ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2014-38
DECISION F2014-D-02

October 6, 2014

ALBERTA HEALTH SERVICES

Case File Number F6585

Office URL: www.oipc.ab.ca

Summary: The Applicant requested information regarding her employment history from Alberta Health Services (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

The Public Body searched for responsive records and responded to the Applicant. The Public Body severed some information under sections 17 (disclosure harmful to personal privacy) and 27 (privileged information).

The Adjudicator determined that it was necessary for the Public Body to conduct a new search for responsive records. She ordered it to disclose the résumé of a contractor who had given evidence on its behalf at an arbitration hearing, with the exception of address information, but confirmed its decision to withhold personal information about an employee. She also determined that it was necessary for the Public Body to reconsider its decision to withhold information under section 27(1)(b). The disposition of these issues is contained in Order F2014-38.

With regard to section 27(1)(a), the Adjudicator decided that the Public Body should have opportunity to obtain evidence and precedents to support its application of section 27(1)(a) to the records. This decision forms Decision F2014-D-02.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 10, 17,18, 19, 21,24, 27, 71,72

Authorities Cited: AB: Orders 99-022, 2001-016, F2007-029, F2008-021, F2008-028, F2009-001, F2009-005, F2013-51; **ON:** P-1920

Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89; *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593; *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Solosky v. the Queen*, [1980] 1 SCR 821; *Blank v. Canada (Minister of Justice)* 2006 SCC 39; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860

I. BACKGROUND

[para 1] On May 9, 2012, Alberta Health Services (the Public Body) received an access request from the Applicant. She requested "all records including grievances, AHS and Human Resource employment records for duration of my employment. Also copies of harassment files."

[para 2] On May 10, 2012, the Public Body received a second request for records under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) which the Applicant indicated was in addition to her first request. She requested:

> I would like to have copies of the incident report that took place on the 12th floor of the Foothills Hospital where I was taken off the floor by the Emergency Response Team in 2007. I would also like a copy of the full report of the harassment claim that was submitted by [an employee] from employee and labour relation in 2010. I would also like a copy of my complete OHS file. I would like copies of all correspondence with my Ability advisor […] in 2011. I will also like copies of my file at the Chronic Pain Clinic, Director […]. I would also like to have copies of all information on all file during the 15 years of my employment at Human Resource. I would also like copies of my correspondence with [an employee] from Internal Audit and Risk Management which I submitted in 2008. I would also like a copy of the incident report that took place in 2007 by [an employee] from Human Resource. A copy of all grievances. I would also like a copy of my Human Rights file that was filed in 2003 and ended in 2010. Also, is it possible to know the names of who has access my file in the past 15 years?

[para 3] On September 7, 2012, the Public Body responded to the Applicant's access request. The Public Body provided her with records, but withheld some information from them under sections 17 (disclosure harmful to personal privacy), 18 (disclosure harmful to individual or public safety), 19 (confidential evaluations), 21 (disclosure harmful to intergovernmental relations), 24 (advice from officials), and 27 (privileged information) of the FOIP Act.

[para 4] The Applicant requested that the Commissioner review the Public Body's response to her access request. The Commissioner authorized mediation to resolve the dispute between the Applicant and the Public Body regarding the Public Body's response. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 5] Prior to the inquiry, the Public Body reconsidered some of its decisions to apply exceptions to disclosure. The Public Body decided that it would no longer rely on sections 18, 19, 21, or 24 of the FOIP Act to withhold information from the Applicant, but continued to rely on sections 17 and 27. In its submissions, it stated that it had reconsidered its decisions to withhold information under section 17 and was now applying this provision to only two documents.

II. RECORDS AT ISSUE

[para 6] The records at issue are those the Public Body has identified as responsive and to which it has applied exceptions to disclosure.

III. ISSUES

Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) (duty to assist) of the Act?

Issue B: Does section 17 of Act (disclosure harmful to personal privacy) require the Public Body to withhold the information from the Applicant that it severed under this provision?

Issue C: Did the Public Body properly apply sections 27(1) (a) and (b) (privileged information) of the Act apply to the information severed by the Public Body under these provisions?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) (duty to assist) of the Act?

[para 7] Section 10 of the FOIP Act states, in part:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 8] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records. In Order 2001-016, the Commissioner said:

> In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) [now 10(1)] of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) [now 10(1)].
>
> Previous orders ... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now 10(1)] of the Act. An adequate search has two

components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

[para 9] As discussed in the foregoing excerpt, a public body bears the burden of proving that it conducted a reasonable search for responsive records.

Did the Public Body complete a reasonable search for responsive records?

[para 10] The Public Body states:

> An adequate search has two components. The Public Body must:
>
> a) Make every reasonable effort to search for the actual record requested
>
> b) Inform the applicant in a timely fashion of what it has done. (Order 98-012)
>
> In general, evidence as to the adequacy of a search should cover the following points:
>
> a) The specific steps taken by the public body to identify and locate records responsive to the applicant's access request.
>
> b) The scope of the search conducted – for example, physical sites, program areas, specific databases, off-site storage areas etc.,
>
> c) The steps taken to identify and locate all possible repositories of records relevant to the access request; key word searches, records retention and disposition schedules.
>
> d) Who did the search?
>
> e) Why the public body believes no more responsive records exist than what has been found or produced (Order F2007-029).
>
> The standard directed by the Act is not perfection but what is reasonable. (Order 2000-020).
>
> The Access and Privacy Coordinator who dealt with this request is now retired and no longer at AHS. However, the contents of the Applicant's file indicates that given the parameters of the access request the Access and Privacy Coordinator contacted the principal areas involved with the request: the Executive Director of Human Resources, Associate General Counsel for Employment and Labour at Legal Services and the Director of Protective Service (Calgary Zone) with regard to the query regarding the Emergency Response Team in 2007. Follow up requests were made regarding the Applicant's file at the Chronic Pain Clinic with the departmental manager.

[para 11] The Applicant points to records she requested that have not been produced. For example, she requested records about her from a file she believes was created regarding her human rights complaints from 2003 to 2010. However, the Public Body has not produced any records of this kind from 2010.

[para 12] The Applicant also questioned why there are no records relating to a harassment claim from 2010, notes and emails from a manager and a department head regarding a 5-day suspension in October 2011 or an incident report documenting an incident in 2007 from an employee of human resources. I agree that there do not appear

to be any records documenting a harassment claim from 2010, or notes and emails from a manager and a department head regarding a 5-day suspension in October 2011. In saying this, I do not mean that I find as a fact that such records exist, only that I am unable to tell from the records, or the Public Body's evidence, whether the Public Body searched for such records. I have no reason to doubt that the incidents described by the Applicant took place and the Public Body does not dispute that they did. It appears likely that such incidents would have been recorded, as were other incidents involving the Applicant's employment. However, the Public Body has not explained why these records have not been produced, or, in the alternative, explained why it believes they cannot be produced.

[para 13] While I agree with the Public Body's statements regarding the evidentiary burden on a public body, and the requirements of an adequate search, I am unable to find on the evidence supplied by the Public Body that the search it conducted for responsive records was adequate.

[para 14] The Public Body argues that the contents of the Applicant's file and the terms of her access request reveal that its former Access and Privacy Coordinator contacted the principal areas involved with the request: the Executive Director of Human Resources, Associate General Counsel for Employment and Labour at Legal Services and the Director of Protective Services (Calgary Zone) with regard to the query regarding the Emergency Response Team in 2007. The Public Body also states that requests were made regarding the Applicant's file at the Chronic Pain Clinic with the departmental manager. I do not disagree that one can draw the inference that the Executive Director of Human Resources, the Associate General Counsel for Employment and Labour at Legal Services and the Director of Protective Services assisted in the search, if it is assumed that the records produced could only come from the areas they manage and be obtained by consulting these employees; however, there is no evidence before me that the areas for which these employees may be responsible would be the *only* likely sources of responsive records, and there is no evidence as to *how* these individuals conducted the search for responsive records in these areas.

[para 15] Previous orders of this office (See Orders F2009-001, F2009-005) have held that the duty to respond openly, accurately, and completely includes explaining the steps taken to locate responsive records and to explain why a public body believes no further records exist. In *University of Alberta v. Alberta (Information and Privacy Commissioner),* 2010 ABQB 89 the Alberta Court of Queen's Bench confirmed the reasonableness of this interpretation of section 10, stating:

> The University argues that it provided a full, complete and accurate response, and that it was unreasonable to find that it failed in the information component of the duty to assist. In particular, the University says that the Adjudicator unreasonably required it to explain why it believes no further responsive records exist and failed to describe the steps it took to identify the location of responsive records.
>
> The University's submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, *Lethbridge Regional Police Commission*, F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to

> give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):
>
> > In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps taken to identify and locate all records and possible repositories of them, and *why the Public Body believes that no more responsive records exist than what has been found or produced.* [emphasis in original]
>
> Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University's rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords would not lead to responsive records, its reasons for concluding that no more responsive records existed.
>
> The University argues that the Adjudicator's reasoning is circular because she unreasonably expanded the search by ignoring the proper scope of the Request and the University's reasonable steps to ascertain the likely location of records, and then asks the University to explain why it did not search further. That argument is itself circular, presupposing that the University's search parameters were reasonable.
>
> In my view, the Adjudicator's conclusion that the University either expand its search or explain why such a search would not produce responsive records was reasonable in the circumstances and based on the evidence.

From the foregoing, I conclude that a public body has a duty to perform an adequate search for responsive records, and must also provide an explanation to an applicant as to why it believes no more records exist than what have been produced from the search. It is possible that the Public Body takes the position that because it is likely that the Executive Director of Human Resources, the Associate General Counsel for Employment and Labour at Legal Services and the Director of Protective Services was in some way involved in the search, that no records were omitted from the search, inadvertently or otherwise. However, on the evidence before me, which does not contain an explanation from these parties as to how the search was conducted, I am unable to draw this inference.

[para 16] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593, Nielsen J. confirmed the Commissioner's reasoning that the head of a public body bears the burden of establishing that an adequate search was conducted and that the head or the head's delegate must be in a position to establish the steps taken to search for records. He said:

> The Commissioner concluded that the EPS had not conducted a search as required by s. 10 of *FOIPP* and had failed to meet its duty to assist [the Applicant], as it did not search all of the records in its custody or under its control, and it had not provided satisfactory evidence as to the steps it took to locate records in relation to [the Applicant] among the records it did choose to search. Consequently, he directed the EPS to conduct such a search and to respond to [the Applicant] openly, accurately and completely.
>
> The EPS argues that in fact a search was conducted and, therefore, it has complied with its duties pursuant to s. 10 of *FOIPP*.

> As recognized by the Commissioner, it would be impractical to require the head of a public body to either conduct or supervise the searches mandated by *FOIPP*. This obligation can be delegated. However, the public body must be in a position to establish that reasonable efforts were taken to search records in order to be able to respond openly, accurately and completely to the request. It follows that the person to whom the obligation is delegated must be in a position to provide evidence sufficient to establish what was done.
>
> In this case, [the FOIP Coordinator] was tasked with organizing the search. Her letter of January 18, 2006 does not detail the steps taken to search for records. It simply asserts that she conducted searches with various individuals and categories of individuals and located the records itemized in the letter. There is no evidence from [the FOIP Coordinator] as to the steps which she took to supervise the search.

[para 17] In the foregoing case, the Court accepted that the head of a public body, or the head's delegate, must be in a position to explain the steps taken to conduct a search for records. In the present case, the Public Body's former FOIP Coordinator is no longer available to provide evidence regarding the extent of the search conducted. However, this does not obviate the Public Body's burden in this regard. It remains possible for the Public Body to obtain records documenting the search conducted (if such exist), to inquire of employees as to whether they participated in the search, or to conduct a new search, in order to satisfy the burden.

[para 18] In her submissions, the Applicant points to records she believes may have been created by specific individuals but that have not been included or addressed in the Public Body's response. The Public Body did not refer to these records in its submissions, or explain why it believes no more records than what it has already located can be produced.

[para 19] While it is possible that some of the records referred to by the Applicant in her submissions may not ever have existed, or may no longer exist, or are possibly present in the records but not identifiable as such, a determination of this kind cannot be made until the Public Body establishes the steps it took to locate responsive records and the areas it searched specifically, and provides its reasons for believing that the records the Applicant points to either have been produced or cannot be produced.

[para 20] The Applicant is dissatisfied with the search on the basis of her view that the Public Body has not produced all the records she is seeking. Her two requests are broad and encompass all employment records created during her employment with the Public Body. The records she complains have not been produced would be responsive within the terms of her access requests. The Applicant has also explained her reasons for believing that these records exist – such as having being told of an investigation and of various meetings that took place, as well as being involved in proceedings. While this does not necessarily mean that the records she seeks were actually created or maintained, it appears likely that the Public Body would create such records, given that it created records of a similar kind in relation to the arbitration hearing and various other incidents in the work place. I acknowledge that it is possible that the Public Body provided such records to the Applicant and these records were not entered into evidence; however, if this is the case, it would be necessary for the Public Body to establish this and to respond

to the Applicant's arguments. As it stands, there is no evidence before me that the records the Applicant seeks were the subject of a search, and it appears likely that there would be such records, given that the Applicant's evidence on this point is uncontradicted.

[para 21] As I am unable to find that the Public Body conducted an adequate search for responsive records, or explained to the Applicant the steps it took to locate responsive records and why it believes there are no more responsive records than what it has produced, I am also unable to find that it met its duty to assist the Applicant within the terms of section 10(1) of the FOIP Act. I must therefore ask the Public Body to conduct a new search that includes the records to which the Applicant refers in her submissions as not having been provided, if it has not already produced these records to her. In either case, it must provide information regarding the search for these records that answers the questions set out in Order F2007-029.

Issue B: Does section 17 of Act (disclosure harmful to personal privacy) require the Public Body to withhold the information from the Applicant that it severed under this provision?

[para 22] The Public Body severed the names of third parties from records 300001, 300002, 300159, and 300213. It states:

> AHS has claimed application of section 17 to the severed portion of the records outlined in the index of its letter dated December 5, 2013 to the Information and Privacy Commissioner. With regard to the disclosure of the names of the individuals and having considered all the relevant circumstances as required by section 17(5) AHS has determined that the disclosure of the names would not be an unreasonable invasion of personal privacy of the third parties, as those persons were acting in formal, representative capacities. AHS, therefore, no longer maintains the applicability of section 17 to those records.
>
> AHS, however, maintains the severing undertaken in the following records: 300001 – 300002, 300159 and 300213.
>
> Record 300001 – 300002 is the personal information of a third party and would fall under section 17(4)(g)(i). Similarly severing in record 300159 relates to the health condition of a third party and would also be presumed an unreasonable invasion of a third party's personal privacy. Record 300213 is an email regarding two separate individuals, the Applicant and a third party. The third party information is not responsive to the access request and also as personal information of a third party the presumption in section 17(4)(g)(i) also applies.

[para 23] Section 17 requires a public body to withhold the personal information of an identifiable individual when it would be an unreasonable invasion of the individual's personal privacy to disclose his or her personal information.

[para 24] Section 1(n) of the FOIP Act defines personal information. It states:

> *1 In this Act,*
>
> > *(n) "personal information" means recorded information about an identifiable individual, including*

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

[para 25] Information is personal information within the terms of the FOIP Act if it is recorded and is about an identifiable individual.

[para 26] The Public Body severed the résumé of a contractor from records 300001 and 300002, information about the condition of one of its employees from record 300159, and a paragraph about the complaint of another employee from record 300213. The first question to consider is whether the information severed under section 17 is personal information to which section 17 can be said to apply.

[para 27] Not all information about individuals is information to which section 17 applies. Previous orders of this office have held that information about individuals acting as representatives of public bodies is not personal information to which section 17 can apply. In Order F2013-51, the Director of Adjudication considered cases of this office in which the question of whether information relating to an individual's work duties was personal information was decided. She said:

> In Order F2009-026, the Adjudicator said:
>
> > If information is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. As noted above, the definition of "third party" under the Act excludes a public body. In Order 99-032, the former Commissioner noted:
> >
> > > The Act applies to public bodies. However, public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.
> >
> > In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which section 17 applies, as it is not the personal information of a

> third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of section 17 may apply to the information. I must therefore consider whether the information about employees in the records at issue is about them acting on behalf of the Public Body, or is information conveying something personal about the employees.

In that case, the Adjudicator found that information solely about an employee acting as a representative of a public body was information about the public body, and not information about the employee as an identifiable individual. In *Mount Royal University v. Carter*, 2011 ABQB 28, Wilson J. denied judicial review of Order F2009-026.

In Order F2011-014, the Adjudicator concluded that the name and signature of a Commissioner for Oaths acting in that capacity was not personal information, as it was not information about the Commissioner for Oaths acting in her personal capacity. She said:

> Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.
>
> However, individuals do not always act on their own behalf. Sometimes individuals may act on behalf of others, as an employee does when carrying out work duties for an employer. In other cases, an individual may hold a statutory office, and the actions of the individual may fulfill the functions of that statutory office. In such circumstances, information generated in performance of these roles may not necessarily be about the individual who performs them, but about the public body for whom the individual acts, or about the fulfillment of a statutory function.

I find that the names and other information about employees of the Public Body and the University of Calgary acting in the course of their duties, as representatives of their employers, cannot be withheld as personal information, unless the information is at the same time that of an individual acting in the individual's personal capacity.

[para 28] The Public Body argues in relation to records 300001 and 30002:

> Record 300001 – 300002 is clearly the personal information of a third party and would fall under section 17(4)(g)(i).

[para 29] Records 300001 and 300002 consist of the résumé of a contractor who gave evidence on behalf of the Public Body at a grievance hearing. It appears likely that this résumé was put before the arbitrator at the hearing in order to qualify the individual as an expert in the areas regarding which she was called to provide evidence, given the résumé's presence in the grievance file and the fact that portions of the arbitrator's award make reference to the qualifications of the contractor. (Record 500394 indicates that all employees and contractors giving evidence on behalf of the Public Body were expected to bring their résumés to the hearing so that they could be qualified to give evidence.) It appears that the résumé, although containing information about the contractor's qualifications, was about the contractor as a representative of the Public Body, in the sense that the résumé was intended to establish that the contractor had the necessary expertise to give evidence on behalf of the Public Body regarding disability management practices.

[para 30] With the exception of the information regarding the contractor's address, I am unable to say that the information severed from records 300001 and 300002 regarding

the contractor has a personal dimension such that it may be withheld under section 17. With regard to the information severed from record 300159 about the reasons an employee was on leave, I agree that this information is about the employee acting in her personal capacity.

[para 31] I turn now to the question of whether section 17 requires the Public Body to withhold the address of the contractor and the circumstances of the employee's leave. Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *[…]*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *[…]*
> >
> > *(g) the personal information consists of the third party's name when*
> >
> > > *(i) it appears with other personal information about the third party, or*
> > >
> > > *(ii) the disclosure of the name itself would reveal personal information about the third party […]*
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> > *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
> >
> > *(b) the disclosure is likely to promote public health and safety or the protection of the environment,*
> >
> > *(c) the personal information is relevant to a fair determination of the applicant's rights,*
> >
> > *(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provided by the applicant.

[para 32] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant (such as the Applicant in this case) under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 33] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 34] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

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

[para 35] Section 17(1) requires a public body to withhold information only once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and, having engaged in this process, the head concludes that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 36] The Public Body argues that the presumption set out in section 17(4)(1)(g) applies to the information it withheld. Section 17(4)(1)(g) applies when the personal information consists of the name of an identifiable individual in the context of other personal information about the individual. As the Public Body states, section 17(4)(g)(i) creates a presumption that it would be an unreasonable invasion of personal privacy to disclose personal information. However, even though section 17(4)(g)(i) gives rise to the presumption that it would be an unreasonable invasion of personal privacy to disclose personal information, its application does not mean that a public body is required by section 17(1) to withhold the information. Rather, as discussed above, a public body must then weigh relevant considerations weighing for or against disclosure to determine whether the presumption is rebutted.

[para 37] With regard to the information regarding the address of the contractor appearing on record 300001, I find that this information is subject to the presumption created by section 17(4)(g)(i). I also find that there are no factors weighing in favor of disclosure, with the result that the presumption against disclosure is not rebutted.

[para 38] With regard to record 300159, I note that the same information that has been severed from this record under section 17(1) was provided to the Applicant when record 500510 was disclosed. However, I do not disagree with the Public Body that the information it severed is personal information subject to the presumption created by section 17(4)(g) and that there are no factors present weighing in favor of disclosure. I will therefore confirm the Public Body's decision in relation to record 300159.

[para 39] With regard to record 300213, I agree with the Public Body that the information it severed from this record is not responsive to the Applicant's access request. This information is about the complaint of another individual, and it forms no part of the Applicant's file. I will therefore confirm the Public Body's decision not to provide this information in response to the Applicant's access request.

Conclusion

[para 40] As I find that the information in records 300001 and 300002 is information about a contractor acting in a representative capacity, and is therefore information to which section 17 cannot apply, I will order the disclosure of these records. I will confirm the decision of the Public Body to sever information from records 300159 and 300213.

Issue C: Did the Public Body properly apply sections 27(1)(a) and (b) (privileged information) of the Act apply to the information severed by the Public Body under these provisions?

[para 41] Section 27(1)(a) of the Act authorizes the head of a public body to withhold privileged information. Section 27(1)(b) authorizes the head of a public body to withhold certain kinds of information that have been prepared by or for a lawyer. These provisions state:

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

(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,

(b) information prepared by or for

(i) the Minister of Justice and Solicitor General,
(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or
(iii) an agent or lawyer of a public body,

in relation to a matter involving the provision of legal services, or

(c) information in correspondence between
(i) the Minister of Justice and Solicitor General,
(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or
(iii) an agent or lawyer of a public body,

and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer.

[para 42] The records provided by the Public Body for the inquiry indicate that the Public Body has withheld information from records under sections 27(1)(a) or 27(1)(b), and in some instances, under both sections 27(1)(a) and (b).

[para 43] Section 27(1)(a) permits a public body to withhold privileged information. Section 27(1)(b), which I will discuss in greater detail below, permits a public body to withhold information prepared by an agent or lawyer if the information was prepared by the lawyer for the purpose of providing legal services. Section 27(1)(a) is limited in its application to privileged information; section 27(1)(b) is not so limited. However, section 27(1)(b) is limited in its application to information prepared by a lawyer, while section 27(1)(a) may include the communications of a lawyer's client.

[para 44] The Public Body argues:

> AHS submits that the exceptions to disclosure set out in s. 27(1) were properly applied to information severed from the Responsive Records.
>
> Section 27(1) of FOIP provides, in relevant part, that the head of a public body may refuse to disclose to an applicant:
>
> > (a) information that is subject to any type of legal privilege, including solicitor client privilege or parliamentary privilege,

(b) information prepared by or for

(i) the Minister of Justice and Solicitor General, or

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

in relation to a matter involving the provision of legal services,

The Commissioner has previously held that for a document to be clothed with solicitor-client privilege as contemplated by section 27(1)(a) the document must meet the following criteria:

(a) it must be a communication between a solicitor and a client:
(b) which entails the giving or seeking of legal advice; and
(c) Is intended to be confidential by the parties.

Order F2003-017 – Fairview College (October 6, 2003) at para.12

Generally speaking, s. 27 has been accorded a broad and liberal interpretation, as noted by McMahon J., sitting as an External Adjudicator:

> As can be seen from the foregoing, the exemptions and exceptions are very wide and have the potential to sweep in a number of government documents. [O]ne need only look to s. 27(1) to see the crafted impediments. Subsection 27(1)(b) permits the public body to refuse disclosure of information prepared by or for an agent or a lawyer of the public body that merely *relates to* a matter involving the provision of legal services. The information need not involve the provision of actual legal services. Even more sweeping is subsection 27(1)(c). It permits non-disclosure of information in any correspondence between a lawyer of a public body ... (which would extend to the non-legal staff ...) on the one hand, and *anyone else*. The information need merely relate to a matter involving the provision of any kind of advice or any kind of service by the agent or lawyer. It would be difficult to draft a more general or exclusionary clause. [emphasis in original]

OIPC External Adjudicator Order #4 (October 3, 2992) at paras. 12 – 13)

Further, it is important to note that the Commissioner has held that if solicitor-client client privilege applies to a record, it applies to the entire record. Accordingly, the Commissioner has held that he does not have authority to order the severing of those portions of the Responsive Records subject to the s. 27 exceptions.

[…]

The Responsive Records withheld it is submitted are clearly caught under s. 27(1)(a) of FOIP because in substance the information is legal advice provided by legal counsel to AHS employees seeking legal advice, which is intended to be confidential and not shared outside AHS.

Further, the Commissioner has held that solicitor-client privilege also applies to information in written communications, including notes, between officials or employees of a public body, in which the officials or employees quote or discuss the legal advice given by the Public Body's solicitor.

Order 99-013: Alberta Environmental Protection (September 2, 1999) at paras. 61 - 66

However, in the alternate if the information does not fall under section 27(1)(a) then it is submitted section 27(1)(b)(iii) is applicable. Section 27(1)(b)(iii) is broader in scope than s.

> 27(1)(a). It applies to any law-related service performed by a person licensed to practice law. It is submitted that because portions of the records are information prepared by a lawyer of a public body in relation to a matter involving the provision of legal services, s. 27(1)(b)(iii) applies.
>
> Therefore, AHS submits that it properly determined that s. 27 applied to portions of the Responsive Records and that it properly withheld these portions of the Responsive Records. After making a determination regarding the application of s. 27, AHS properly exercised its discretion to refuse to disclose these portions of the Responsive Records to the Applicant. In so doing, AHS considered that release of these portions of the Responsive Records would likely reveal the content of the privileged legal advice, that this information was obtained for the confidential use of AHS alone, and that the information already released to the Applicant was likely sufficient to enable any review of the matter by the Applicant without the release of the privileged information.

[para 45] Although the Public Body's submissions suggest that section 27(1)(a) was applied to all the records it withheld under section 27, and that in the alternative it relies on section 27(1)(b), review of the notations on the records indicates that this may not be the case. The Public Body did not indicate that it was applying section 27(1)(a) to all the records it withheld under a provision of section 27(1), but rather, relied on section 27(1)(b) alone in many cases. In addition, there are records to which the Public Body only referred to section 27(1)(a), but not section 27(1)(b). For example, the Public Body severed information from records 500253 – 500259, 500261 – 500267, 500352 – 500354, 500355 – 500357, 500357a, 500358 – 500366, 500367 – 500371, 500372 – 500381, 500382 – 500389, 500390, 500395, 500405 – 500406, 500414, 500416 – 500420, 500439 – 500444, 500445 – 500447, 500466 – 500477, 500489, 500497 and 500523 under section 27(1)(a), without reference to section 27(1)(b).

[para 46] While in its submission the Public Body describes the information it severed under section 27(1)(a) as "legal advice provided by legal counsel to AHS employees seeking legal advice" I find that most of the records to which the Public Body applied provisions of section 27(1)(a) cannot be described in this way. For example, the information to which the Public Body has applied section 27(1)(a) falls into the following categories: notes created by legal counsel in preparation for a grievance hearing, information regarding a legal retainer, the first name of a lawyer, email instructions from legal counsel to an articling student, and emails sent by legal counsel to herself, to her assistant, and to other legal counsel. These records do not consist of legal advice that legal counsel provided or intended to provide to AHS employees, nor do they consist of discussions by AHS employees of advice legal counsel provided.

[para 47] That is not to say that the information may not be potentially privileged; however, under section 71(1) of the FOIP Act, a public body bears the burden of proving that information is subject to the privilege it claims. This burden cannot be met when a public body's reasons for applying a privilege do not obviously correspond to the information over which it has asserted the privilege.

[para 48] I will address the categories of records over which the Public Body is asserting solicitor-client privilege to illustrate my concerns.

Notes made by legal counsel in order to prepare for a hearing

[para 49] Records 500350, 500352, 500353, 500354, 500355, 500356, 500357, 500358, 500359, 500360, 500361, 500362, 500363, 500364, 500365, 500366, 500367, 500368, 500369, 500370, 500371, 500372, 500373, 500374, 500375, 500376, 500377, 500378, 500379, 500380, 500381, 500382, 500383, 500384, 500385, 500386, 500387, 500388, 500389, 500390, 500405, 500406, 500418, 500419, 500420, 500439, 500440, 500441, 500442, 500443, 500444, 500445, 500446, 500447, 500466, 500467, 500468, 500469, 500470, 500471, 500472, 500473, 500474, 500475, 500476, 500477, 500489, 500523, 500660, 500661, 500673, 500675, 500676, 500678, 500679, and 500686 are examples of records containing notes made by the Public Body's counsel over which it is asserting solicitor-client privilege.

[para 50] As the Public Body notes, for a document to be subject to solicitor-client privilege under section 27(1)(a) the document must meet the following criteria:

> (a) it must be a communication between a solicitor and a client:
> (b) which entails the giving or seeking of legal advice; and
> (c) is intended to be confidential by the parties.
>
> (See *Solosky v. the Queen*, [1980] 1 SCR 821.)

[para 51] Despite the Public Body's characterization of the records listed above as records containing legal advice provided by legal counsel to its employees, or alternatively, discussions of legal advice by its employees, I am unable to identify any advice provided to employees or discussed by them in these records. Rather, legal counsel appears to have prepared these records for her own use at a pending arbitration hearing in which she was representing the Public Body.

[para 52] Because these records do not, on their face, conform to the description provided by the Public Body of the records it is withholding on the basis of solicitor-client privilege, I cannot find them to be subject to the privilege based on the Public Body's submissions.

[para 53] Possibly the Public Body is relying on some aspect of solicitor-client privilege that it believes applies to these records (other than that they are advice provided to or discussed by the Public Body's employees), but if that is so, it has not explained this to me, or provided me with any legal precedents to support such a position.

[para 54] For example, the Public Body may be of the view that recorded strategies of counsel in relation to the matter about which advice has been sought, even though not actually provided to the person or persons who sought the advice or discussed by them, and which are not actually "communications" in the sense of being a direct exchange of information, nonetheless fall within the protection of the privilege.

[para 55] If that is the Public Body's position, it would be necessary for it to present persuasive authority that information that is not directly exchanged may be covered by the privilege. I have not found any such authority.

[para 56] The following discussion by the Federal Court of Appeal in *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104, in which the Court explains the circumstances in which information prepared by government lawyers can be said to be subject to solicitor-client privilege, explains what kinds of information can be said to fall within the continuum of legal advice. The Court said:

> All communications between a solicitor and a client directly related to the seeking, formulating or giving of legal advice are privileged, along with communications within the continuum in which the solicitor tenders advice. See *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 at paragraph 8.
>
> Part of the continuum protected by privilege includes "matters great and small at various stages…includ[ing] advice as to what should prudently and sensibly be done in the relevant legal context" and other matters "directly related to the performance by the solicitor of his professional duty as legal advisor to the client." See *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at page 1046 *per* Taylor L.J.; *Three Rivers District Council v. Governor and Company of the Bank of England*, [2004] UKHL 48 at paragraph 111.
>
> In determining where the protected continuum ends, one good question is whether a communication forms "part of that necessary exchange of information of which the object is the giving of legal advice": *Balabel*, *supra* at page 1048. If so, it is within the protected continuum. Put another way, does the disclosure of the communication have the potential to undercut the purpose behind the privilege – namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them?
>
> For example, where a Director of a government department receives legal advice on how certain proceedings should be conducted and the director so instructs those conducting proceedings, the instructions, essentially cribbed from the legal advice, form part of the continuum and are protected: *Minister of Community and Social Services v. Cropley* 2004 CanLII 11694 (ON SCDC), (2004), 70 O.R. (3d) 680 (Div. Ct.). Disclosing such a communication would undercut the ability of the director to freely and candidly seek legal advice.

[para 57] In the foregoing excerpt, the Federal Court of Appeal proposes the following test to determine whether a communication falls within the continuum of legal advice so as to be subject to solicitor-client privilege: Does the disclosure of the communication have the potential to undercut the purpose behind the privilege – namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them? I acknowledge that arguably the purpose of the privilege may be undercut if a legal counsel cannot candidly write down their thoughts as to how they are considering acting on behalf of a client, whether this is directly communicated to their client or not, without fear these records could potentially be disclosed. At the same time, the Court consistently speaks of communications as "exchanges of information", and as noted, the lawyer's notes in the present case do not appear to be a communication or exchange of information.

[para 58] Alternatively, the Public Body may believe that these records reveal information provided by the client to the legal counsel, but if that is so, the Public Body has not argued or provided any evidence to support this.

[para 59] There is, furthermore, a body of authority relating to litigation privilege, which would arguably support the idea that it is this latter privilege, rather than solicitor-client privilege, which applies to aspects of counsel's preparation for litigation (and which accordingly terminates when litigation ends (See *Blank v. Canada (Minister of Justice)* 2006 SCC 39). If that were indeed the case, and had there been evidence as to the continuing existence or contemplation of proceedings related to the arbitration, I might conceivably have found that the records were subject to litigation privilege as litigation privilege applies to records that were created for the dominant purpose of litigation. However, again, this was not argued by the Public Body in this case, neither has the Public Body or the Applicant referred to related proceedings in their submissions.

[para 60] Normally, when the burden of proof is not met in an inquiry, disclosure of the records in question is ordered. However, I cannot exclude the possibility that the records may consist of or reflect privileged communications and I am also unable to exclude the possibility that there could be proceedings related to the arbitration hearing in existence or within contemplation. Given that these privileges are of significant importance to the proper functioning of the justice system, I have decided to return the issue of the application of section 27(1)(a) to the Public Body with directions so that it may gather evidence and authority to support its decision.

[para 61] In making the decision to allow the Public Body to gather further evidence and authority, I note that the former Assistant Commissioner of the Ontario Office of the Information and Privacy Commissioner took a similar approach in Interim Order P-1920. In that order, he said:

> In Order P-1551, Adjudicator Holly Big Canoe discussed the scope of litigation privilege and its underlying principles. As a result of her analysis, she found that certain records for which the Branch 2 section 19 exemption had been claimed no longer qualified because litigation had terminated and any privilege attached to these records was lost as a result. Order P-1551 was issued during the course of the present appeal, and the parties did not have the benefit of Adjudicator Big Canoe's reasoning in responding to the Notice of Inquiry.
>
> Having reviewed the records, in my view, the issue of whether litigation privilege which may have been enjoyed by the Crown has been lost through the absence of reasonably contemplated litigation or the termination of litigation is relevant with respect to certain records at issue in this appeal. I have decided that the parties should be given the opportunity to provide representations on this issue before I make my determination on these records, and a Supplementary Notice of Inquiry will be sent to the parties coincidental with the issuance of this order.

[para 62] In that case, the Assistant Commissioner decided to issue a final order with respect to the issues he could dispose of, and to issue an interim decision in relation to the issues where he decided that the parties should have the opportunity to make further submissions. Given the importance of the issue of privilege, I have decided to

follow the same process with regard to the records to which the Public Body has applied section 27(1)(a), and I am unable to decide on the evidence before me whether the information is privileged or not.

Information relating to a legal retainer

[para 63] In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 the Supreme Court of Canada confirmed that solicitor-client privilege may apply to communications between a lawyer and a prospective client when the communications are made by the prospective client for the purpose of obtain legal advice.

> When dealing with the right to confidentiality it is necessary, in my view, to distinguish between the moment when the retainer is established and the moment when the solicitor-client relationship arises. The latter arises as soon as the potential client has his first dealings with the lawyer's office in order to obtain legal advice.
>
> The items of information that a lawyer requires from a person in order to decide if he will agree to advise or represent him are just as much communications made in order to obtain legal advice as any information communicated to him subsequently. It has long been recognized that even if the lawyer does not agree to advise the person seeking his services, communications made by the person to the lawyer or his staff for that purpose are nonetheless privileged (*Minter v. Priest*, [1930] A.C. 558; *Phipson on Evidence*, 12th ed., 1976, p. 244, No. 589; 8 Wigmore, *Evidence* (McNaughton rev. 1961), p. 587, para. 2304).

In the foregoing excerpt, the Supreme Court of Canada determined that communications made by a prospective client in order to obtain legal advice from a lawyer are subject to solicitor-client privilege.

[para 64] Records 500253 – 500267 contain a proposed retainer agreement sent by the Public Body to a lawyer and a version of the retainer agreement signed by both the lawyer and the client. These records contain communications made by the Public Body in order to obtain counsel.

[para 65] The Public Body has severed portions of records 500253 – 500267 and provided the remainder to the Applicant. In particular, it provided record 500253 to the Applicant with only the billing number severed. The portions of this record that were provided to the Applicant confirm the name of the lawyer, the lawyer's law firm, the date, the fact that the lawyer was retained and the substance of the matter for which counsel was retained.

[para 66] The Public Body also disclosed a portion of record 500254 that indicates that it, in conjunction with records 500255 – 500258, form a document entitled "Outside Counsel Billing Guidelines and General Retainer Agreement", but it also withheld parts of this document. As the title suggests, this document contains general billing guidelines and the terms of a general retainer agreement.

[para 67] In essence, the Public Body has disclosed to the Applicant the specific details of the retainer agreement it entered with the lawyer – i.e., the name of the lawyer it retained, and the matter for which she was retained. The information it has not

disclosed consists of a form that stipulates the general terms and guidelines under which the Public Body always retained outside counsel at the time it entered the agreement.

[para 68] If the agreement form were not signed and associated with a specific matter, for example, if the form were produced in response to an access request for the general terms under which the Public Body typically retains outside counsel, then the form would not be subject to solicitor-client privilege as it would not be a communication between a solicitor and a client. The form before me is signed by the lawyer and the client and therefore reflects a communication between a solicitor and a client; however, the only information that is unique to the retainer agreement between the lawyer and the Public Body appearing on records 500254 – 500258 that would be conveyed to the Applicant by disclosing them is the information that was already disclosed to her when record 500253 was provided to her. The same holds true for records 500259 – 500267. The agreement itself does not reveal anything about the advice the Public Body sought from the lawyer, only the terms under which it normally hires lawyers. In other words, if the retainer agreement were disclosed, only neutral information revealing nothing more about the services or advice the Public Body sought from the lawyer than was revealed to the Applicant through disclosure of record 500253, would be disclosed by doing so.

[para 69] As Public Body has disclosed to the Applicant the nature of the advice or services it sought and the name of the lawyer and her law firm, it appears that this information was either not intended to be kept in confidence, or that the Public Body has elected to waive the privilege as against the Applicant. As these communications constitute all the information that could be said to be privileged in records 500253 – 500267, given that they constitute the only information consistent with communications made for the purpose of seeking legal advice from a professional legal advisor in that capacity, I find that the information severed from records 500253 – 500267 is not subject to solicitor-client privilege.

Record 500658 (Email from legal counsel to an employee of the Public Body)

[para 70] Record 500658 contains two emails: one written by an employee of the Public Body to counsel for the Public Body to which she attached an email written by the Applicant, and one written by counsel for the Public Body to the employee of the Public Body. The Public Body disclosed the email written by the employee with the attached email written by the Applicant in its entirety. The Public Body severed information from the body of the email written by counsel for the Public Body under section 27(1)(a), but disclosed the subject line, date line and address lines of the email.

[para 71] I find that the information severed from record 500658 is subject to solicitor-client privilege, as it forms part of a communication between a solicitor and a client entailing the giving of legal advice; and was intended to be confidential by the parties.

Records 500395, 500397, 500600, 500601, 500602, 500605, 500606, 500608 (Records containing emails from which a lawyer's name and telephone number has been severed)

[para 72] Records 500395, 500397, 500600, 500601, 500602, 500605, 500606, 500608 are emails either sent to the external legal counsel referred to in records 500253 – 500267 or that refer to her. The Public Body did not sever the substance of the emails, but applied section 27(1)(a) to sever the name of the lawyer and her direct telephone line. The Public Body otherwise disclosed to the Applicant all information from the emails including information regarding the services the lawyer was asked to provide the Public Body, the law firm at which she worked, and any directions or suggestions she provided to the Public Body.

[para 73] Had the Public Body not disclosed the substantive portions of the emails appearing in records 500395, 500397, 500600, 500601, 500602, 500605, 500606, and 500608, I would have accepted that the name of the lawyer where it appears in the record could be privileged. However, absent the presence of information meeting the requirements of *Solosky* in records 500395, 500397, 500600, 500601, 500602, 500605, 500606, 500608, I am unable to find that the name of the lawyer or her telephone number is subject to solicitor-client privilege or would reveal information of this kind. Moreover, I note that the lawyer's name and a telephone number at which she could be reached were disclosed to the Applicant on record 500253. As records 500253, like records 500395, 500397, 500600, 500601, 500602, 500605, 500606, and 500608, disclosed the name of the law firm at which the lawyer worked, the name of the lawyer can be reconstituted from reviewing record 500253. Even if the lawyer's name were privileged, it would serve no purpose to withhold it now, given that the name can be restored to the record from reviewing information disclosed from other records.

[para 74] For these reasons I find that section 27(1)(a) does not apply to the information severed under this provision from records 500395, 500397, 500600, 500601, 500602, 500605, 500606, and 500608.

Records 500414, 500415, 500416, 500417, 500660 – 500661, 500673, 500675 – 500676, 500678, and 500679 (Emails sent or copied to an articling student and/or a legal assistant)

[para 75] Records 500414, 500415, 500416, 500417, 500660, 500661, 500673, 500675, 500676, 500678, and 500679 consist of emails sent or copied to an articling student and / or a legal assistant by legal counsel. Legal counsel addressed and sent some of these emails to herself with copies to the articling student and the legal assistant.

[para 76] The emails consist of instructions created for the purpose of preparing for an arbitration hearing, as well as lists of tasks that were to be done in preparation for a grievance hearing.

[para 77] For the same reason that I am unable to find that the solicitor's notes are privileged, I am unable to find that these emails are privileged. While I accept that on many occasions a lawyer may communicate with legal assistants, articling students, and others in order to provide legal advice to a client and that such communications are

subject to solicitor-client privilege, records 500414, 500415, 500416, 500417, 500660, 500661, 500673, 500675, 500676, 500678, and 500679 do not appear to consist of legal advice provided to, or discussed by, the Public Body's employees.

[para 78] As with the notes, possibly the Public Body is relying on an interpretation of solicitor-client privilege that does not depend on there being direct communications, or discussions of advice that has been given. It is also possible that some of the records withheld by reference to solicitor-client privilege may reveal communications made to the legal counsel by the Public Body as a client, which may possibly be supported by evidence. Similarly, it may be that litigation privilege applies, and there is evidence of related hearings, either ongoing or within contemplation, as described in *Blank, supra*.

[para 79] As discussed above, normally when the burden of proof is not met in an inquiry, disclosure of the records in question is ordered. However, I cannot exclude the possibility that the records may consist of or reflect privileged communications and I am also unable to exclude the possibility that there could be proceedings related to the arbitration hearing in existence or within contemplation. Given that these privileges are of significant importance to the proper functioning of the justice system, I have decided to return the issue of the application of section 27(1)(a) to the Public Body with directions so that it may gather further evidence or authority to support its application of this provision.

Records 500497, 500669, 500671, 500672, 500674 (Emails sent by legal counsel for the Public Body to other lawyers and emails sent by other lawyers to legal counsel for the Public Body)

[para 80] Record 500497 is an email sent by the Public Body's counsel to another lawyer for the Public Body. The email contains procedural instructions and a request that the lawyer take a particular action in relation to the grievance hearing. The lawyer's purpose in creating the email, as evidenced by the contents of the email, was to ensure that the necessary steps were taken to prepare for a hearing. These records do not conform to the description of the records withheld on the basis of solicitor-client privilege provided by the Public Body, and, again, the Public Body has not provided an alternative explanation for withholding them on this ground.

[para 81] From the contents of the emails severed from records 500669, 500671, 500672, and 500674, I infer that they are communications between counsel for the Public Body and lawyers external to the Public Body. The contents of the records indicate that she had sought advice from these lawyers regarding strategy in preparation for the grievance hearing. Again, these records do not conform to the description of the records withheld on the basis of solicitor-client privilege provided by the Public Body, and, again, the Public Body has not provided an alternative explanation for withholding them on this ground.

[para 82] Again, I acknowledge the possibility that to withhold these records the Public Body is relying on an interpretation of solicitor-client privilege that does not

depend on their being direct communications of advice to the client, nor discussions of advice that has been given. It is also possible that some of the records withheld by reference to solicitor-client privilege may reveal communications made to the legal counsel by the Public Body as a client, which may possibly be supported by evidence. Similarly, it may be that litigation privilege applies, and there is evidence of related hearings, either ongoing or within contemplation, as described in *Blank, supra*.

[para 83] As discussed above, normally when the burden of proof is not met in an inquiry, disclosure of the records in question is ordered. However, I cannot exclude the possibility that the records may consist of or reflect privileged communications and I am also unable to exclude the possibility that there could be proceedings related to the arbitration hearing in existence or within contemplation. Given that these privileges are of significant importance to the proper functioning of the justice system, I have decided to return the issue of the application of section 27(1)(a) to this information to the Public Body with directions so that it may gather further evidence and authority to support its application of this provision.

Section 27(1)(b)

[para 84] In Order F2008-021, I interpreted section 27(1)(b) in the following way:

> In the context of "information in relation to a matter involving the provision of legal services", I read "matter involving the provision of the legal services" such that the "matter" is constituted by, or consists of, the provision of legal services. The other potential interpretation of this part of the provision – that the phrase is met for any matter to which legal services have been provided at some time – is implausible. It would have the provision take into account a factor (that the matter happens to have involved the provision of legal services) that may be coincidental and have no relevance to the information that is being prepared and which requires the protection of the provision. I interpret the phrase "information prepared in relation to" as referring to information compiled or created for the purpose of providing the services, in contrast to merely touching or commenting upon the provision of the services. The use of the term "prepared" – which the *Canadian Oxford Dictionary* defines as "to make ready for use" - carries the suggestion that the information is necessary for the outcome that legal services be provided.
>
> It follows, then, that the person contemplated by the provision who is preparing the information, is doing so for the purpose of providing legal services, and therefore must be either the person providing the legal service or a person who is preparing the information on behalf of, or, at a minimum, for the use of, the provider of legal services.

For section 27(1)(b) to apply to information, the information in question must be prepared by the lawyer or someone acting under the direction of the lawyer for the purpose that a lawyer will use the information in order to provide legal services to a public body.

[para 85] In Order F2008-028, the Adjudicator held that the term "prepared" in section 27(1)(b) precludes information that is not substantive, such as dates, letterhead, and names and business contact information. He said at paragraphs 156 – 158 of that order:

I find that the substantive information on pages 305-311 was prepared for a lawyer of a public body in relation to a matter involving the provision of legal services, and therefore falls within section 27(1)(b)(iii). However, this is not because the information was sent to a solicitor, as the fact that information was destined to go to someone does not necessarily mean that it was prepared by or for that person. Under other sections of the Act, it has been concluded that, for a record or information to be created "by or for" a person, the record or information must be created "by or on behalf of" that person [Order 97-007 at para. 15, discussing what is now section 4(1)(q) of the Act; Order 2000-003 at para. 66, discussing what is now section 4(1)(j); Order 2008-008 at para. 41, discussing section 24(1)(a)]. Here, I find that the substantive content of pages 305-311 was prepared "for" the lawyer who received the information because the covering letter indicates that the sender of the information was specifically asked to provide input.

However, to fall under section 27(1)(b), there must be "information prepared" as those words are commonly understood (Order 99-027 at para. 110). I therefore do not extend the application of section 27(1)(b) to the dates, letterhead, and names and business contact information of the sender and recipient of the information on pages 305-311. These are not items of information that were "prepared". In keeping with principles articulated in respect of sections 22 and 24 of the Act, section 27(1)(b) does not extend to non-substantive information, such as dates and identifying information about senders and recipients, unless this reveals the substantive content elsewhere. However, in the context of section 27(1)(b) - which applies more broadly to information that was prepared rather that the substance of deliberations or advice under sections 22 and 24 - I find that the heading on page 309 reveals the information that was prepared in the rest of the document.

Pages 351-352, 353 (lower two thirds), 355 (upper half) and 373 consist of e-mail exchanges. I find that the content of these e-mails may not be withheld under section 27(1)(b). With the exception of the last five lines of page 352 and the top half of page 351, I do not consider the information to be "prepared". In my view, the word "prepared" implies that there must be a greater degree of substantive content, rather than simply a communication of an administrative nature (e.g., distributing documents, arranging meetings) or a communication referring to or briefly discussing information that has been prepared elsewhere. There is presumably substantive content in the attachments to some of the e-mails, but that content is not actually revealed in the e-mails. I also find that the last five lines of page 352 and the top half of page 351 do not fall under section 27(1)(b) because, although the information is substantive, it is not in relation to legal services. The content expressly refers to "policy" objectives.

[para 86] In Order F2008-028, the Adjudicator also considered what the term "agent" means in the context of section 27. He said:

Even if the sender or recipient of correspondence is not a lawyer, section 27(1)(c) permits the withholding of information sent to or from an "agent". In my view, the reference to "agent" is not intended to include *everyone* employed by or otherwise acting on behalf of the Minister of Justice and Attorney General or another public body. If that were the case, section 27(1)(c) would shield a great many records of a public body from disclosure under the Act, given that a great many records consist of correspondence from employees in relation to the advice or other services that they provide. The Legislature may have cast a wide net in section 27(1)(c), but it could not have intended to cast such a wide net. If it had so intended, it would have used the word "employee" – as done elsewhere in the Act – rather than the word "agent".

A basic rule of interpretation is that it is presumed that Parliament or a Legislature uses language carefully and consistently, and that within a statute, the same words are taken to have the same meaning and different words have different meanings [*Winko v. British Columbia (Forensic Psychiatric Institute),* [1999] 2 S.C.R 625 at para. 133, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at

> pp. 163 to 65]. Given this rule of interpretation, the fact that the word "agent" is used in section 27(1)(c) – as well as 27(1)(b) – shows that the Legislature intended for the term "agent" to mean something different than the broader term "employee". ("Employee" is already defined in section 1(e) of the Act to include a person who performs a service for the public body under a contract or agency relationship, so use of the term "employee" would not have excluded outside legal and non-legal agents).
>
> As cited above, External Adjudication Order No. 4 stated that section 27(1)(c) would extend to correspondence sent to or received by non-legal staff of Alberta Justice. However, that Order did not say *all* non-legal staff of Alberta Justice (or other public bodies). There may be times where a non-legal staff member has acted as the agent of the Minister of Justice and Attorney General or another public body, such as for the purpose of acts done under particular legislation, or in the course of a specific matter or proceeding. However, the fact that the individual was an "agent" should be demonstrated in each case.
>
> In this inquiry, the Public Body has not explained the roles of the individuals who sent or received correspondence, in order for me to ascertain whether and why they are "agents" of the Minister of Justice and Attorney General or another public body. I therefore find that some of the information at issue does not fall under section 27(1)(c)[...]

[para 87] Applying the reasoning in Orders 99-022, F2008-021, and F2008-028, information "prepared for an agent or lawyer of a public body" is substantive information prepared on behalf of an agent or lawyer so that the agent or lawyer may provide legal services. Information sent to an agent or lawyer of the public body in circumstances where the sender is seeking to obtain legal services, is not captured by section 27(1)(b), as the information is not prepared on behalf of the agent or lawyer. It also follows that section 27(1)(b) does not cover the situation where a person, even a person who is one of the persons listed in subclauses I – iii, creates information that is connected in some way with the provision of legal services but is not created for that purpose. For example, section 27(1)(b) does not apply to information that merely refers to or describes legal services without revealing their substance. The term "agent" does not refer to any employee of a public body, but to an individual who is acting as an agent of a public body under particular legislation or in the course of a specific matter or proceeding.

[para 88] The records the Public Body supplied for my review indicate that it severed portions of records 200152, 200157, 200158, 300197, 300199, 300200, 300201, 300203, 300204, 300205, 500001, 500002, 500003, 500004, 500250, 500251, and 500252, 500316, 500321, 500324, 500326, 500331 – 500332, 500334 – 500335, 500338 – 500339, 500340 – 500341, 500342 – 500343, 500344, 500350, 500352 – 500354, 500355 – 500390, 500406, 500414 – 500415, 500418 – 500419, 500420, 500439 – 500444, 500445 – 500447, 500466 – 500477, 500489, 500523, 500645 – 500646, 500660, 500661, 500663 – 500665, 500673, 500675 – 500676, 500678, 500679, and 500681 – 500682 under section 27(1)(b).

[para 89] Although the Public Body does not refer in its submissions to records 200152, 200157, 200158, 300197, 300199, 300200, 300201, 300203, 300204, 300205, 500001, 500002, 500003, 500004, 500250, 500251, and 500252 as having information severed from them, or include them in the table of records it provided in its initial submissions, each of these records indicates that information has been severed under section 27(1)(b). Moreover, the Public Body does not state, as it did with the information

it severed under section 17, that it has made a new decision and decided to disclose the information severed from these records. I will therefore include them in my analysis, despite the fact that the Public Body has not referred to them in its arguments.

[para 90] The Public Body applied section 27(1)(b) to the following categories of records:

- Notes prepared by the Public Body's counsel (records 300200, 300201, 300208), 300211, 500001 – 500002, 500003 – 500004 , 500250 – 500252, 500350 – 500378, 500379, 500380 – 500381, 500382 – 500389, 500390, 500405 – 500406, 500414 – 500415 (notes to self and articling student), 500418 – 500419, 500420, 500439 – 500544, 500455 – 500457, 500466 – 500477, 500489, 500525, 500660, 500661, 500673, 500675 – 500676, 500678 – 500679, and 500681 – 500682

- Letters and drafts of letters from the Public Body's counsel to witnesses (records 200152, 200157 – 200158, 500316, 500321, 500324, 500326, 500331 – 500332, 500334 – 500335, 500338 – 500339, 500340 – 500341, 500342 – 500343, and 500344

- Letter from counsel to an arbitrator regarding the grievance hearing (record 500645)

- Letters and draft letters from counsel to the Alberta Human Rights and Citizenship Commission (records 300197, 300199, 300203 – 300205)

- Draft letter from counsel to Telus Sourcing Solutions (record 300220)

- Letter from counsel to employees regarding human rights complaint (record 300222)

- A list of exhibits prepared by counsel to be submitted at a grievance hearing (records 500663 – 500665)

The information to which the Public Body has applied section 27(1)(b) was prepared by the Public Body's counsel either to prepare for a hearing, or as part of her role as the Public Body's representative at a hearing. Representing the Public Body at a hearing is a legal service that the Public Body's counsel provided to the Public Body. I therefore find that section 27(1)(b) applies to the information the Public Body severed under this provision.

[para 91] However, a finding that section 27(1)(b) applies to information is not the same thing as finding that a public body properly withheld information under this provision. Section 27(1)(b) is a discretionary provision, and it is therefore necessary for the Public Body to establish that it properly exercised its discretion when it withheld information from the Applicant under its authority.

Exercise of discretion

[para 92] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that are involved. The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

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

[para 93] While the foregoing case was decided in relation to the law enforcement provisions in Ontario's legislation, it is clear from paragraphs 45 and 46 of this decision that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in freedom of information legislation in particular. The provisions of section 27(1) of Alberta's FOIP Act are discretionary.

[para 94] Applying the principles in *Ontario (Public Safety and Security)*, a finding that section 27(1)(a) or (b) applies means that the fact that the information is privileged, or the fact that information was prepared by a lawyer in relation to a matter involving the provision of legal services *may* trump public and private interests in disclosing the information. After determining that section 27(1)(a) or (b) applies, the head of a public body must decide whether to disclose or withhold information that is the subject of a discretionary exception by considering all relevant factors weighing for or against disclosure.

Section 27(1)(a)

[para 95] I will first address the record to which I have found solicitor-client privilege applies or may apply. I will then address the records to which it is possible that litigation privilege applies.

Solicitor-client privilege

[para 96] I found above that the information the Public Body severed from record 500658 is subject to solicitor-client privilege.

[para 97] In *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23, the Supreme Court of Canada discussed the extent to which decisions to withhold information under solicitor-client privilege should be reviewed. The Court said:

> We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in *McClure*, stressed the categorical nature of the privilege:
>
> . . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.
>
> (See also Goodis, at paras. 15-17, and Blood Tribe, at paras. 9-11.)

[para 98] The Court held that the public interest in protecting solicitor-client privilege will almost always outweigh any competing interests in information that is subject to this privilege. As a result, exercising discretion to withhold information that is subject to solicitor-client privilege does not require balancing interests on a case-by-case basis.

[para 99] As I noted above, in several cases the Public Body severed information from communications made for the purpose of giving or seeking legal advice and disclosed information it did not consider to be contentious. That is the Public Body's right, and is in keeping with the spirit of the FOIP Act, although it was unnecessary that it do so.

[para 100] I found above that the information the Public Body severed from record 500658 was subject to solicitor-client privilege, and that section 27(1)(a) applied to the information for that reason. Given the importance of maintaining solicitor-client privilege, I consider that the public interest in withholding this information outweighs any competing interests in disclosing it. I therefore confirm the Public Body's decision to sever the information I have found to be subject to section 27(1)(a) from record 500658.

[para 101] As discussed above, with respect to the balance of the information to which the Public Body has applied solicitor-client privilege, I have decided to provide the Public Body with the an opportunity to consider whether any of the information is subject to solicitor-client privilege on the basis of a theory of the privilege that does not require the information at issue to either be legal advice directly communicated between solicitor and client, or to have been the subject of a discussion of advice that was sought or given. If the Public Body decides that there is such an explanation, it should be a decision based on sound factual determinations and reasoning and precedent supporting the theory. In addition, if it takes the position the records withheld on this basis reflect or reveal information provided by the Public Body's employees to its legal counsel, it may wish to obtain evidence to support this position.

Litigation Privilege

[para 102] I have not made a finding that any of the information withheld by the Public Body is subject to litigation privilege. Possibly litigation privilege applies to some of the information, but the Public Body has not argued this, nor is there any evidence before me regarding the existence or possible existence of related proceedings. However, as above, I am providing the Public Body with the opportunity to make a decision as to whether litigation privilege applies to any of the information, and whether there are related proceedings in existence or within contemplation.

[para 103] If the Public Body determines litigation privilege applies, then it must exercise discretion to either disclose or withhold the information. In this regard, I note that in *Blank* (*supra*), Fish J., speaking for the majority of the Supreme Court of Canada, noted that litigation privilege should not be applied to withhold information from an applicant unless the public interest is served by doing so. He said:

> I hasten to add that the *Access Act* is a statutory scheme aimed at promoting the disclosure of information in the government's possession. Nothing in the Act suggests that Parliament intended by its adoption to extend the lifespan of the litigation privilege when a member of the public seeks access to government documents.
>
> The language of s. 23 is, moreover, permissive. It provides that the Minister may invoke the privilege. This permissive language promotes disclosure by encouraging the Minister to refrain from invoking the privilege unless it is thought necessary to do so in the public interest. And it thus supports an interpretation that favours *more* government disclosure, not *less*. [emphasis in original]

[para 104] If the Public Body finds evidence and authority to establish that the information in the records is subject to litigation privilege, it must determine whether the public interest would be served by withholding the records from, or disclosing them to, the Applicant. If the Public Body's case in related litigation could reasonably be expected to be harmed by disclosure of the information in the records, then the public interest would be served by withholding the records from the Applicant. However, if disclosure would not be reasonably be expected to result in harm to the Public Body's case – such as would be the case where the records reveal only strategies adopted by the Public Body in the grievance hearing and which would be known to the Applicant by virtue of her participation in the hearing, then there may be no public interest served by withholding the information in which case discretion should be exercised in favor of disclosure.

Section 27(1)(b)

[para 105] I turn now to the question of whether the Public Body has demonstrated that it properly exercised its discretion when it withheld information from the Applicant under section 27(1)(b).

[para 106] The Public Body explains its decision to apply section 27(1)(b) and to withhold information under this provision in the following terms:

Generally speaking, s. 27 has been accorded a broad and liberal interpretation, as noted by McMahon J. sitting as an External Adjudicator.

> As can be seen from the foregoing, the exemptions and exceptions are very wide and have the potential to sweep in a number of government documents. [O]ne need only look to s. 27(1) to see the crafted impediments. Subsection 27(1)(b) permits the public body to refuse disclosure of information prepared by or for an agent or a lawyer of the public body that merely *relates to* a matter involving the provision of legal services. The information need not involve the provision of actual legal services. Even more sweeping is subsection 27(1)(c). It permits non-disclosure of information in any correspondence between a lawyer of a public body ... (which would extend to the non-legal staff ...) on the one hand, and *anyone else*. The information need merely relate to a matter involving the provision of any kind of advice or any kind of service by the agent or lawyer. It would be difficult to draft a more general or exclusionary clause. [emphasis in original]

[…]

Further, it is important to note that the Commissioner has held that if solicitor-client privilege applies to a record, it applies to the entire record. Accordingly, the Commissioner has held that he does not have authority to order the severing of those portions of the Responsive Records subject to the s. 27 exceptions.

[…]

The Responsive Records withheld it is submitted are clearly caught under s. 27(1)(a) of FOIP because in substance the information is legal advice provided by legal counsel to AHS employee seeking legal advice, which is intended to be confidential and not shared outside AHS.

[…]

However, in the alternate if the information does not fall under section 27(1)(a) then it is submitted section 27(1)(b)(iii) is applicable. Section 27(1)(b)(iii) is broader in scope than s. 27(1)(a). It applies to any law-related service performed by a person licensed to practice law. It is submitted that because portions of the records are information prepared by a lawyer of a public body in relation to a matter involving the provision of legal services, s. 27(1)(b)(iii) applies.

Therefore AHS submits that it properly determined that s. 27 applied to portions of the Responsive Record and that it properly withheld these portions of the Responsive Records. After making a determination regarding the application of s. 27, AHS properly exercised its discretion to refuse to disclose these portions of the Responsive Records to the Applicant. In so doing, AHS considered that release of these portions of the Responsive Records would likely reveal the content of the privileged legal advice, that this information was obtained for the confidential use of AHS alone, and that the information already released to the Applicant was likely to enable any review of the matter by the Applicant without the release of privileged information.

[para 107] The Public Body's explanation of the exercise of discretion is satisfactory in relation to record 500658, which I have found to contain information subject to solicitor-client privilege.

[para 108] However, as the Public Body notes, section 27(1)(b) requires only that information be prepared by a lawyer and relate to the provision of legal services. The information need not be privileged or confidential. A record may meet the requirements of section 27(1)(b) and not be confidential or be subject to solicitor-client privilege, or give rise to a quantifiable harm if disclosed. The Public Body's explanation that it exercised its discretion to withhold records under this provision because they contain legal advice is valid only to the extent this is so, which, as discussed above, has not been established (and if it were, there would be no need to exercise case-by-case discretion, as explained in paragraph 100 above).

[para 109] If the Public Body chooses not to rely on the idea the records withheld under section 27(1)(a) are subject to solicitor-client privilege, the Public Body's exercise of discretion to withhold information to which it applied section 27(1)(b) (in which it relied on the notion of protecting privileged legal advice) is inadequate. If it continues to rely on section 27(1)(b) to withhold records (without establishing that the information was privileged legal advice) it must consider all relevant factors in exercising its discretion, including that some of the information may have become more widely known, including to the Applicant, during the course of the hearing.

V. SUMMARY

[para 110] I have found that the Public Body has not established that it conducted an adequate search for responsive records. I will require it to conduct a new search that includes the records to which the Applicant refers in her submissions as not having been provided, if it has not already produced these records to her. The Public Body must provide information regarding the search it has conducted for these records that answers the questions set out in Order F2007-029 to which it refers in its submissions.

[para 111] I confirm the Public Body's decision to withhold the address information from record 300001. I also confirm its decision to sever information from record 300159 under section 17(1). However, I find the remaining information to which the Public Body applied section 17 on records 300001 – 300002 is not personal information to which section 17 can apply.

[para 112] With regard to section 27(1)(a), but for record 500568, the Public Body has not established that the information it withheld under this provision is privileged. However, it remains possible that information severed from records 500350, 500352, 500353, 500354, 500355, 500356, 500357, 500358, 500359, 500360, 500361, 500362, 500363, 500364, 500365, 500366, 500367, 500368, 500369, 500370, 500371, 500372, 500374, 500375, 500376, 500377, 500378, 500379, 500380, 500381, 500382, 500383, 500384, 500385, 500386, 500387, 500388, 500389, 500390, 500405, 500406, 500414, 500415, 500416, 500417, 500418, 500419, 500420, 500439, 500440, 500441, 500442, 500443, 500444, 500445, 500446, 500447, 500466, 500467, 500468, 500469, 500470, 500471, 500472, 500473, 500474, 500474, 500476, 500477, 500489, 500523, 500660, 500661, 500669, 500673, 500675, 500676, 500678, 500679, and 500686, is subject to solicitor-client privilege, I have made the decision to give the Public Body an opportunity

to gather evidence and precedents for its claim of solicitor-client privilege in relation to these records and to provide an explanation for its view that this privilege applies to the information it severed.

[para 113] If the Public Body is relying on litigation privilege, I also give the Public Body an opportunity to gather evidence as to whether related litigation exists or is within contemplation that would support its application of section 27(1)(a) to records 500350, 500352, 500353, 500354, 500355, 500356, 500357, 500358, 500359, 500360, 500361, 500362, 500363, 500364, 500365, 500366, 500367, 500368, 500369, 500370, 500371, 500372, 500374, 500375, 500376, 500377, 500378, 500379, 500380, 500381, 500382, 500384, 500385, 500386, 500387, 500388, 500389, 500390, 500405, 500406, 500414, 500415, 500416, 500417, 500418, 500419, 500420, 500439, 500440, 500441, 500442, 500443, 500444, 500445, 500446, 500447, 500466, 500467, 500468, 500469, 500470, 500471, 500472, 500473, 500474, 500475, 500476, 500477, 500489, 500523, 500660, 500661, 500669, 500671, 500672, 500673, 500675, 500676, 500678, 500679 and 500686. If the Public Body determines that there are related proceedings in existence or within contemplation, and relies on litigation privilege to withhold the information, it must demonstrate that it exercised its discretion appropriately, taking into account all relevant factors, as discussed above.

[para 114] With respect to information it severed under section 27(1)(b), should the Public Body choose to rely on this provision for withholding information it must, with the exception of record 500568, re-exercise its discretion, and exercise it appropriately taking into account all, and only, relevant factors, as discussed above.

[para 115] As stated above, I have decided give the Public Body the opportunity to gather evidence and precedents to support its application of section 27(1)(a).This decision is set out in Part VI "Decision F2014-D-02". The final disposition of those issues I am able to decide is set out in Part VII "Order F2014-38".

VI. DECISION F2014-D-02

[para 116] I have decided to provide the Public Body the opportunity to gather evidence and authority with respect to its application of section 27(1)(a) to records 500350, 500352, 500353, 500354, 500355, 500356, 500357, 500358, 500359, 500360, 500361, 500362, 500363, 500364, 500365, 500366, 500367, 500368, 500369, 500370, 500371, 500372, 500374, 500375, 500376, 500377, 500378, 500379, 500380, 500381, 500382, 500383, 500384, 500385, 500386, 500387, 500388, 500389, 500390, 500405, 500406, 500414, 500415, 500416, 500417,500418, 500419, 500420, 500439, 500440, 500441, 500442, 500443, 500444, 500445, 500446, 500447, 500466, 500467, 500468, 500469, 500470, 500471, 500472, 500473, 500474, 500475, 500476, 500477, 500489, 500523, 500660, 500661, 500669, 500671, 500672, 500673, 500674, 500675, 500676, 500678, 500679, and 500686. The Public Body will have until December 12, 2014 to gather evidence and authority to support its application of section 27(1)(a) to the foregoing records. If the Public Body determines that neither solicitor-client privilege nor litigation privilege applies to the information to which it has applied section 27(1)(a),

then it must disclose the information to the Applicant by that date. On or before December 12, 2014, Public Body will provide a new response to the Applicant and to this office explaining whether it is withholding information on the basis of solicitor-client privilege or litigation privilege, or has decided to disclose the information to the Applicant.

[para 117] Following December 12, 2014, the inquiry will resume to dispose of the issues in relation to the records set out in paragraph 112. The notice of inquiry appended to this decision contains the new dates for exchanging submissions.

VII. ORDER F2014-38

[para 118] I order the Public Body to conduct a new search that includes the records to which the Applicant refers in her submissions as not having been provided, if it has not already produced these records to her.

[para 119] I order the Public Body to provide the Applicant with information regarding the search conducted for these records that answers the questions set out in Order F2007-029.

[para 120] I order the Public Body to disclose the information it severed from records 300001 and 300002, with the exception of the address information appearing on record 300001.

[para 121] I confirm the decision of the Public Body to sever personal information from record 300159.

[para 122] I confirm the decision of the Public Body that information severed from record 300213 as non-responsive is non-responsive.

[para 123] I confirm the decision of the Public Body to withhold information from record 500658 under section 27(1)(a).

[para 124] I found above that records 500253 – 500267 and records 500395, 500397, 500600, 500601, 500602, 500605, 500606, and 500608 do not contain information subject to section 27(1)(a). As the Public Body did not apply any other exceptions to disclosure to these records, I order the Public Body to disclose the information the Public Body severed from these records.

[para 125] I order the Public Body to make the new decision in relation to section 27(1)(b) and to provide this decisions and any additional information that it decides to disclose to the Applicant. If the Applicant disagrees with the new decisions, she may request review by the Commissioner on an expedited basis.

[para 126] I further 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.

_____
Teresa Cunningham
Adjudicator