original e-mail), 179

[para 184] As such, I uphold the decision of the Public Body to withhold these records from the Applicant.

[para 185] I find that the following pages of records do not fulfill the criteria under section 27(1)(a). Furthermore, as there are no mandatory exceptions that apply to the pages and the Public Body did not claim any other discretionary exceptions, I order the Public Body to disclose these pages to the Applicant:

Record #2: 5-23, 25-29, 35-38, 41, 52, 53 (heading, name, phone number and date), 54, 55, 81, 83-85, 89, 90 (subsequent e-mail), 97, 101-103, 152 (letter without notation), 153, 154, 155, 212, 215, 217, 218, 219, 220, 221, 222, 225, 226, 227, 228, 229, 231, 234, 284, 285, 286, 287, 288, 289, 294, 297, 298, 299, 300, 301, 302, 303, 309, 310, 311, 312, 316, 317, 319, 320, 321, 322, 324, 325, 326, 327, 329, 330, 331, 332, 333, 335, 336, 337, 338, 339, 340, 341, 342, 343, 345, 346, 348-363, 365-370, 373-388, 390, 391, 394, 395

Record #2 (typed portion without notations):
24, 99, 213, 214, 216, 223, 224, 230, 232, 233, 290, 291, 292, 293, 295, 296, 304, 305, 306, 307, 308, 313, 314, 315, 318, 323, 328, 334, 344, 347, 364, 371, 372, 389, 392, 393

[para 186] I further order that the Public Body notify me in writing within 50 days of receiving this Order, that the Public Body has complied with this Order. I have attached, to the Public Body's copy of the Order, a copy of the records to be withheld, either partially or entirely, to the Applicant. Where I have held that a portion of a record is to be withheld and portion disclosed, I have highlighted the portion to be withheld.

Dave Bell
Adjudicator