ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2012-08

April 27, 2012

SERVICE ALBERTA

Case File Number F5443

Office URL: www.oipc.ab.ca

Summary: The Applicants requested records relating to a prosecution that Service Alberta (the Public Body) had undertaken in relation to them. The Public Body granted access to records but withheld information under sections 17 (information harmful to personal privacy), 24 (advice from officials), and 27 (privileged information) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). It also indicated that it considered some records to be exempt from the application of the FOIP Act under sections 4(1)(a) and 4(1)(l)(ii), or on the basis that they were not responsive to the Applicants' access request. The Applicants requested review of these decisions by this office on May 11, 2007.

In Order F2009-024, the Adjudicator reviewed the Public Body's response to the access request. The Adjudicator confirmed the decision to withhold information under section 17. She also confirmed the decision of the Public Body to withhold some information on the basis of section 27(1)(a), and other information on the basis of section 27(1)(b). However, she found that the Public Body had not established that the records withheld as nonresponsive were nonresponsive or that it had properly exercised its discretion when it withheld records under section 24(1)(a). She ordered the Public Body to provide a new response to the Applicants in which it provided reasons for its decision to find records responsive or nonresponsive and to explain how it had exercised its discretion. As the Public Body had withheld records on the basis of solicitor-client privilege, rather than the relevant provision of the FOIP Act, the Adjudicator ordered the Public Body to make a response to the Applicant which made reference to the provision of the FOIP Act on which it was relying.

The Public Body made a new response to the Applicants, and the Applicants requested review of it.

The Adjudicator found, with few exceptions, that the Public Body had not established that the records were nonresponsive and ordered them to include these records in the response to the Applicants, subject to any applicable exceptions.

The Adjudicator found that the Public Body had not established that it had exercised its discretion appropriately when it elected to withhold records under section 24(1)(a). She ordered it to reconsider its decision to withhold the records.

The Adjudicator confirmed the decision of the Public Body to withhold information on the basis of solicitor-client privilege.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 6, 7, 12, 17, 24, 27, 72;

Authorities Cited: AB: Orders 96-006, 96-017, 97-020, F2004-026, F2007-014, F2009-024, F2009-025, F2010-007, F2010-036, F2011-012, Decision F2011-D-002

Cases Cited: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, *Canada v. Solosky,* [1980] 1 S.C.R. 821, *R. v. McClure,* [2001] 1 SCR 445

I. BACKGROUND

[para 1] On October 30, 2003, the Applicants, a number of funeral homes, made the following request for access to Alberta Government Services, (now Service Alberta) for records:

> We request copies of complete records relating to the Applicants in your control or custody which may or may not have resulted in charges being laid against any or all of the Applicants, and specifically:
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> (a) all interviews, notes of interviews, audio or visual recordings of interviews or transcriptions of interviews, the subject matter of which were the Applicants, or any of them;
> (b) all information and documents received from any former employee, employee, affiliate, consultant, contractor, or agent of the Applicants or any of them;
> (c) all correspondence between any governmental department, agency or board and the Applicants, or any of them, including email correspondence;
> (d) all correspondence between any governmental department, agency or board and any employee or agent of the Applicants, or any of them, including email correspondence;
> (e) all correspondence between any governmental department, agency or board, including email correspondence,
> (f) all documents collected or relied upon in respect of an investigation relating to the Applicants;
> (g) copies of any policies or protocols relevant to the investigation, whether or not resulting in a prosecution, involving the Applicants, or any of them;
> (h) copies of any complaints, letters, notices or comments in relation to the Applicants;

(i) all documents or records considered prior to, subsequent to, or in the course of any investigation relating to any or all of the Applicants;
(j) all news releases, inter-departmental memos and notes relating to any or all of the Applicants; and
(k) all records, documents, and files in the possession of, or created by or through, the Alberta Funeral Services Regulatory Board, or any employee, agent or contractor in that capacity.

[para 2] The Public Body responded to the Applicants' access request in 2006, once the prosecution referred to in the access request had concluded.

[para 3] The Public Body identified and located a number of records and provided these to the Applicants. The Public Body applied section 4(1)(l)(ii), section 17, section 24(1)(a). and sections 27(1)(a) and (b) to some of the information. The Public Body also withheld some information as "unresponsive" to the Applicants' request.

[para 4] The Applicants requested review of the Public Body's response to their access request.

[para 5] In Order F2009-024, I found that section 4(1)(l)(ii) applied to the record to which the Public Body had applied this provision. I confirmed that the Public Body had properly withheld information under section 17(1). I also found that section 24(1)(a) applied to the information to which the Public Body had applied this provision, but found that the Public Body had not demonstrated that it had properly applied its discretion when it withheld information pursuant to this provision. I ordered it to provide reasons for its exercise of discretion. I found that the Public Body properly applied section 27(1)(a), but that in some cases, the Public Body had not properly applied section 27(1)(b). However, as it appeared from the Public Body's arguments that the Public Body believed that the records to which it had applied section 27(1)(b) were subject to solicitor-client privilege, I ordered the Public Body to make a decision as to whether section 27(1)(a) applied to the information I had found was not subject to section 27(1)(b). I decided that the evidence was insufficient to determine whether information was responsive or not, and ordered the Public Body to include in a new response to the Applicants an explanation as to why it believes the Applicants had not requested the information it was withholding as "unresponsive". I ordered the Public Body to make a new response under section 10 explaining why it believed the Applicants had not requested the records it had withheld as nonresponsive.

[para 6] The Public Body provided a new response to the Applicants. The Applicants requested review of the new response. In Decision F2011-D-002, I determined that the issues to be heard for this inquiry are the following:

1. Does the Public Body have a duty under the FOIP Act to the Applicants in relation to the records it has withheld as nonresponsive? If so, has this duty been met?

2. Did the Public Body properly exercise its discretion when it withheld information from the records under section 24(1)(a)?

> 3. Did the Public Body properly apply section 27(1)(a) (privileged information) to withhold information from the records?

[para 7] The parties provided initial and rebuttal submissions. After I reviewed the parties' submissions, I had further questions for the Public Body as to how it had made decisions regarding the responsiveness of records and how it had exercised its discretion. The Public Body provided further submissions in response to my questions and the Applicants provided comments regarding the Public Body's submissions.

II. RECORDS AT ISSUE

[para 8] The records at issue are those records containing information that the Public Body has withheld from the Applicants and which the Public Body identifies as being "records at issue".

III. ISSUES

Issue A: Does the Public Body have a duty under the FOIP Act to the Applicants in relation to the records it has withheld as nonresponsive? If so, has that duty been met?

Issue B: Did the Public Body properly exercise its discretion when it withheld information from the records under section 24(1)(a)?

Issue C: Did the Public Body properly apply section 27(1)(a) (privileged information) to withhold information from the records?

IV. DISCUSSION OF ISSUES

Issue A: Does the Public Body have a duty under the FOIP Act to the Applicants in relation to the records it has withheld as nonresponsive? If so, has that duty been met?

[para 9] In Order 97-020, the former Commissioner found that determining whether records are responsive is an important component to responding to an access request. He said:

> In Ontario Order P-880, the Office of the Information and Privacy Commissioner of Ontario had the following to say about "responsiveness":
>
> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

> "Responsiveness" must mean anything that is reasonably related to an applicant's request for access. In determining "responsiveness", a public body is determining what information or records are relevant to the request. It follows that any information or records that do not reasonably relate to an applicant's request for access will be "non-responsive" to the applicant's request.

[para 10] The former Commissioner determined that sections 6 and 11 (now sections 7 and 12) of the FOIP Act provide the legislative authority for determining that records or portions of records are non-responsive. He said:

> How do I reconcile section 6(1) of the Act, which speaks only of access to a record, and section 11(1) of the Act, which speaks of access to a record or part of a record?
>
> Section 6(1) and section 11(1) are both contained in that part of the Act dealing with the process of obtaining access. Those sections should be read in such a manner that they do not conflict. Consequently, I intend to read section 6(1) and section 11(1) together as supporting an interpretation that a public body may grant access to part of the record that contains the responsive information, and may remove the non-responsive information from that record.

[para 11] Section 6 of the FOIP Act gives applicants a right of access to any record in the custody or control of a public body. This right is subject only to the exceptions established in Division 2 of Part I of the FOIP Act. Section 6 states, in part:

> *6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.*

[para 12] Section 12 of the FOIP Act states, in part:

> *12(1) In a response under section 11, the applicant must be told*
> - *(a) whether access to the record or part of it is granted or refused,*
> - *(b) if access to the record or part of it is granted, where, when and how access will be given, and*
> - *(c) if access to the record or to part of it is refused,*
>   - *(i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
>   - *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
>   - *(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.*

The Commissioner considered section 12 to address "the process of gaining access." He also decided that because section 12 refers to "parts of records" that this provision authorizes public bodies to remove "non-responsive portions" of records.

[para 13] In Order F2009-025, I said:

> The "non-responsiveness" of information in records is not an exception to the right of access created by section 6 of the FOIP Act. Rather, I understand the Commissioner [in Order 97-020] to mean that there is no duty for a Public Body to grant access to information under section 6 if an applicant has not first made a request for access to that information. A Public Body is not required to provide a response in relation to all information in its custody or under its control to an Applicant; only information that reasonably relates to the access request. Essentially, a Public Body's duties to an applicant in relation to responding to an access request are not engaged until an applicant asks for the information.

[para 14] The issue before me, then, is to determine whether the Public Body has duties to the Applicant under the FOIP Act in relation to the information it has withheld from the records as "non-responsive". In order to make this determination, I must consider whether the Applicant requested this information.

[para 15] The Applicants described the records sought as records "relating to the Applicants that may *or may not* have resulted in charges being laid against the Applicants". The Applicants also described specific kinds of records they were seeking. In particular, they noted that they were seeking all documents collected or relied upon in respect of the investigation, and all documents or records considered prior to, subsequent to, or in the course of any investigation relating to any or all of the Applicants.

[para 16] An affidavit of an access and privacy advisor provides the following explanation of the manner in which the decision to withhold information as nonresponsive was made:

> I recall that this particular FOIP request was very disorganized. There were many records that had been collected, but it was not clear which records had already been reviewed. Records were located in unmarked boxes, placed into folders in the bottom of file cabinets, and contained highlighting with no notes to explain what the intended course of action was. The request had been entered into the FOIPNet tracking system, but no processing action codes or notes were entered.
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> The records which I initially found related to the program area's Edmonton office were numbered, and thus, my Director instructed me to begin the FOIP processing (i.e. applying exception and exemptions in accordance with the FOIP Act) to those records. Some of these records formed the basis of the initial release to the Applicants on August 31, 2011,[*sic*] now referred to as the "Edmonton First Release".
>
> I subsequently discovered a number of other records in the FOIP offices, related to the program area's Edmonton office, which had not been numbered (which later formed part of the "Edmonton Second Release" together with the balance of the records that had been numbered by [an employee of Service Alberta]. Due to inexperience, I simply numbered these records as a continuation of the previous ones and then began the FOIP processing of these records as well.

Unfortunately, while I was processing the records for the Edmonton Second Release, it became apparent to me that a number of the records were not, in fact, responsive to the FOIP Request. I, in a number of instances, also discussed the records I was concerned about with [Service Alberta's lead investigator] on this matter. In our discussions I confirmed that a number of the records that had been provided to the FOIP office, and which were subsequently numbered, were not responsive to the FOIP request as they were not records (either generally or as specifically listed in (a) to (k) of the FOIP request), which "may or may not have resulted in charges being laid against any or all of the Applicants."

I determined that in relation to the Edmonton records, records that pertained only to general corporate matters (such as corporate searches, documents dealing with amalgamations and cemetery expansions, blank cemetery purchase agreements, corporate accounting reports, and general licensing issues) were non-responsive as these would not pertain to the investigations, or could not have resulted in any charges laid against any or all of the Applicants. For example there were records relating to the purchase of cemetery lands, details regarding the amendment of funeral regulations, day to day business correspondence like a family arranging for disinterment, etc. The records also contained personal information of employees that were unrelated to the charges at hand (e.g. relating to previous employment). These were also deemed to be non-responsive to this request. If this type of information was part of a record that was responsive, the non-responsive portion was redacted.

My determination of responsiveness was also informed by communication with the Applicants. On September 12, 2006, the Applicants had the opportunity to review and to select the documents the Applicants wanted from the additional Edmonton records that had been located (which formed the basis of the "Edmonton Second Release). As noted above, I had already numbered these records. The applicants did not review all of these records on that date.

If a record was reviewed and the Applicants indicated that they did not want it, the Public Body considered it to be nonresponsive and did not include these records in its index provided to the Applicants for the Edmonton Second Release. I am advised by the Public Body's solicitor… and do verily believe that these records, therefore, are not at issue in this inquiry.

However, if the record was not one that the [Applicants] reviewed, but was one that the Public Body determined was nonresponsive, the Public Body did include the record in its Edmonton Second Release index and labeled it as "nonresponsive" in that index. A copy of that correspondence dated September 22, 2006 from the Public Body to the Applicants outlining this process is attached as Exhibit "A" to this my Affidavit.

After I had numbered the records in relation to the Edmonton Second Release, I found that the review to determine whether a record was responsive to the Applicants' FOIP Request should have taken place before the records were numbered and nonresponsive records should not have been numbered and identified in the response to the Applicants.

The Calgary records in the custody of the FOIP Office were provided later after legal proceedings had ended and were received late January 2007. These records were reviewed for responsiveness and the majority of non-responsive records were removed. The Calgary records were then numbered and I began the FOIP processing of those records.

The Applicants did not review the Calgary Records. As a result, in the indexes for the Calgary Release, in cases where the Public Body had determined that the record was nonresponsive, it was labeled as "nonresponsive" in the index.

For the Calgary records, I determined that information such as investigator's diary notes about other investigations unrelated to the Applicants, and unsolicited correspondence from third parties unrelated to the decision to lay charges or not lay charges, were nonresponsive. If this type of information was part of a record that was responsive, the nonresponsive portion was

> redacted. Occasionally, these records made up part of a record series (eg. an investigator's diary which had references to the relevant investigation as well as other investigations) so these records were not culled from the records on a first review of the records, but were only identified when I was processing the records on a page by page basis.
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> Subsequent to the Edmonton First Release, Edmonton Second Release and the Calgary Releases being provided to the Applicants, it was established through communication with the Applicants, that the Applicants also did not want copies of records which had been prepared or provided by the Applicants. Copies of correspondence dated July 28, 2006 and December 14, 2006, between the Public Body and the Applicants confirming this understanding are attached as Exhibits "B" and "C" to this my Affidavit. While these records had originally been identified as nonresponsive in the indexes of records provided to the Applicants, on reconsideration where these records originated from the Applicants, these records were still deemed to be nonresponsive but, in a duty to assist, we released these records in their entirety to the Applicants. I am advised by the Public Body's solicitor… and do verily believe that these records, therefore, are not at issue in the inquiry.

[para 17] As the criteria the Public Body had used to determine the responsiveness of records was unclear to me when I reviewed its submissions, I asked the Public Body the following questions regarding its evidence:

> 1. What led the Public Body to consider records to be nonresponsive to (i) of the Applicants' access request? Specifically, and with reference to the records,
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> a) did the FOIP Advisor consider records that did not record, or relate directly to, the activities of the Applicants that were under investigation, but which were considered or reviewed, or may have been considered or reviewed, in the course of the investigation, responsive or nonresponsive?
> b) did she consider records to be responsive or unresponsive if the information they contain related in some way to the investigation but was not information such as would have resulted in charges being laid?
> c) if the FOIP Advisor regarded information described above as responsive, what kind of information in the records that had initially been selected did she consider to be nonresponsive?
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> 2. I ask that the Public Body provide specific evidence from the FOIP Advisor, if possible, that describes how she reached the conclusion that records were nonresponsive in each case. Specifically, were her decisions based on:
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> - her own assessment, based on the contents of the records, as to whether they would have been considered or reviewed for the purposes of the charging decision?
> - information given to her by the lead investigator that he/she would not have reviewed or considered certain types of records for the purposes of the decision?
> - information given to her by the lead investigator that the records were not reviewed by any of the investigators involved in the case for the purposes of the decision?

[para 18] The Public Body responded to my questions and stated:

> In short, it is the role of the FOIP Advisor to review a record to determine its responsiveness to the FOIP request. In this case, as the FOIP office's request for records was written very broadly (essentially requesting any records referencing the Applicants or written by [the lead investigator] during a certain time period) it resulted in many records being sent to the FOIP office that were clearly outside of the scope of the Applicant's request as the records did not relate to any of the investigations of the Applicants nor did they relate to the decision to lay or not lay charges.

[para 19] The Public Body cited the Applicants' access request and argued that it should be interpreted in the following way:

> The Public Body submits that due to the words "and specifically" in the opening paragraph of the FOIP request, sub clauses (a) through (k) of the FOIP request must be interpreted within the context and scope outlined in the opening paragraph. These sub clauses are not separate, stand-alone requests for records. As a result, the specific types of records referenced in sub clauses (a) – (k) must be ones that are related to the Applicants and which were relevant to the consideration of charges.
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> From the questions posed by the Adjudicator in the correspondence of January 30, 2012, it appears that the Adjudicator may be suggesting that sub clause (i) of the Applicants' FOIP Request can be read as a stand alone request that is defined only by a time period and thus captures all records considered before, during or after the date of the investigation of the Applicants, regardless of whether the records relate to the investigation or to a decision to lay or not lay charges.
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> While the Public Body acknowledges that is a potential interpretation of sub clause (i), the Public Body submits that this interpretation is unreasonable based on (a) the Applicants' advice to the Public Body respecting the records and (b) the Applicants' own submissions in these inquiries.
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> The Applicants' counsel met with the Public Body on 3 separate occasions prior to the release of any records, and through the review of records, advised that they did not want many of the records that had been captured by the "pull" of records. As noted previously, this "pull" was broadly worded and would have captured all records, up to the date of the FOIP Request, which referenced the Applicants.
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> The fact that the Applicants did not want all of the records made during that time period, but rather limited their interest to records related to the investigations and the decisions to lay or not lay charges, is clear evidence of the appropriate interpretation of the FOIP Request. The FOIP Request was not based on locating records during a specific time period, or capturing all records about the Applicants that may have been considered by the Public Body during that time period. Rather the requests for information contained in the sub clauses were to be considered in the broader context of the opening paragraph and thus needed to be related to the investigation and the "decision to lay or not lay charges."

[para 20] The Public Body summarizes the circumstances of the search it conducted in the following way:

> In short, there was a request to produce records sent by the FOIP Coordinator to the program areas that was worded very broadly, thereby capturing every record in the Public Body's custody or control which referenced any of the Applicants or was produced by the lead investigator, regardless of whether the record related in any way to the investigations about the Applicants or was produced by the lead investigator, regardless of whether the record related in any way to the investigation about the Applicants or the decision to lay or not lay charges.
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> The broad "pull of records", while effective at obtaining *all potentially responsive records*, was left disorganized by the original FOIP Coordinator. An inexperienced FOIP Advisor made a number of processing errors, such as numbering all of these records prior to reviewing them for responsiveness. [my emphasis]

The Public Body characterizes the original search as retrieving *potentially responsive* records, rather than retrieving responsive records only.

[para 21] In their rebuttal submissions, the Applicants state:

> The Applicants do not suggest that the Public body was obliged to consider all records in its possession to be responsive, rather, the Applicants' request was quite clearly directed at all records that were relevant to the deliberative process that ultimately resulted in the decision to either lay or not lay charges against the Applicants. If the Public Body had concerns about the nature of the Applicants' request, the Public Body could readily have contacted the Applicants' counsel for clarification in this regard.

[para 22] With regard to information located in the investigators' files, the Applicants state in their final rebuttal submissions:

> With respect to information in the investigation file, the Applicants feel compelled to comment on the evidence of [the access and privacy advisors of the Public Body] that records contained within the investigation file were not necessarily responsive to the Applicants' request.
>
> With respect, unless the investigators were in the habit of maintaining files full of irrelevant information, one would think that records contained in the investigation file would be responsive to the Applicants' request for records relating to the Applicants that may or may not have resulted in charges being laid. Although the Public Body submits that it treated the Applicants' request broadly, in the circumstances, the Public Body should have erred on the side of including all information contained in the investigation files, unless it was clearly subject to some other exemption in the legislation.

The Edmonton Records

[para 23] The access and privacy advisor who made decisions in 2007 regarding the responsiveness of records the Public Body refers to as the "Edmonton records" states:

> Although I was not involved in the records search, the file indicates that the Edmonton Releases contained the records pulled from both the Alberta Funeral Services Regulatory Board and from throughout Government Services which were identified by using a keyword search in Versatile, a records management program. This search identified all files containing the Applicants' names from everywhere in the Public Body (i.e. Deputy Minister's Office, Legislative Services, Consumer Services North and South, etc.), and these records were subsequently pulled for the FOIP Request.
>
> Attached as Exhibit "B" to this my Affidavit is an email chain dated January 11, 2007 which confirms the entire investigation file was not processed as part of the FOIP request until the prosecutions were concluded. The email states that the investigator identified the records / information pertaining to the investigator files and would be providing them to the FOIP office shortly. As a result, I believed that the Edmonton Records did not contain any part of the investigative file. The Calgary Release therefore consisted of the material from the active Calgary Consumer Services investigation files.

[para 24] From its submissions and arguments, I understand that the records the Public Body refers to as "the Edmonton records" are records that it pulled on the basis of a keyword search of records throughout all areas of the Public Body. The Public Body recognized that this search method could have the effect of producing records not actually responsive to the Applicants' request, as records retrieved using this method need only refer to the Applicants,' rather than relate to the investigation concerning them.

For this reason, the Public Body apparently showed records 1716, 1724, 1794, 1806, 1813, 2544 – 2548 to the Applicants, who indicated that they did not want these records. However, with the remaining Edmonton records in issue, the access and privacy coordinators made decisions, based on reviewing the records, as to where the records had likely originated, and whether, on that basis, the records could have resulted in charges being laid.

[para 25] The Public Body notes that it met with the Applicants' counsel on three separate occasions to discuss the responsiveness of the Edmonton records. However, with the exception of records 1716, 1724, 1794, 1806, 1813, 2544 – 2548, the records in issue were not reviewed or discussed with the Applicants.

[para 26] The Public Body acknowledges the flaws of the search method with which the Edmonton records were identified and retrieved. Rather than conduct a targeted search for records in areas likely to be involved in the investigation, the Public Body's original FOIP coordinator instead conducted a keyword search using the names of the Applicants and retrieved all electronic records containing references to them that were created in a given time frame. In contrast, the Applicants requested records relating to them, as opposed to records containing their names" and which resulted in charges either being laid or not laid, including "all documents collected or relied upon in respect of an investigation relating to the Applicants." The search conducted by the Public Body, which did not consider the circumstances in which records were created, or the reasons for creating or collecting records, is problematic for two reasons: it is arguably over inclusive, given that records not relating to the investigation would be pulled, and under inclusive, given that records on which employees might have relied in the investigation, that did not mention the Applicants specifically, could have been excluded from this search.

[para 27] The adequacy of the search conducted by the Public Body is not before me, and in any event, it corrected many of the defects in the original search process by conducting additional searches. What I must decide for this inquiry is whether the records the Public Body has withheld as nonresponsive are nonresponsive. Whether records are responsive to the Applicants' access request, as it is framed, is a question of fact: Were the records created or collected for use in the investigation regarding the Applicants or were they not?

[para 28] From its submissions and its answers to my questions, I infer that the Public Body is unable to answer the factual question as to whether the Edmonton records it has withheld as nonresponsive were created or collected for use in the investigation, given the passage of time and staffing changes that have occurred since the investigation took place. In view of this, its access and privacy coordinators have adopted a subjective, qualitative test to determine whether information is responsive, which was: were the contents of the records such as to appear to make them relevant to the issues that were the subject of the investigation, or may have resulted in charges being laid (or not laid) against the Applicants? In other words, the Public Body has interpreted the Applicants'

access request as one for records that its access and privacy coordinators consider may have been reviewed or may have been relevant to decisions made in relation to the prosecution.

[para 29] However, as noted above, the Applicants did not limit their request in that way: they requested any information that was *actually* created or collected for use in the investigation, and did not limit the request to only that information that *appeared, from its content*, to have been reviewed or relied on.

[para 30] As set out above, the Public Body acknowledges that the search for the records was conducted by an inexperienced FOIP coordinator and that the problems with the search came to light several years later when the access and privacy advisors who provided evidence for the inquiry sought to complete the response to the Applicants. However, in my view, the problems created by the original search, in which records were retrieved without consideration of whether they were actually created or collected for use in the investigation, are not cured by interpreting the Applicants' access request as one for records that it would have been reasonable for an employee to use in making decisions to charge or not charge.

[para 31] In relation to the Edmonton records, the Public Body does not state categorically that these records were not used in the investigation or created or collected for that purpose, and I infer that this is because it is not in position to do so. Instead, while it acknowledges that the records are "potentially responsive", in its description of the search that located them, it argues that the records are not responsive on the basis that the records may have originated in program areas that did not take part in the investigation or because the records would not have resulted in charges being laid (or not being laid).

[para 32] I note that the access and privacy advisor made educated guesses based on the subject matter of records as to the likely origins of these records and whether the records had any role in the investigation and on that basis determined that the information in the records were not part of the investigations. A difficulty with this approach is that records may be created by one branch of a public body and be used by another branch. I am unable to discount the possibility that the Edmonton records may have been reviewed for the purposes of the investigation. This is because the original location of the records, and all the uses to which these records may have been put by employees of the Public Body, has not been established for this inquiry. The Public Body also indicates that a criterion for the search that retrieved these records is that records would be responsive if they were produced by the lead investigator. If that is so, then it is possible that the records were used in some way by the lead investigator for the investigation. As the Public Body notes, these records are potentially responsive. The evidence does not establish that they are not responsive. I am unable to conclude, on the evidence before me, that the Edmonton records were not reviewed, created or collected by an employee for the purposes of the investigation regarding the Applicants.

[para 33] As specific examples, records 880 – 959, 963, 965 – 70, 972 – 975, 977 – 979, 987 – 989, 991 – 993, 995 – 997, 1013, 1589 – 1628, 1632, 1637 – 39, 1641 – 1642, and 1643 – 1668 refer to an investigation and an appeal in relation to an employee of one of the Applicants whose license was cancelled. It remains possible that these records were referred to by an individual researching the history of the Applicants' involvement with the department. While I agree with the Public Body that these records would not be relevant to the issues under investigation in a narrow legal sense, that does not mean they were not reviewed by an employee on the chance that they would contain information germane to the investigation or to expand on an investigator's knowledge of the Applicants' businesses, and therefore related to the investigation in that way. Moreover, the scope of the Applicants' access request argues against a finding that they confined their access request to only those records that were relevant in a narrow legal sense to the decisions to charge the Applicants.

[para 34] Given the amount of time that has passed since the investigation was conducted and the decisions to charge were made, the Public Body is not in a position to ask employees whether they reviewed the Edmonton records as part of the investigation, or created or collected them for that purpose. The employees involved in the investigation may no longer be employed there, or alternatively, may simply be unable to recall which records they reviewed. However, the duty of the Public Body to include all responsive records in its custody or control in its response to the Applicants remains, and I find that it has not been established that this duty has been met. However, in relation to records 1716, 1724, 1794, 1806, 1813, and 2544 – 2548, as the Public Body states that the Applicants have reviewed these records and indicated they do not want them, I find that all duties under the FOIP Act in relation to those records have been met.

The Calgary Records

[para 35] The affidavit of the access and privacy advisor establishes that the records referred to in the Public Body's submissions as the "Calgary records", are those records contained "in the investigative files related to the Applicants' FOIP request." This statement in the affidavit regarding the origin of these records is supported by emails created by those who sent and received these records.

[para 36] The evidence of the Public Body establishes that the Calgary records originated from the files containing information regarding the Applicants gathered by the investigators who participated in the investigation. The access and privacy coordinators also determined the responsiveness of the contents of these files by determining the relevance of the information to decisions whether to lay charges or by determining whether the records made reference to the Applicants.

[para 37] As discussed above, the evidence of the Public Body is that the all the Calgary records originated from the investigators' files pertaining to the investigation of the Applicants. With the exception of the investigator's diary notes that document unrelated investigations, I find that the Calgary records are responsive to the access

request, as they are records that were collected for the purpose of the investigation, by virtue of their being placed in the investigators' files for use by the investigators.

[para 38] With regard to the investigators' diary notes documenting unrelated investigations, I find that those notes are nonresponsive to the access request. These notes appear next to notes documenting steps taken in relation to the Applicants because the investigator recorded his notes in temporal sequence. The presence of notes relating to other cases in the notebook is therefore only coincidental and served no purpose in the investigation.

Conclusion

[para 39] For the reasons above, with the exception of the investigators' diary notes that detail investigations of parties other than the Applicants, described above, or those records that the Applicants have confirmed to the Public Body that they do not want, I find that the information severed as "nonresponsive" remains potentially responsive. I will therefore order the Public Body to make a new response to the Applicants that includes the records it has withheld as nonresponsive. The Public Body is not precluded from applying any applicable exceptions to disclosure in its new response. In addition, this order does not preclude the Public Body from permitting the Applicants, should both parties consider this to be a satisfactory approach, to view the records to determine whether the Applicants want to receive copies of them or not, as it did on previous occasions.

Issue B: Did the Public Body properly exercise its discretion when it withheld information from the records under section 24(1)(a)?

[para 40] The Public Body applied provisions of section 24(1)(a) to withhold records 2780 – 2781. (Records 2883 – 2884 are duplicates of records 2780 – 2781.) These records consist of a memorandum written on March 5, 2003. In Order F2009-024, I found that the information in these records met the requirements of section 24(1)(a). However, I found that I was unable to review the Public Body's exercise of discretion to withhold these records, as it had not provided any reasons for its exercise of discretion. I therefore ordered it to provide reasons for its decision to withhold the information it had withheld under section 24(1)(a).

[para 41] Section 24 states, in part:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Counsel,*
>
> *(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 42] In Order 96-006, former Commissioner Clark established a test to determine whether information is advice, recommendations, analyses or policy options within the meaning of section 24(1)(a). He said:

> Accordingly, in determining whether section 23(1)(a) [now section 24(1)(a)] will be applicable to information, the advice, proposals, recommendations, analyses or policy options ("advice") must meet the following criteria.
>
> The advice 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.

The three part test adopted by Commissioner Clark in Order 96-006 is intended to assist parties to identify information meeting the requirements of section 24(1)(a). In that order, the former Commissioner found that the purpose of section 24(1)(a) is to protect governmental decision and policy making processes from interference.

[para 43] In *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23, the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion. The Court noted:

> The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.
>
> In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:
>
> > In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis in original]
>
> Decisions of the Assistant Commissioner regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness (see *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).

> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).
>
> In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.
>
> The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above.
>
> Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

[para 44] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

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

In addition, the fact that the Court remitted the issue of whether the Head of the Public Body had properly exercised discretion to withhold information indicates that a failure by the Commissioner to consider whether a head properly exercised discretion is a reviewable error.

[para 45] While this case was decided under Ontario's legislation, in my view, it has equal application to Alberta's legislation. Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

> *72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*

> *(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access…*

[para 46] In Order 96-017, Commissioner Clark reviewed the law regarding a Commissioner's authority to review the head of a public body's exercise of discretion and concluded that section 72(2)(b), (then section 68(2)(b)), was the source of that authority. He commented on appropriate applications of discretion and described the evidence necessary to establish that discretion has been applied appropriately.

> A discretionary decision must be exercised for a reason rationally connected to the purpose for which it's granted. The court in *Rubin* stated that "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act..."
>
> The court rejected the notion that if a record falls squarely within an exception to access, the applicant's right to disclosure becomes solely subject to the public body's discretion to disclose it. The court stated that such a conclusion fails to have regard to the objects and purposes of the legislation: (i) that government information should be available to the public, and (ii) that exceptions to the right of access should be limited and specific.
>
> In the court's view, the discretion given by the legislation to a public body is not unfettered, but must be exercised in a manner that conforms with the principles mentioned above. The court concluded that a public body exercises its discretion properly when its decision promotes the policy and objects of the legislation.
>
> The Information and Privacy Commissioners in both British Columbia and Ontario have also considered the issue of a public body's proper exercise of discretion, both in the context of the solicitor-client exception and otherwise. In British Columbia, the Commissioner has stated that the fundamental goal of the information and privacy legislation, which is to promote the accountability of public bodies to the public by creating a more open society, should be supported whenever possible, especially if the head is applying a discretionary exception (see Order No. 5-1994, [1994] B.C.I.P.C.D. No. 5)…
>
> …
>
> In Ontario Order 58, [1989] O.I.P.C. No. 22, the Commissioner stated that a head's exercise of discretion must be made in full appreciation of the facts of the case and upon proper application of the applicable principles of law. In Ontario Order P-344, [1992] O.I.P.C. No. 109, the Assistant Commissioner has further stated that a "blanket" approach to the application of an exception in all cases involving a particular type of record would represent an improper exercise of discretion.
>
> I have considered all the foregoing cases which discuss the limits on how a public body may exercise its discretion. In this case, I accept that a public body must consider the objects and purposes of the Act when exercising its discretion to refuse disclosure of information. It follows that a public body must provide evidence about what it considered.

[para 47] In that case, the former Commissioner found that the Public Body had not made any representations or provided any evidence in relation to its exercise of discretion. Further, he determined that the head must consider the purpose of the exception in the context of the public interest in disclosing information when exercising discretion. As the head of the Public Body had not provided any explanation for

withholding information, the Commissioner ordered the head to reconsider its exercise of discretion to withhold information under a discretionary exception.

[para 48] Similarly, in Order F2004-026, former Commissioner Work said:

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

In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in *Ontario (Public Safety and Security)*, although there is now increased emphasis as to whether interests in disclosing information have also been considered when exercising discretion.

[para 49] As discussed above, the purpose of section 24(1)(a) is to enable public bodies to make sound decisions by enabling them to seek advice in confidence, free from interference, harassment, and second-guessing before or after they make decisions regarding potential courses of action.

[para 50] Tab 11 of the Public Body's written submissions contains the following recommendation for the Public Body's delegated head. The recommendation states:

> The AFSRB [the Alberta Funeral Services Regulatory Board] advised that this memo is deliberations between 2 Board staff prior to submitting recommendations to the Board for consideration re finalizing the settlement agreement. [My emphasis]
>
> Recommend that Service Alberta maintain its position and withhold the record under section 24.

[para 51] The delegated head of the public body approved this recommendation by signing it. The recommendation to withhold information under section 24(1)(a) is based on the fact that the AFSRB stated that the information consists of deliberations.

[para 52] In *Ontario (Public Safety and Security)*, the Supreme Court of Canada established the following two-part process for applying discretionary exceptions to disclosure under the FOIP Act:

> As discussed above, the "head" making a decision under ss. 14 and 19 of the Act has a discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made. [My emphasis]

[para 53] The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

> In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly. [My emphasis]

[para 54] In the Public Body's initial submissions, counsel for the Public Body argued that disclosure of the records "would obviously reveal the exact form of sensitive information" the provision is intended to protect. However, counsel for the Public Body did not elaborate as to what was sensitive about the information. Moreover, as counsel for the Public Body did not make the decision to withhold information under section 24(1)(a) she was not necessarily in a position to explain the interests that were considered relevant and how they were factored in the decision to withhold the records. In any event, evidence explaining how discretion was exercised was absent from the Public Body's submissions. I therefore wrote the Public Body and referred it to the decision in *Ontario (Public Safety and Security) (supra).* I also asked it to provide an affidavit from the individual who had made the decision to withhold the information under section 24(1)(a) addressing the following questions:

> **1. What is the purpose of section 24(1)(a) of the FOIP Act?**
>
> **2. Was this purpose served by withholding the information from the records? How?**
>
> **3. Were other relevant interests, such as the public interest in disclosure, considered when the decision was made to withhold these records? If so, how were these interests outweighed?**
>
> **4. Did the Public Body consider disclosing some, of the information from these records? If not, why not?**

[para 55] In response to my questions, the delegated head of the Public Body provided an affidavit stating:

> With respect to records 2780 – 81 and 2883 - 84, and my consideration of an exception under s. 24(1)(a) of the FOIP Act, I am confident that I reviewed the records to determine whether the disclosure of them would disclose "advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council". My understanding of this section is that it is intended to permit advice and recommendations to be provided to decision-makers so that open and frank discussion can be had within the public body on possible courses of action. On reviewing the records at issue once again, while preparing this affidavit, I remain confident in my decision that the records can appropriately be characterized as falling within this exception of the FOIP Act as the documents contain advice and recommendations related to the potential settlement options being considered by the public body.

[para 56] In answer to my question as to the purpose of section 24(1)(a) of the FOIP Act the delegated head of the Public Body explained that he considers it to be to permit open and frank discussion within a public body. I agree that this is a purpose of section 24(1)(a) of the FOIP Act.

[para 57] The delegated head of the Public Body did not answer my question as to whether other relevant interests, such as the public interest in disclosure, were considered when making the decision to withhold information under section 24(1)(a) or (b) and so I am unable to say that the Public Body considered any other interests when making the decision to withhold the information under section 24(1)(a). From his affidavit, it appears that two considerations contributed to his decision: (1) that section 24(1)(a) applied to the information, and (2) the purpose of section 24(1)(a). I also infer that the delegated head of the Public Body formed the view that withholding information from the records would serve the purpose of section 24(1)(a). However, as set out in *Ontario (Public Safety and Security)* the head, when deciding how to exercise discretion, must also consider both public and private interests in disclosing information to an applicant, in addition to considering the purpose of a provision.

[para 58] In the present case, the public interest at stake is the public interest in disclosing information. In addition, private interests must also be considered and weighed when making the decision to disclose or withhold information. In this case, the private interest in disclosure is that set out in the Applicants' access request: they are seeking records to assist them to understand decisions made by the Public Body to charge or not charge them with offences.

[para 59] The delegated head of the Public Body does not state that he considered any interests in disclosing the information, or acknowledge that there might have been any. I am therefore not satisfied that the delegated head of the Public Body considered these in making the decision to withhold the information and I am therefore unable to confirm that discretion was appropriately exercised when he decided to withhold information under section 24(1)(a).

[para 60] In response to my questions as to how it had exercised its discretion, the Public Body argued:

> Although *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, does provide important guidance on the exercise of discretion, the Public Body would also invite the Adjudicator to consider the decision in Order F2011-012 of the Alberta Information and Privacy Commissioner.
>
> In this Order the Adjudicator considers the information in the record and acknowledges that it is the exact type of information intended to fall under s. 24(1)(a); it "consists of recommendations and alternatives presented to the [decision maker]". The Adjudicator recognizes that the Public Body should normally have more fully explained its decision not to disclose, but was "satisfied that the Public Body properly exercised its discretion, in this particular case, on my review [of] the information that it withheld… and on my consideration of the Public Body's statements regarding the intent and purpose of section 24.

[para 61] I do not interpret the approach of the Adjudicator in Order F2011-012 to be at odds with the decision of the Supreme Court of Canada in *Ontario (Public Safety and Security)*, or to diverge from it, given that the Adjudicator tested the manner in which discretion was exercised in that case.

[para 62] *Ontario (Public Safety and Security)* establishes that the Commissioner must test the exercise of discretion of the head of a public body when the head chooses to withhold information under a discretionary exception to disclosure. The Adjudicator in F2011-012 reviewed the records before him and found that it was evident from the records and the Public Body's other submissions that discretion had been exercised appropriately. Moreover, in paragraph 21 of that decision, the Adjudicator referred to the public interest in disclosing the information and found that it had been established in that case that this interest had been outweighed. Clearly, the Adjudicator had sufficient information before him to make this determination. That is not the case in this inquiry, as the Public Body did not answer all the questions I put to it regarding its exercise of discretion.

Conclusion

[para 63] I find that the Public Body has not demonstrated that it exercised it discretion appropriately when it withheld records 2780, 2781, 2883, and 2884 under section 24(1)(a). I will therefore order it to reconsider its decision to withhold these records. In doing so, it must consider the relevant interests weighing in favor of disclosure in addition to those weighing against it, and all relevant circumstances.

Issue C: Did the Public Body properly apply section 27(1)(a) (privileged information) to withhold information from the records?

[para 64] The Public Body withheld information from records under section 27(1)(a) on the basis that it is subject to solicitor-client privilege.

[para 65] Section 27(1)(a) of the FOIP Act is a discretionary exception to disclosure. It states, in part:

> *27(1) The head of a public body may refuse to disclose to an applicant*
> *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege…*

The Public Body withheld information from records 19, 26 – 27, 28 – 29, 30, 68 – 69, 70 – 71, 195 – 196, 344, 360, 707, 1048, 1115, 1117, 1118, 1121 – 1122, 1312, 1352 -1353, and 1359, and from duplicates of these records, on the basis that disclosing this information would reveal information subject to solicitor-client privilege.

[para 66] The test to establish whether communications are subject to solicitor-client privilege is set out by the *Supreme Court of Canada in Canada v. Solosky* [1980] 1 S.C.R. 821. Speaking for the Court, Dickson J. (as he then was) said:

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

[para 67] The requirements of section 27(1)(a) are met if the information in question would reveal information subject to a legal privilege. With respect to solicitor-client privilege, the requirements are met if the information in question would reveal information that is a communication between a solicitor and a client, entailing the seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 68] The first question to consider is whether the information withheld by the Public Body reveals a communication between a solicitor and a client. Having reviewed the records, I find that this aspect of the test is met in relation to the information withheld from the records. The records either consist of communications between employees of the Public Body and a lawyer, or are summaries of communications between employees of the Public Body and a lawyer, prepared by employees of the Public Body to inform other employees of the Public Body of the communications. I find that the relationship between the lawyers referred to in the records and the Public Body, was that of solicitor and client. I also find that in all cases, disclosure of the information in question would have the effect of revealing communications between a solicitor and a client.

[para 69] The second question to consider is whether the communication entails the seeking or giving of legal advice. I find that this aspect of the test is met in relation to each of the records. The context provided by the information in the records establishes that employees sought legal advice on behalf of the Public Body from lawyers on a variety of matters and the information in the records, in all cases, serves to identify the nature of the legal advice sought or received.

[para 70] In regard to the third question, I must consider whether the evidence establishes that the communications were intended to be kept in confidence.

[para 71] I note that employees communicated the legal questions that had been asked, or the advice received in response to the legal questions to other employees of the Public Body. It is clear from the records that the legal advice sought or received was communicated to other employees so that they could either wait for legal advice before acting, or so that they could act in accordance with legal advice that had been received. Practically speaking, a public body cannot act on legal advice if those responsible for acting on it are not made aware of it. There is nothing in the records to suggest that the legal advice was communicated outside the Public Body to a third party or was communicated indiscriminately. Moreover, the nature of the communications themselves, lead me to find that they were likely to have been communicated with an expectation that confidentiality would be maintained, in the sense that it would not be communicated outside the Public Body. I therefore find that the third part of the *Solosky* test is met.

[para 72] I find that the information in the records to which the Public Body applied section 27(1)(a) reveals information subject to solicitor-client privilege. I therefore find that section 27(1)(a) applies to this information.

[para 73] The Applicants ask that I consider whether the "innocence at stake" exception to solicitor-client privilege applies in the event that I find the information is subject to solicitor-client privilege.

[para 74] In *R. v. McClure*, [2001] 1 SCR 445 the Supreme Court of Canada described the test for determining whether the innocence at stake provision applies:

> The innocence at stake test is applied in two stages in order to reflect the dual nature of the judge's inquiry. At the first stage, the accused seeking production of a solicitor-client communication must provide some evidentiary basis upon which to conclude that there exists a communication that could raise a reasonable doubt as to his guilt. At this stage, the judge has to decide whether she will review the evidence.
>
> If the trial judge is satisfied that such an evidentiary basis exists, then she should proceed to stage two. At that stage, the trial judge must examine the solicitor-client file to determine whether, in fact, there is a communication that is likely to raise a reasonable doubt as to the guilt of the accused. It is evident that the test in the first stage (could raise a reasonable doubt) is different than that of the second stage (likely to raise a reasonable doubt). If the second stage of the test is met, then the trial judge should order the production but only of that portion of the solicitor-client file that is necessary to raise the defence claimed.

[para 75] *McClure* establishes a procedure in which the "innocence at stake" exception is determined by the trial judge who is charged with determining the guilt or innocence of an accused. The process set out in *McClure* has no application to an inquiry under the FOIP Act. I am not deciding whether the Applicants are guilty or innocent of an offence, and there is no evidence before me that would enable me to determine the applicability of the exception. I am not in a position to determine whether the information in the records could raise a reasonable doubt, and I lack jurisdiction to do so in any event.

[para 76] If the Applicants are concerned that the information to which the Public Body applied section 27(1)(a) could raise a reasonable doubt in a criminal proceeding, then the process in *McClure* should be followed, by which I mean they should raise the issue with a trial judge charged with determining that issue.

Exercise of discretion

[para 77] In *Ontario (Public Safety and Security)*, (cited above), the Supreme Court of Canada considered to what extent it is necessary for the Commissioner to review the exercise of discretion when information has been withheld on the basis of solicitor-client privilege. The Court determined that there is less need to scrutinize the exercise of discretion when information has been withheld on the basis of solicitor-client privilege and said:

> We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before

> us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in *McClure*, stressed the categorical nature of the privilege:
>
> > . . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis added; para. 35.]
> >
> > (See also *Goodis*, at paras. 15-17, and *Blood Tribe*, at paras. 9-11.)
>
> Accordingly, we would uphold the Commissioner's decision on the s. 19 claim.

[para 78] Once a public body establishes that disclosing information would reveal information subject to solicitor-client privilege, withholding the information is usually justified for that reason alone. (See Orders F2007-014, F2010-007, F2010-036.) As the Court noted in *Ontario (Public Safety and Security)*, 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 79] As I am satisfied that the information withheld by the Public Body on the basis of solicitor-client privilege, and there is a public interest in maintaining solicitor-client privilege, it follows that I find that the Public Body properly exercised its discretion to withhold the information it withheld under section 27(1)(a).

V. ORDER

[para 80] I make this Order under section 72 of the Act.

[para 81] I order the Public Body to include the records it has withheld as nonresponsive in a new response to the Applicants, except for records 1716, 1724, 1794, 1806, 1813, 2544 – 2548 and the investigator's notes addressing unrelated investigations.

[para 82] I order the Public Body to reconsider its decision to withhold the information it withheld under section 24(1)(a).

[para 83] I confirm the decision of the Public Body to withhold the information it withheld under section 27(1)(a).

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

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Teresa Cunningham
Adjudicator