# ALBERTA

# OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

# ORDER F2015-22

August 31, 2015

## CITY OF CALGARY

Case File Number F6650

**Office URL:** www.oipc.ab.ca

**Summary:** The Applicant, UCANU, made a request to the City of Calgary (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for "all City of Calgary documentation (i.e. a legal opinion provided to the City, supporting evidence, etc.) which supports the stated legal notion that "Graham Construction and Engineering, a JV" is a body corporate and not a partnership or joint venture". The Applicant also requested "All City of Calgary documentation (i.e. a legal opinion provided to the City, corporate registry searches, copies of JV agreements; etc.), which supports the legal notion that "GRAHAM CONSTRUCTION AND ENGINEERING, A JV" =consists of= "Graham Construction and Engineering Inc.", "Graham Construction and Engineering LP", and "Jardeg Construction. Services Ltd."

The Public Body searched for responsive records in its legal department. It located some responsive records and withheld these records on the basis of solicitor-client privilege. The Public Body also withheld an email attachment, which had been provided to it by the Graham Group (the Third Party) under section 16 of the FOIP Act (disclosure harmful to business interests of a third party), in addition to provisions of section 27(1) of the FOIP Act (privileged information).

The Applicant requested review of the Public Body's response, on the basis that responsive records would not be confined to the legal department, and because it was not satisfied that the Public Body had properly withheld all the records it had located on the basis of section 27(1) of the FOIP Act.

The Adjudicator found that the Public Body had not conducted an adequate search for responsive records, as it had adopted an overly narrow interpretation of the Applicant's access request. She ordered the Public Body to contact the Applicant to clarify what kinds of records were being sought, and to conduct a new search for responsive records.

The Adjudicator determined that section 27(1)(c) did not apply to the emails from the Third Party as they did not relate to a matter involving the provision of legal services within the terms of that provision. The Adjudicator found that while most of the records the Public Body had withheld on the basis of solicitor-client privilege were subject to this privilege, an attachment to the email referred to above was not.

The Adjudicator ordered the Public Body to disclose the emails from the Third Party and the attachment appearing on records 16 – 22.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 10, 16, 27, 72; *Interpretation Act*, R.S.A. 2000, c. I-8, s. 12

**Authorities Cited: AB:** Orders 99-008, 99-018, F2005-011, F2005-030, F2008-019, F2008-028, F2009-007, F2009-015, F2011-016, F2012-06, F2013-37, F2013-47, F2013-51, F2015-12 **ON:** MO-2801

**Cases Cited:** *Imperial Oil Ltd. v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231; *University of Calgary v. JR*, 2015 ABCA 118; *Canada (Information Commissioner) v. Canada (Commissioner of the RCMP)* 2003 SCC 8; *Edmonton Police Service v. Alberta (Information and Privacy Commissioner*), 2012 ABQB 595; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112; *Guarantee Co. of North America v. Beasse*, [1991] A.J. No. 1199; *R. v. Gruenke* [1991] 3 S.C.R. 263; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815; *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319; *John Doe v. Ontario (Finance)*, [2014] 2 S.C.R. 3

## I. BACKGROUND

[para 1] The Applicant made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the City of Calgary (the Public Body). The Applicant requested:

> a. All City of Calgary documentation (i.e. a legal opinion provided to the City, supporting evidence, etc.), which supports the stated legal notion that "GRAHAM CONSTRUCTION AND ENGINEERING, A JV" is a =body corporate= and not a partnership or joint venture.
>
> and,

> b. All City of Calgary documentation (i.e. a legal opinion provided to the City, corporate registry searches, copies of JV agreements; etc.), which supports the legal notion that "GRAHAM CONSTRUCTION AND ENGINEERING, A JV" =consists of= "Graham Construction and Engineering Inc.", "Graham Construction and Engineering LP", and "Jardeg Construction. Services Ltd."

[para 2] The Public Body responded to the Applicant's access request. The Public Body stated:

> This is in response to your request for access to information of The City of Calgary in accordance with the *Freedom of Information and Protection of Privacy Act* (the Act). Unfortunately, access to all the information requested is refused as follows:
>
> Pages 00001 – 00005 Section 27(1)(c)
> Pages 00006 – 000012 Section 16(1)

[para 3] Subsequently, the Public Body wrote the Applicant to inform him that records 00006 – 000012 were now being withheld under section 27(1)(a) and (b) of the FOIP Act.

[para 4] The Applicant requested review by the Commissioner of the Public Body's response. He requested review of the decision of the Public Body to withhold information under sections 16 and 27(1)(c).

[para 5] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 6] In its initial submissions, the Public Body stated that it had reconsidered its original decisions, and had applied section 27(1)(a), (b), and (c) of the FOIP Act. However, in an affidavit accompanying the initial submissions, the Public Body's FOIP Officer stated that the Public Body applied sections 27(1)(a) and (b) to withhold records 1– 3, 6 – 12, and 13 – 22, and section 27(1)(c) to withhold records 4 and 5. The affiant also stated that section 16 of the FOIP Act was being applied to records 6 – 12 and 13 – 22.

[para 7] The Public Body's initial submissions also stated that it had located additional records, (records 13 – 22).

[para 8] The Public Body initially provided only records 4 and 5 for my review, as it has asserted solicitor-client privilege over the records. However, on my request, it provided records 2 – 22.

[para 9] The Graham Group (the Third Party) confirmed that it was representing three parties whose information appears in records 6 – 12 and 16 – 22. However, the Third Party did not make submissions for the inquiry.

## II. RECORDS AT ISSUE

[para 10] Records 1 – 22 are at issue.

## III. ISSUES

**Issue A: Did the Public Body conduct an adequate search for responsive records?**

**Issue B: Does section 16(1) of the FOIP Act (disclosure harmful to business interests) apply to the information in the records?**

**Issue C: Did the Public Body properly apply section 27(1)(a) to information in the records?**

**Issue D: Did the Public Body properly apply section 27(1)(b) to information in the records?**

**Issue E: Did the Public Body properly apply section 27(1)(c) to information in the records?**

## IV. DISCUSSION OF ISSUES

**Issue A: Did the Public Body conduct an adequate search for responsive records?**

[para 11] The Public Body argues:

> Previous decisions from the Alberta Privacy [Commissioner's] office have indicated that a Public Body's efforts to assist an applicant includes conducting an adequate search for records and keeping an applicant apprised of what has been done.
>
> The Public Body is comprised of a number of business units. Each business unit has records which relate to the function and mandate of that particular business unit. The Public Body's FOIP Officer's review an applicant's access request and identify which business units may have records that would be responsive to the request.
>
> The Business Unit that was requested to search for records was the Law Department. The Law Department includes the Legal Division, Corporate Security Division, and the Risk Management and Claims Division. The Legal Division provides legal services and legal advice to business units within the Public Body. Legal opinions prepared for the Public Body would be held within the Legal Division.
>
> The Legal Division of the Law Department conducted the search for records, through electronic and manual methods, the types of searches and key words used are more fully described in the Affidavit of [the FOIP Officer] at paragraphs 13-32 [Tab 1].
>
> The Public Body did not narrow the Applicant's request. The Applicant's request for all City of Calgary documentation is qualified by the statement "which supports the stated legal notion" and specifically states "... i.e. a legal opinion provided to the City, supporting evidence, etc ..." (see Applicant's initial submission- Appendix "A") it was reasonable for the Public Body to interpret this as a request for legal opinions and supporting documentation in the possession of

> the Public Body. The test under section 10 of the FOIP Act is whether the Public Body's interpretation of the Applicant's access to information request was reasonable not whether another possible interpretation of an access to information request is available. The Public Body submits that it acted reasonably in its interpretation of the Applicant's request and in its search for records.
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> In order to provide responsive records the Public Body conducts searches within the Public Body's business units who would reasonably have a connection with the records relating to an information request. The Law Department provides legal opinions to the Public Body. As the request was for "all documentation related to a legal notion", the Law Department's records were searched. The Law Department used keywords that were broad enough to ensure that responsive records would be located.
>
> Additional records were located by the Public Body. These additional records are either the same or similar to the Records that were initially withheld from the Applicant. The additional records were overlooked as they were thought to be copies of the initial set of Records. The Applicant has been advised of the additional records and the exceptions to disclosure that have been applied to these records.

[para 12] The affidavit of the FOIP Officer who responded to the Applicant's access request states:

> During the review with a Portfolio Officer from OIPC the Applicant expanded his access request and sought records which were outside the time period and scope of [its] original request.
>
> I believe the Applicant is seeking an inquiry regarding matters that are not within the scope of [its] original request.
>
> I reviewed the Applicant's access request in order to ascertain which Business Units within the Public Body might have responsive records.
>
> I determined that the Applicant requested legal opinions provided by lawyers employed by the Public Body which concerned the corporate structure of "Graham Construction Engineering, a JV".
>
> I determined that the only Business Unit which would provide legal opinions within the Public Body is the Law Department. I sent a FOIP Business Unit Record Request Form to the Law Department.
>
> The Law Department includes the Legal Division, Corporate Security Division, and the Risk Management and Claims Division. The Legal Division is the division of the Law Department that would have records relating to legal opinions provided by lawyers employed by the Public Body.

[para 13] The Applicant argues that the Public Body adopted an overly narrow interpretation of its access request and, as a consequence, conducted an inadequate search for records responsive to the request.

> Under subsections 2(a) and 6(1) of the *Act*, applicants have a right of access to any record in the custody or control of a public body, subject only to limited and specific exceptions set out in the *Act.* Section 71 provides that, in an inquiry, the burden is on the head of a public body (or other

parties seeking to prevent access) to prove that the applicant has no right of access to the record or part of the record.

This presumptive right of access must lie at the heart of any assessment of the application of exceptions under the *Act.* From this starting point, and for the reasons which follow, UCANU submits that each of the questions identified in the Notice of Inquiry must be answered in the negative, and the requested records must be disclosed.

*(i) Duty to Assist - Subsection 10(1)*

Subsection 10(1) of the *Act* imposes a general duty on public bodies to assist applicants: "the head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately, and completely." UCANU maintains that the City of Calgary failed to meet its obligations under subsection 10(1) in this case. In particular, UCANU maintains that by confining its search to the Law Business Unit, the City of Calgary failed to conduct an adequate search for responsive records by reading the request too narrowly and misconstruing its scope.

It is well-established that the duty to assist includes conducting an adequate search for records. A public body has the burden of proving that it conducted an adequate search, as it is in the best position to provide evidence of the adequacy of its search and to explain the steps that it has taken to assist an applicant within the meaning of subsection 10(1). As noted by the Commissioner in *Re Covenant Health* (Order F2013-18):

> Whether the duty to conduct a reasonable search for responsive records is met is, in some cases, dependent on the manner in which a public body interprets an applicant's access request. If a public body adopts an overly narrow interpretation of an access request, it may fail to search for records otherwise falling within the scope of the request.

For this reason, the Commissioner has recognized that public bodies must interpret access requests reasonably, and that a broad rather than narrow view should be taken when determining what is responsive to an access request. Indeed, in order to meet their statutory duty to assist, public bodies have an obligation to clarify ambiguously worded access requests or access requests that may be open to more than one interpretation:

> If a public body has adopted an overly restrictive interpretation of the access request without consulting the applicant, and other interpretations are possible and better reflect the kinds of records the applicant is seeking, then the public body may fail to meet its duty to assist the applicant, by failing to search for responsive records. If it is found that a public body has failed to conduct an adequate search for responsive records because of an overly narrow interpretation of an access request, the public body will be ordered to conduct an adequate search for responsive records that includes the kinds of records sought by the applicant.

In the present case, the City narrowly confined its search to its "Law Business Unit" because UCANU's original request for *"all* City of Calgary documentation" was followed by the parenthetical statements "(i.e. a legal opinion provided by the City, supporting evidence, etc.)" and "(i.e. a legal opinion provided by the City, corporate registry searches, copies of JV agreements, etc.)." Contrary to its obligations under subsection 10(1), the City used these parenthetical comments- which were clearly intended only as *examples* to *guide* the City in its search - to unduly *narrow* the scope of the request from including *"all* City of Calgary documentation" to include *only* legal memos and opinions. [emphasis in original]

> Rather than seeking to confirm or clarify the scope of UCANU's request, the City simply narrowed the request and confined its search to the Law Unit because "no other business unit within the City would be involved in providing legal opinions." By so doing, the City misconstrued UCANU's request and failed to search contracts or other records which may contain information relating to Graham's status as either joint venture or body corporate.

[para 14] The Applicant argues that the Public Body erred by failing to search areas other than its law department for responsive records. It states:

> The City's own Administration Policies make clear that records concerning contractors' corporate or joint venture status would in fact be located in departments and/or business units *other than* the Law Business Unit. In this regard, UCANU notes:
>
> • It is the Supply Management Division - not the Law Business Unit - that is the central purchasing authority for the City and governs all procurement activities across the corporation. To be clear, the Supply Management Division is *not* a part of the Law Business Unit. Rather, the Supply Management Division reports to the City Treasurer as part of the Finance & Supply Business Unit.
>
> • The City's Procurement Vendor Classification Policy (FA-037) requires the Supply Management Division to conduct appropriate due diligence and "maintain relevant background documentation in accordance with the Procurement Vendor Source List Management Policy" for all "pre-qualified vendors" - including Graham.
>
> • The Procurement Vendor Source List Management Policy (FA-038) charges the Supply Management Division with creating "source lists" of pre-qualified vendors. The Policy does not require that the Law Business Unit participate or be involved in preparing source lists of pre-qualified vendors like Graham, but it does require the Supply Management Division to maintain records regarding pre-qualified vendors.
>
> • The Procurement Contract Management Policy (FA-045) requires the Supply Management Division to maintain all records and relevant supporting documents for contracts greater than $100,000 for seven years after the contract's last transaction. Indeed, this policy provides that Supply will maintain processes to ensure that contract documents and related information are accessible to individuals with authority to access them in accordance with the *Freedom of Information and Protection of Privacy* Act.
>
> • The Procurement Supply Chain Governance Policy (FA-049) further confirms that it is the Supply Management Division that is responsible for the execution, monitoring, and control of the City's procurement expenditures.
>
> In addition, UCANU notes that City of Calgary Bylaw Number 32M98 requires contractors - presumably including Graham - to provide the Chief License Inspector with information including trade names, partnership or corporate details, and the names of persons having financial interests in the business. All of this information pertains to the business status or structure of the contractor, and thus comes within the scope of UCANU's request.

[para 15] The Applicant argues that the Public Body applied too restrictive an interpretation to its access request with the result that it confined its search to information located in its legal department. However, the access request was not limited to records of legal opinions or records located in the legal department. The Applicant argues that responsive records are likely to be located in the Supply Management Division and the Public Body has not yet searched in this location.

[para 16] The Applicant also provided the affidavit of its president, who states that he has obtained records from the public records of the Alberta Court of Queen's Bench regarding litigation involving the City of Calgary. He indicates that by doing so, he was able to obtain records that would be responsive to his access request, but which have not been produced.

[para 17] The Public Body counters that it properly interpreted the access request and that the only possible location for the types of records requested by the Applicant is its legal department. It relies on the fact that the Applicant qualified the request with the phrase "which supports the stated legal notion" and by the phrase "i.e. a legal opinion provided to the City, supporting evidence etc."

[para 18] I agree with the Applicant that records supporting a legal notion would not necessarily be located in a legal department. Terms such as "corporation", "joint venture", and "partnership" are legal notions, but are widely used. References to these legal notions or evidence supporting that an entity is a corporation, joint venture, or partnership would not necessarily be confined to the Public Body's legal department. As the Applicant notes, the Public Body's policies, which the Applicant submitted as evidence for the inquiry, indicate that records documenting the legal status of an entity are likely to be located in the Public Body's Supply Management Division.

[para 19] The Applicant's use of the phrase "i.e. a legal opinion provided to the City, supporting evidence etc." adds ambiguity to the access request. "I.e." stands for "*id est*", a Latin phrase meaning "that is". This phrase is intended to specify or limit what the statement it modifies means. This abbreviation is often confused with "e.g.", which stands for the Latin phrase "*exempli gratia"*, and is an abbreviation used to indicate that non-exhaustive examples of what was stated previously will follow. The reason I find that the use of the abbreviation "i.e." adds ambiguity to the access request is because the Applicant requested "*all documentation* supporting a legal notion [my emphasis]" and then, added "i.e. a legal opinion provided to the City, *supporting evidence, etc* [my emphasis]." The terms "legal opinion", "supporting evidence" and "etc." refer to different kinds of records. A legal opinion is a specific kind of record, while "supporting evidence" and "etc." are broad terms that could apply to many different kinds of records in different areas of the Public Body. The term "JV Agreement" to which the Applicant also refers, is a narrow idea, but one that is not contained in the notion of "legal opinion". However, the use of i.e. suggests that all four are intended to describe the kinds of records the Applicant means by "all documentation supporting the legal notion". The phrase "*all documentation supporting the legal notion*" is itself a much broader concept than "a legal opinion".

[para 20] While the use of the abbreviation "i.e." may lend ambiguity to the access request, the fact that the request for "all documentation" is broad and the terms "supporting evidence" and "etc." are also broad, combined with the fact that the terms "legal opinion" and "supporting evidence", and the terms "legal opinion" and "copies of JV agreements" are not synonymous, lead me to find that the phrases "i.e. a legal opinion

provided to the City, supporting evidence, etc," and "i.e. a legal opinion provided to the City, corporate registry searches, copies of JV agreements", etc." are better interpreted as providing non-exhaustive examples of responsive information as opposed to narrowing the access request to legal opinions.

[para 21] The affidavit evidence of the Applicant's president supports this conclusion. In his affidavit, he states:

> In phrasing my request, I deliberately asked for "all City of Calgary documentation," and provided the parenthetical statements "(i.e. a legal opinion provided by the City, supporting evidence, etc.)" and "(i.e. a legal opinion provided by the City, corporate registry searches, copies of JV agreements, etc.)" as examples to guide the City in its search for responsive records. It was my expectation at the time of my request, and remains my understanding today, that records responsive to my request would be held with the City of Calgary's Finance and Supply Management business units, among other locations.

[para 22] In Order F2004-026, former Commissioner Work noted that public bodies may have to clarify access requests in some circumstances in order to meet the duty to assist. He said:

> Finally, in its oral submission, the Applicant argued that the Public Body failed in its duty to assist by failing to clarify with the Applicant what it meant by "implementation" in the context of its original request. The Public Body suggested it did not do this because it assumed that it already understood the request. It explained that it thought it would not be reasonable for the Applicant to ask for the numbers of records that would be involved on the other understanding (that the request included all records in 2003 created by the Public Body relative to Bill 27 after the Bill's passage - which the Public Body described as "11 cubic feet of records"). While I have some sympathy with the Public Body's point, I have also been advised by the parties that the Applicant has since clarified this aspect of the request, which suggests that clarification was possible, and that there is indeed some further information relative to this aspect that is being sought. Thus I agree that the Public Body should have asked for clarification as to the part of the request that was ambiguous in its wording, rather than relying on its assumption, and that its failure to take this step was a failure to assist the Applicant.

[para 23] In Order F2011-016, the Adjudicator considered previous orders of this office commenting on the duties of public bodies to interpret access requests reasonably. He said:

> The Applicant submits that the Public Body was too restrictive in its interpretation of the information that he requested and therefore overlooked responsive records. Previous Orders of this Office have said that a record is responsive if it is reasonably related to an applicant's access request and that, in determining responsiveness, a public body is determining what records are relevant to the request (Order 97-020 at para. 33; Order F2010-001 at para. 26). The Applicant argues that applicants should be given some latitude under the Act when framing their access requests, as they often have no way of knowing what information is actually available. I note Orders of this Office saying that a broad rather than narrow view should be taken by a public body when determining what is responsive to an access request (Order F2004-024 at para. 12, citing Order F2002-011 at para. 18).

[para 24] In that order, the Adjudicator found that Alberta Health Services had taken too restrictive an approach in its interpretation of the kinds of information requested by the

applicant. As a result, the public body had failed to meet its duty to assist the applicant, because it had not searched for the records the applicant had requested. The Adjudicator said:

> Because the Public Body took an overly restrictive view of the information that the Applicant was seeking, in view of both the wording of his initial access request and the clarification subsequently provided by him, I find that the Public Body did not adequately search for responsive records and therefore did not meet its duty to assist the Applicant under section 10(1) of the Act. I intend to order it to conduct another search for responsive records, bearing in mind the scope of the information that the Applicant actually requested, as discussed above.

[para 25] As former Commissioner Work noted, a public body has a duty to clarify ambiguously worded access requests or access requests that are open to more than one interpretation. If more than one interpretation is possible, and different interpretations result in more or fewer records being located, then the Public Body has a duty to clarify what the Applicant meant. This duty exists because a public body is usually in a better position to know its own processes, what kinds of records it has, where it keeps them, and when it creates them, than is an applicant. Ambiguity can arise in an access request simply because an applicant is unaware of the language used by a public body, the kinds of decisions it makes, and the kinds of processes it has in place and how it documents them.

[para 26] If a public body has adopted an overly restrictive interpretation of the access request without consulting the applicant, and other interpretations are possible and better reflect the kinds of records the applicant is seeking, then the public body may fail to meet its duty to assist the applicant, by failing to search for responsive records. If it is found that a public body has failed to conduct an adequate search for responsive records because of an overly narrow interpretation of an access request, the public body will be ordered to conduct an adequate search for responsive records that includes the kinds of records sought by the applicant.

[para 27] In this case, the Public Body adopted an interpretation that did not give sufficient weight to those parts of the Applicant's request that indicated it was not restricting its access request – i.e. those parts of the access request referring to "all documentation supporting the legal notion", and "supporting evidence, etc.". Moreover, the Public Body did not contact the Applicant to confirm whether its interpretation of the access request was accurate, even though its interpretation would result in fewer records being responsive than would other plausible interpretations.

[para 28] Because the Public Body adopted a narrower interpretation of the access request than intended by the Applicant and did not take steps to clarify the access request or confirm that its interpretation was correct, it failed to search areas where records responsive to the access request may be located, for example, the Supply Management Division. As a result of the failure to clarify the access request, the Public Body is unable to establish that it conducted an adequate search for responsive records. I must therefore ask it to take steps to clarify the kinds of records the Applicant is seeking with the Applicant and to conduct a new search for responsive records.

**Issue B: Does section 16(1) of the FOIP Act (disclosure harmful to business interests) apply to the information in the records?**

[para 29] The Public Body applies section 16 to withhold records 6 – 12 and 16 – 22. These records contain an attachment emailed to the Public Body's lawyer by the Third Party.

[para 30] Section 16 of the FOIP Act requires the head of a public body to withhold specific kinds of information that could harm a third party's business interests if it is disclosed. Section 16 states, in part:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
> *(i) trade secrets of a third party, or*
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party,*
>
> *(b) that is supplied, explicitly or implicitly, in confidence, and*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
> *(iii) result in undue financial loss or gain to any person or organization, or*
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[para 31] The Public Body argues:

> The Public Body submits that the purpose of Section 16 of the Act is to protect business information of a proprietary nature that belongs to a third party.
>
> Section 16 of the Act sets out a mandatory exception to the principle that an individual has a right to access records in the custody or control of a Public Body. As Section 16 is a mandatory exception to disclosure its application to the Records must also be considered by the Commissioner.
>
> In the recent Alberta Court of Appeal case, *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner), 2014 ABCA 231* ("IOL") the Court noted that the purpose of Section 16 is to distinguish between public information that is in the hands of a Public Body and

information from private entities that comes into the possession of a Public Body and may be entitled to protection from disclosure. [Tab 2 para. 67]

In the subject case the Public Body has applied Section 16 of the Act to the Records where the Public Body found that the Records revealed commercial information of the Third Party. As noted by the Court of Appeal in IOL the test is whether disclosure of the Records would reveal the information that Section 16 is designed to protect. [Tab 2 para. 69]

The Court noted in IOL that confidentiality often depends on the intentions of the parties, and regard should be given to the circumstances in which a record has come into the possession of a public body from a private organization.

The circumstances surrounding the provision of the Records to the Public Body indicate they were provided in confidence to the Public Body. Records 6-12 and 16-22 were provided by the Third Party in relation to a request from a lawyer employed by the Public Body and involved a matter with the Third Party. The Records formed part of the legal review and analysis conducted by a lawyer for the Public Body. These Records form part of the lawyer's work product privilege as well the Records reveal confidential commercial information of the Third Party.

The Public Body submits that disclosure of the information could reasonably be expected to harm the competitive position of the Third Party.

The Applicant is currently involved in litigation with the Third Party and has filed a Statement of Claim against both the Third Party and the Public Body.

In the case of IOL the Court noted that The City of Calgary was interested in obtaining third party information (i.e. the remediation agreement) as The City was a significant landowner in the Lynnview Ridge subdivision and had issues about the remediation of the lands. The Court stated that disclosing the remediation agreement to The City could reasonably be expected to harm the competitive position or significantly interfere with the negotiating position of Imperial Oil vis-à-vis The City of Calgary. It is interesting to note that in the IOL case, The City of Calgary had not filed a statement of claim against either IOL or the other parties involved in the inquiry. The Public Body submits that in the subject case where the Applicant has commenced a lawsuit against the Third Party and the Third Party has objected to the release of the information on the basis of section 16 of the Act it can be reasonably expected that revealing the protected information will significantly harm either the competitive position or will interfere significantly with the negotiating position of the Third Party in the lawsuit. [Tab 2 para. 37 and 87]

[para 32] The Applicant argues:

Subsection 16(1) is a mandatory exception for business information provided by a third party. Information may be. excepted from disclosure under subsection 16(1) only if the information: 1) reveals trade secrets or commercial, financial, labour relations, scientific, or technical information of a third party (paragraph 16(1 )(a)); 2) was supplied in confidence (paragraph 16(1 )(b)); and 3) the disclosure of which could reasonably be expected to bring about one of the outcomes listed in paragraph 16(1 )(c).

First, there is no basis for the assertion that basic information about the corporate or other structure of entities contracting with public bodies is commercial information. The law is clear that records will not be regarded as commercial simply because they were created for the purpose of securing a commercial contract. In *Re Alberta Transportation,* the OIPC found that while specific business information concerning unit prices, liabilities and amounts payable, credit limits, and inflation rates fell within the subsection 16(1) exception, other information contained in the contract proposal documents did not. In particular, it is well-established that

general corporate information and references to previous contracts do not meet the test for commercial information.

With respect to the second element of the subsection 16(1) test, the Commissioner held in *Re Alberta Transportation* that information provided by a contractor in a proposal is not "supplied" by the affected party for purposes of paragraph 16(1 )(b). Moreover, there is no actual, direct evidence that such information was provided in confidence, or that the affected part had a reasonable expectation of confidentiality with respect to the information. In fact, courts have held that sophisticated organizations involved in major contracts with public bodies can be presumed to have full knowledge of the government's commitment to public access to information. Even where a tender process expressly includes confidentiality provisions or assurances, such clauses cannot override the right of access and specific provisions of the *Act*.

In *Canada Post*, the Federal Court held that parties seeking government contracts should not expect their submissions to be exempted from disclosure on the basis of confidentiality:

> One must keep in mind that these proposals are put together for the purpose of obtaining a government contract, with payment to come from public funds. While there may be much to be said for proposals or tenders being treated as confidential until a contract is granted, once the contract is either granted or withheld there would not, except in special cases, appear to be a need for keeping tenders secret. In other words, when a would-be contractor sets out to win a government contract he should not expect that the terms upon which he is prepared to contract, including the capacities his firm brings to the task, are to be kept fully insulated from the disclosure obligations of the Government of Canada as part of its accountability.
>
> The public policy rationale underlying the *Act* is that the disclosure of information provided to a government institution is the rule not the exception. The tendering process for government contracts is subject to the *Act.* A potential bidder for a government contract knows, or should know, when submitting documents as part of the bidding process that there is no general expectation that such documents will remain fully insulated from the government's obligation to disclose, as part of its accountability for the expenditure of public funds. In this context, the Applicant's claim that it held an "expectation" that its records would be held in confidence, based on the disputed letter, is unreasonable.

The approach adopted by the Commissioner concerning disclosure of contract documents and corporate financial and organizational details under Alberta's *Act* has been similar, reflecting a view that parties who provide business information to public bodies in the hope of securing contracts cannot be presumed to have supplied that information with a reasonable expectation of confidentiality.

In the present case, there is no doubt that corporate information must be provided by parties seeking contracts or pre-qualified vendor status with the City and that, like any other would-be contractor seeking to win a major contract with a public body, Graham had no reason to expect that information it provided, including information concerning its corporate structure or joint venture arrangements, would be insulated from disclosure obligations and the presumptive right of access under the *Act.*

With respect to the third element of the test, there is no basis on which to reasonably expect that disclosure of the requested information will bring about one of the outcomes listed in paragraph 16(1 )(c), such as significant harm to a third party's competitive position, undue financial loss, or disclosure of labour relations information. In Order 98-013, the Commissioner emphasized that harm to interests such as a third party's competitive position must be *significant,* and the onus rests with the public body to show evidence of: i) the connection between disclosure of the

> specific information and the harm which is alleged; ii) how the harm constitutes damage or detriment to the matter; and iii) that there is a reasonable expectation that the harm will occur. In this regard, courts have emphasized that descriptions of *possible* harm are insufficient, and that "bare arguments or submissions cannot establish a reasonable expectation of harm."
>
> Significantly, the Commissioner has previously ruled that evidence of ongoing litigation between an affected party and the applicant is not evidence of harm for the purposes of paragraph 16(1)(c). As the Supreme Court of Canada has held, "competitors, like everyone else in Canada, are entitled to the disclosure of government information" under access to information legislation. Moreover, a distinction can be drawn between revealing a contractor's bid while the tendering process is underway and disclosing the details of contracts that have already been signed, and that the latter circumstances are unlikely to meet the threshold of significant harm or undue financial loss or gain.

[para 33] In Order F2005-011, former Commissioner Work adopted the following approach to section 16 analysis:

> Order F2004-013 held that to qualify for the exception in section 16(1), a record must satisfy the following three-part test:
>
> Part 1: Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?
>
> Part 2: Was the information supplied, explicitly or implicitly, in confidence?
>
> Part 3: Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

[para 34] To meet the requirements of section 16, information must meet each of the requirements of section 16(1)(a), (b), and (c). These requirements are incorporated into the test set out by former Commissioner Work.

[para 35] I turn now to the question of whether the information provided to the Public Body by the Third Party meets the requirements of the three part test set out in Order F2005-011.

*Part 1: Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?*

[para 36] For section 16(1)(a) to be apply to information, the information must be a trade secret or commercial, financial, labour relations, scientific or technical information, and the information must be "of a third party". Past orders of this office have interpreted the phrase "of a third party" to refer to proprietary information, in the sense that the information could be said to *belong* to a third party (See orders 99-008, F2008-019, F2012-06, F2013-37, F2013-47, F2015-12).

[para 37] The information to which the Public Body has applied section 16 is an attachment sent to it by the Third Party. Neither the Public Body nor the Graham Group

has pointed to specific information in the attachment or explained why it believes this information conforms with the requirements of section 16(1)(a) or how it believes the information does so. I am unable to say who could be said to be the owner of the information in the attachment or whether any of the information can be said to be, or to reveal, a trade secret or the commercial, financial, labour relations, scientific or technical information of a party.

[para 38] The attachment could be said to have a commercial aspect to it as it reveals something about the terms third parties were prepared to accept in order to do business together.

[para 39] However, the terms referred to in the attachment were generated by the third parties through negotiations. As a result, it cannot be said that the information belongs to a third party in the sense of being proprietary information, given that it is the result of their mutual agreement. I am therefore unable to say that the information *belongs* to the third parties. However, as discussed above, a requirement of section 16(1)(a) is that the information be "of a third party". In my view, information generated through negotiation is not "of a third party", unless the information otherwise reveals some information that could be said to belong to one of the parties to the negotiation.

[para 40] I draw support for the position that negotiated information is not information "of a third party" from Order MO-2801, an order of the Office of the Information and Privacy Commissioner of Ontario. In that case, the Adjudicator stated:

> As stated above, the only representations about section 11(a) by Peel was that the records contain financial information that was negotiated between the affected party and Peel and that this information is confidential business information i.e. unit pricing information. Adjudicator Laurel Cropley in Order PO-2620, relying on Order PO-1736 discussed part 2 of the test under section 11(a) as follows:
>
> > Based upon my review of the records and representations, I conclude that the information contained in the records does not "belong to" the OLGC. I find that I have not been provided with sufficient evidence to demonstrate that the mutually-generated, agreed-upon terms which formed part of a negotiation process constitute the intellectual property of the OLGC or are a trade secret of the OLGC. Other than a statement that the information was created at the expense of the OLGC and the other contracting parties, I have not been provided with evidence to indicate how the OLGC expended money, skill or effort to develop the information. Therefore, I find that the information sought to be withheld does not "belong to" the OLGC within the meaning of section 18(1)(a) of the [*Freedom of Information and Protection of Privacy Act* (the provincial Act), the equivalent to section 11(a) of the Act]. Part 2 of the test under that section has not, therefore, been met.
>
> I agree with this reasoning and find that the negotiated unit pricing information of the affected party's product in pages 1002-1003, 1005-1017, 1019-1020, 1023-1025, 1027-1031, and 1033-1044 of the records does not "belong to" Peel. I find that I have not been provided with sufficient evidence to demonstrate that the mutually-generated, agreed-upon terms which formed part of a negotiation process constitutes the proprietary information of Peel. I have not been provided with evidence to indicate how Peel expended money, skill or effort to develop

> this information. Part 2 of the test under section 11(a) has not been met. As no other exemptions have been claimed for these pages, I will order this information disclosed.

[para 41] In the foregoing case, the parties argued that the contract revealed the financial information of a third party. The Adjudicator rejected this argument on the basis that the information was negotiated and could not be said to belong to the third party. In the case before me, no one has argued that the information in the records falls within section 16(1)(a) on any basis. There is simply no evidence before me that the mutually-generated, agreed-upon terms appearing in records 16 – 22 are the proprietary information of any of the parties referred to in the attachment. I am also unable to say that the information in the attachment belongs to the Third Party, as its information does not appear in the attachment. I am also unable to find that the information in the attachment reveals any information falling within the terms of section 16(1)(a) as the Public Body and the Third Party have not pointed out any such information to me.

*Part 2: Was the information supplied, explicitly or implicitly, in confidence?*

[para 42] In Order 99-018, former Commissioner Clark decided that the following factors should be considered in determining whether information has been supplied in confidence:

> In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:
>
> *(i)* Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
>
> *(ii)* Treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization.
>
> *(iii)* Not otherwise disclosed or available from sources to which the public has access.
>
> *(iv)* Prepared for a purpose which would not entail disclosure.

[para 43] In order to determine the question of whether the information in records 16 – 22 was supplied in confidence, I will review the factors set out by former Commissioner Clark in Order 99-018.

*Was the information severed from pages 16 – 22 communicated to the Public Body on the basis that it was confidential and that it was to be kept confidential?*

[para 44] Record 5 contains the email by which the Third Party transmitted the attachment to the Public Body. The email contains a caution advising unintended recipients that the email and any attachments are confidential and intended only for the party to whom the email is addressed. Record 5 does not contain any instructions or cautions to the Public Body as to

how the specific information in the email or its attachment is to be treated. The Third Party does not refer to any expectations of confidentiality or restrict the Public Body's use of the attachment in any manner.

[para 45] The email by which the records were sent to the Public Body does contain a confidentiality caution; however, the caution is addressed to individuals who receive the email in error, rather than the intended recipient. I am therefore unable to conclude from the caution that the parties referenced in the attachment or the Third Party supplied the attachment to the Public Body on terms of confidence, given that the caution is not directed at the Public Body, which was an *intended* recipient of the email.

*Was the information treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization?*

[para 46] There is no evidence before me regarding the manner in which the Graham Group or the three parties referenced in the attachment in records 6 – 12 and 16 – 22 treated the information in the attachment before it was provided to the Public Body. I am therefore unable to find that it was treated by the Third Party or the parties referred to in the attachment with a concern for its protection.

*Has the information been otherwise disclosed or is it available from sources to which the public has access?*

[para 47] There is no evidence before me in relation to this question. I am therefore unable to find that the information has not otherwise been disclosed or is unavailable from sources to which the public has access.

*Was the information prepared for a purpose which would not entail disclosure?*

[para 48] Based on the evidence of the parties and my review of the factors set out in Order 99-018, I am unable to find that the purpose of drafting the information in the attachment was one that did not entail disclosure.

[para 49] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner*), 2012 ABQB 595, Ross J. denied judicial review of Order F2008-027, in which the four factors set out above had been applied. Ross J. stated:

> The Adjudicator held that the evidence supported a subjective expectation of confidentiality on the part of the parties, while the law requires an objective determination in all of the circumstances that information was communicated on a confidential basis […]

> I am satisfied that the Adjudicator's Decision is intelligible and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." In the result, I hold that her conclusion that the information in question was not supplied in confidence is a reasonable decision based on the law and the evidence before her.

[para 50] The Court in the foregoing case determined that the test adopted in Order 99-018 is a reasonable measure in determining whether information has been supplied in confidence within the terms of the FOIP Act. However, the Court also stated that the law requires an "objective determination" in all of the circumstances that information was communicated on a confidential basis, and she considered the test followed by the Adjudicator to be appropriate for making such a determination.

[para 51] In *Imperial Oil v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231, the Alberta Court of Appeal referred to the test for determining whether information has been supplied in confidence as a subjective one. The Court stated:

> The Commissioner made the obvious point that no public body can "contract out" of the FOIPP Act. No party disputes that, but that is not the issue. The exception in s. 16(1)(b) is that the information was "supplied, explicitly or implicitly, in confidence". That is substantially a subjective test; if a party intends to supply information in confidence, then the second part of the test in s. 16(1) is met. It follows that while no one can "contract out" of the FOIPP Act, parties can effectively "contract in" to the part of the exception in s. 16(1)(b). It also follows that the perceptions of the parties on whether they intended to supply the information in confidence is of overriding importance. No one can know the intention of the parties better than the parties themselves. It is therefore questionable whether the Commissioner can essentially say: "You did not intend to implicitly provide this information in confidence, even if you thought you did".

[para 52] The Court of Appeal did not refer to Ross J.'s decision in *Edmonton Police Service*, when arriving at its conclusion that the threshold for meeting the requirements of section 16(1)(b) is a subjective belief that one is providing information in confidence. As the Commissioner did not refer to the test set out in Order 99-018 in Order F2005-030 (the order under review in the Imperial Oil case), it is unclear whether the Court of Appeal intended to overturn Ross J.'s decision in *Edmonton Police Service*. However, if the intent of the Court of Appeal was to overturn this decision, even applying the subjective standard referred to in *Imperial Oil*, I find that there is no evidence on which to make a finding that the Graham Group provided the records to the Public Body with a subjective belief that the records were being provided in confidence.

[para 53] As there is no evidence before me as to what the parties referred to in the attachment or the Third Party thought when the attachment in records 6 – 12 and16 – 22 was provided to the Public Body, and there are no

statements in records 4 or 5 directly referring to the attachment and the terms under which it was being provided, I am unable to say that the parties referred to in the attachment and the Third Party understood themselves to be supplying the information in the attachment on terms of confidence.

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

[para 54] Section 16(1)(c) describes the harms that must reasonably be expected to result from disclosure of information before section 16 can be said to apply. Section 16(1)(c) contains an exhaustive list of harmful outcomes; as a result, it is not open to me to find that section 16(1)(c) is met on the basis of harms that parties anticipate will result from disclosure, if those harms are not enumerated in section 16(1)(c). Section 16(1)(c) lists only four potential harms arising from disclosure. To qualify, disclosure of information meeting the requirements of section 16(1)(a) and (b) must be reasonably expected to result in one or more of the four following outcomes:

> 1. *harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
> 2. *result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
> 3. *result in undue financial loss or gain to any person or organization, or*
> 4. *reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[para 55] As cited above, the Public Body argues that disclosure of the attachment could be expected to harm the competitive interests of the Third Party on the basis that the Third Party is involved in litigation with the Applicant. The Applicant counters that harm to one's position in litigation is not one of the harms contemplated by section 16(1)(c) and cites previous orders to that effect.

[para 56] Orders F2009-007 and F2009-015 reject the argument that harm to a third part's position in litigation falls within section 16(1)(c). In Order F2009-015, the Director of Adjudication said:

> First, it says that its disclosure can reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the homeowners. It does not elaborate as to how this would happen, but says that it accepted the representations of the homeowners' legal counsel on this question, and it appends these representations. These representations suggest (at page 3 of counsel's letter of January 19, 2007) that as litigation was ongoing regarding the fire, disclosure of the Report, which had not been produced in those proceedings,
>
> > … could reasonably be expected to harm the competitive position of [the homeowners], and would interfere significantly with their bargaining position in the

> litigation. The report specifically considers the origin of the fire, which is in dispute, and which underlies [the homeowners'] bargaining position.

The same argument is reflected in the submission of the Affected Parties, in that it refers to harm to the bargaining position of the homeowners in litigation against the Applicant's client.

With respect to this argument, I note that in Order PO-2490, a decision of an Adjudicator of the Office of the Information and Privacy Commissioner of Ontario, the Adjudicator decided that "competitive position" in section 17 of the *Freedom of Information and Protection of Privacy Act* of Ontario, which is equivalent to section 16 of the FOIP Act, does not include a litigant's competitive position, as the provision is intended to protection confidential informational assets of businesses. He said:

> In my opinion, the reference to "competitive position" in section 17(1)(a) of the *Act* was not intended to include a litigant's competitive position in civil litigation. As noted above, previous orders of this office have found that section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions, and the Divisional Court endorsed this view in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* [2005] O.J. No. 2851 (Div. Ct.). In my view, this is aimed at protecting such assets in the competitive context of the marketplace, rather than before the courts.
>
> …
>
> The interpretation that "competitive position" does not include the position of the parties to civil litigation is further supported by the legislative history of section 17. The Williams Commission report entitled Public Government for Private People (Toronto: Queen's Printer, 1980) (the Williams Commission report) described the purpose of the third party information exemption found in section 17 of the Act and made the following comment:
>
> > ... It is accepted that a broad exemption for all information relating to businesses would be both unnecessary and undesirable ... . Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be preserved. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as is practicable, form part of the public record.
> >
> > ...
> >
> > The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information.
>
> It is clear from a review of the discussion in the Williams Commission report that the intent of the provision was to protect the information assets of business that might be exploited by competitors in the marketplace, rather than other litigants.

> Previous orders of this office have consistently adopted this view. For example, in Order PO-2293, former Assistant Commissioner Tom Mitchinson stated:
>
> > Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the Act is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO- 2184, and MO-1706].
>
> Even if I had concluded otherwise, and found that litigation qualified as a suitable venue for "competition" in the context of section 17(1)(a), I would not have found that the appellant had established this harm in the present circumstances. In my view, the appellant's representations on this point do not explain how its position would be harmed by disclosure. Beyond providing a basic description of the litigation, and saying that the records "in part respond" to the requester's claim, no explanation is provided of how disclosure of these particular records could reasonably be expected to harm the appellant's competitive position. In addition, such a reasonable expectation is not self-evident from even a careful review of their contents… .

I agree with the reasoning of the Adjudicator in that order, and find that harm to competitive or negotiating positions within the context of section 16 refers to harm to competitive or negotiating positions in commercial or business transactions, as opposed to in litigation. Further, in the case before me, I have been told that the homeowners are involved in litigation, but I have not been told how the information in the records at issue could be expected to harm their position in that litigation, nor is the likelihood of harm to its position in litigation resulting from disclosure evident from the contents of the records. Therefore, even if I were to consider section 16 as applying to litigation, I would be unable to find that the homeowners or their counsel had established harm to their negotiating position in litigation.

[para 57] The Public Body refers to *Imperial Oil Ltd. v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 in support of its arguments that section 16(1)(c) is met in this case because the Applicant and the Third Party are involved in litigation.

[para 58] It is not clear to me from *Imperial Oil* that the Court of Appeal held that harm to litigation position is a harm falling within the terms of section 16(1)(c). The Court said:

> The Commissioner did not consider whether the information provided by Imperial Oil qualified as a "trade secret", and it is not clear if the point was argued. The information arguably met the test in *Merck Frosst* at paras. 109-111, as it was treated as secret, could be used in an industrial application by Imperial Oil, and there was a justified legal reason for protecting it. Imperial Oil clearly wanted it to remain confidential. The Director felt that the request for confidentiality was reasonable. In those circumstances, the Commissioner was likely entitled to review the decision to refuse disclosure under s. 65(1) of the *FOIPP Act.* However, there is no indication on this record that the Director's decision not to disclose was in any respects unreasonable. Both Alberta Environment and the Environmental Appeals Board were firmly of the view that disclosure would seriously undermine the mediation process commonly used to resolve environmental disputes. That was a reasonable position for them to take, and it is amply supported by the record.

> *Summary of s. 16 Factors*
> In summary, the Remediation Agreement satisfied all of the preconditions for non-disclosure found in s. 16. Imperial Oil had supplied protected commercial, financial, scientific or technical information in confidence to Alberta Environment. The disclosure of that information to the City of Calgary was likely to cause harm to the legitimate business interests of Imperial Oil. While there was an enactment that initially authorized disclosure of that information, the decision taken under the terms of that enactment not to disclose was reasonable.

[para 59] While the Court of Appeal refers to disclosure of the agreement in the Imperial Oil case as harmful to the mediation process established by the Environmental Appeal Board and Alberta Environment, (a harm not to the third party in that case but to the processes established by the executive branch of government) it also refers to the information in the settlement agreement as "commercial, financial, scientific or technical information" that would harm the "legitimate business interests of Imperial Oil" if disclosed to the City of Calgary. I am unable to say that the Court of Appeal considered harm to Imperial Oil's litigation position to be a factor in its analysis or one that may be considered under section 16(1)(c).

[para 60] As I do not interpret the Court of Appeal as finding that harm to litigation position is a harm that may be considered under section 16(1)(c), and because I agree with the reasoning in Orders F2009-007 and F2009-015, as well as the reasoning in Order PO-2490, a decision of the Office of the Information and Privacy Commissioner of Ontario, I find that harm to litigation position is not a harm that falls within the terms of section 16(1)(c). As this is the harm referred to by the Public Body in its submissions, it follows that I find that it has not been established that a harm falling within the terms of section 16(1)(c) would result from disclosure of the attachment.

[para 61] If I am wrong in my conclusion that harm to litigation is not a harm falling within the terms of section 16(1)(c), then I note that in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, the Supreme Court of Canada confirmed that when access and privacy statutes refer to reasonable expectations of harm, that a party must demonstrate that disclosure will result in a risk of harm that is beyond the merely possible or speculative. The Court stated:

> It is important to bear in mind that these phrases are simply attempts to explain or elaborate on identical statutory language. The provincial appellate courts that have not adopted the "reasonable expectation of probable harm" formulation were concerned that it suggested that the harm needed to be probable: see, e.g., *Worker Advisor*, at paras. 24-25; *Chesal v. Nova Scotia (Attorney General)*, 2003 NSCA 124, 219 N.S.R. (2d) 139, at para. 37. As this Court affirmed in *Merck Frosst*, the word "probable" in this formulation must be understood in the context of the rest of the phrase: there need be only a "reasonable expectation" of probable harm. The "reasonable expectation of probable harm" formulation simply "captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm": para. 206.
>
> > Understood in this way, there is no practical difference in the standard described by the two reformulations of or elaborations on the statutory test. Given that the statutory tests are expressed in identical language in provincial and federal access to information

statutes, it is preferable to have only one further elaboration of that language; *Merck Frosst*, at para. 195:

> I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(*c*) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes. [Emphasis added in original.]

This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.

[para 62] On the evidence before me, I find, in any event, that the likelihood of harm resulting from disclosure to the Third Party's negotiating position in litigation has not been established in this inquiry. No explanation or evidence has been provided as to how harm to litigation position could be reasonably expected to result from disclosure and I am unable to speculate as to how the contents of the attachment could be harmful to anyone's litigation position. The Public Body has only stated the possibility that harm could result from disclosure; it has not described the nature of the harm or provided any explanation as to the information in the attachment it believes could result in the harm, or an explanation as to why it believes harm could result from disclosure of such information.

*Conclusion*

[para 63] For the reasons above, I find that the requirements of clauses 16(1)(a), (b), and (c) are not met. It follows that I find that section 16 does not apply to the attachment appearing in records 6 – 12 and 16 – 22.

**Issue C: Did the Public Body properly apply sections 27(1)(a), (b), and (c) to information in the records?**

[para 64] Section 27(1) authorizes a public body to withhold information subject to privilege in addition to specific kinds of information that may be created by or sent to, a lawyer. It states, in part:

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

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

*(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 65] The Public Body applied section 27(1)(a) to records 1 – 3, 6 – 12, 13 – 15, and 16 – 22. The basis for its application of this provision is solicitor-client privilege. The Public Body has applied section 27(1)(b) to withhold records 1 – 3, 6 – 12, and 16 – 22. The Public Body has applied section 27(1)(c) to records 4 and 5.

[para 66] The Public Body provided *in camera* submissions regarding its application of the privilege to the records. It also provided records 2 – 3, 6 – 12 and 13 – 15 for my review, and described the contents of record 1 in detail and the circumstances in which it was created.

***Section 27(1)(a) – Solicitor-Client Privilege***

[para 67] In its open submissions regarding the application of solicitor-client privilege, the Public Body stated:

> The Public Body submits that the recent decision of the Alberta Court of Appeal in *University of Calgary v. R.(J),* 2015 ABCA 118 [Tab 10] is relevant, binding and applicable in this inquiry.
>
> In *University of Calgary v. R.(J.), (supra)* the Alberta Court of Appeal considered whether the Privacy Commissioner (Alberta) could compel production of records in order to review a public body's claim of solicitor client privilege. The Alberta Court of Appeal found that Section 56 of the Act did not allow the Commissioner or her delegate to infringe on solicitor client privilege and stated at para. 2:

> " ... the Commissioner does not have statutory authority to compel production of records over which a public body ..... has asserted solicitor client privilege"

The Court found that the Act does not contain clear, specific and explicit statutory language that would authorize an infringement on the solicitor client relationship. Therefore the Records subject to solicitor client privilege have not been provided to the Alberta Office of the Information and Privacy Commissioner even though they may be subject to other exceptions to disclosure.

The Applicant has commenced litigation which involves the parties in this inquiry. The Public Body notes that the Applicant has available to him processes under Alberta civil procedure, where assertions of relevance or privilege can be reviewed by a Court of competent jurisdiction ... "

> " .. Indeed the entire process under FOIPPA in this case was, from a practical standpoint, wholly unnecessary, since this dispute was also litigated under Alberta's civil procedure. Had JR taken objection to assertions of solicitor client in respect of any record contained in the University's affidavit of records (which she did not), the validity of such assertions could and should have been competently assessed under the comprehensive procedure set out in Rule 5.11 of the Rules of Court. While recognizing that FOIPPA 's process is independent of the litigation process, I would have thought that where the propriety of an assertion of solicitor client privilege by public body litigant is to be reviewed, the better practice would generally be to have that review performed by a judge or master of the court in the course of that litigation rather than by engaging a collateral process." (paragraph 53 - University of Calgary v. R.(J.), (supra)) [sic]

The Alberta Court of Appeal has recognized that where the Public Body is a litigant the proper forum for a review of a claim of solicitor client privilege is through a court, otherwise incompatible decisions on the same records can arise. A court may find that privilege applies whereas an administrative tribunal may find it does not and the implications of such diverse decisions are significant as once privileged documents are disclosed the privilege is lost, one cannot un ring the bell.

The Public Body argues that *University of Calgary v. JR*, 2015 ABCA 118 is relevant to this inquiry and binding.

[para 68] In *University of Calgary*, the Court of Appeal decided that the Commissioner has no power to compel records over which a public body has claimed solicitor-client privilege. However, the Court of Appeal did not go so far as to rule that the Commissioner has no power to order the disclosure of records subject to solicitor-client privilege in the event the Commissioner does not receive evidence sufficient to support a public body's application of the privilege.

[para 69] In this case, the Public Body supplied the records for my review at my request following its initial submissions, with the exception of record 1, for which it provided a detailed description of the record's contents. As the Public Body provided records and evidence at my request, I find that those portions of the *University of Calgary* decision dealing with production to the Commissioner for the Commissioner's review are not pertinent to this inquiry.

[para 70] The Public Body has also pointed to the comments of the Court of Appeal where it questioned why the applicant in that case did not seek the records she requested through the discovery process, as opposed to a FOIP application.

[para 71] The Applicant counters:

> A decision not to disclose requested information may be quashed where the public body's decision was made in bad faith or for an improper purpose, or where the public body took into account irrelevant considerations in arriving at its decision. The Supreme Court of Canada has made very clear that the purposes underlying a request are irrelevant and must not be considered in assessing whether to grant access to a requested record:
>
> > [I]t is the nature of the information itself that is relevant - not the purpose or nature of the request. The *Privacy Act* defines "personal information" without regard to the intention of the person requesting the information. Similarly, s.4(1) of the *Access Act* provides that every Canadian citizen and permanent resident "has a right to and shall, on request, be given access to any record under the control of a government institution". This right is not qualified; the *Access Act* does not confer on the heads of government institutions the power to take into account the identity of the applicant or the purposes underlying a request. In short, it is not open to the RCMP Commissioner to refuse disclosure on the grounds that disclosing the information, in this instance, will not promote accountability; the *Access Act* makes this information equally available to each member of the public because it is thought that the availability of such information, as a general matter, is necessary to ensure the accountability of the state and to promote the capacity of the citizenry to participate in decision-making processes.
> >
> > [...]
> >
> > In my opinion, it is impossible to justify an approach that results in two people requesting the same information from the same federal institution obtaining different responses. Such an interpretation leads to an inequitable result and is incompatible with the objectives of the *Privacy Act.*[…] The purpose or motive of the request is wholly irrelevant. The strategy used by the person filing a request cannot modify the nature of the requested information.

[para 72] I agree with the Applicant that *Canada (Information Commissioner) v. Canada (Commissioner of the RCMP)* 2003 SCC 8, states the law regarding the extent to which a public body may consider the motives of a requestor; that is, the motive of a requestor is irrelevant. There is no reason why a litigant cannot make a request for access to a public body as may any other citizen. Indeed, the Alberta Court of Appeal appears to acknowledge that this is so, as it recognized that the FOIP Act contains a process "independent of the litigation process". In *University of Calgary*, cited above, the Court of Appeal did not go so far as to say that an individual cannot be involved in litigation and make an access request at the same time.

[para 73] To return to the issue of whether solicitor-client privilege applies to the records to which the Public Body has applied section 27(1)(a), the test to determine whether information is subject to solicitor-client privilege is set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821. In *Solosky*, the Court said:

> As Mr. Justice Addy notes, privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege—(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties. To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court. Finally, the privilege is aimed at improper use or disclosure, and not at merely opening.

[para 74] The Court in *Solosky* is clear that not every communication between a solicitor and another party is legal advice or subject to solicitor-client privilege. Rather, solicitor-client privilege will attach to confidential communications between a legal advisor, acting in that capacity, and a client, where the communication is made for the purpose of giving or seeking legal advice. It will only be communications that meet all three requirements of this test that are subject to solicitor-client privilege.

[para 75] The foregoing test is not a narrow one. In *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112, the Alberta Court of Appeal determined that records need not contain legal advice to meet the *Solosky* test. If the information has been communicated so that legal advice could be obtained or given, even though the information is not in itself legal advice, the information meets the requirements of "a communication made for the purpose of giving or seeking legal advice". The Court said:

> The appellant also argues that even if some of the documents contain legal advice and so are privileged, there is no evidence that all of the documents do so. For example, the appellant argues that minutes of meetings, emails and miscellaneous correspondence between Justice Canada lawyers and the Department of Indian and Northern Affairs may not contain any actual advice, or requests for advice, at all. The solicitor-client privilege is not, however, that narrow. As the court stated in *Balabel v. Air India*, [1988] Ch 317, [1988] 2 All E.R. 246 at p. 254 (C.A.):
>
> > Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> The miscellaneous documents in question meet the test of documents which do not actually contain legal advice but which are made in confidence as part of the necessary exchange of information between the solicitor and client for the ultimate objective of the provision of legal advice.

[para 76] From the foregoing, I conclude that communications between a solicitor and a client that are part of the necessary exchange of information between them but which do not actually contain legal advice, may fall within the scope of solicitor-client privilege.

*Records 1 – 2*

[para 77] The Public Body has explained that records 1 and 2 are located in a legal file and provided evidence that these records were created by one of its lawyers who used them to provide a legal opinion to the Public Body. As noted above, the Public Body provided me with record 2.

[para 78] I am satisfied from the contents of record 2 and the context surrounding its creation, which was provided by the Public Body *in camera*, that this record is subject to solicitor-client privilege. I say this because record 2 appears intended as research forming the basis of a legal opinion that was provided to the Public Body.

[para 79] The Public Body's evidence regarding record 1 is less satisfactory than its evidence in relation to record 2, given that it did not provide the record for my review; however, from the Public Body's description of this record, and its relationship to the content of other records which I find to be privileged, below, I conclude on the balance that it is more likely than not that this record is subject to solicitor-client privilege.

[para 80] I find that records 1 and 2 are subject to solicitor-client privilege.

*Record 3*

[para 81] Record 3 contains the Public Body's lawyer's notes regarding a conversation he had with a representative of the Third Party. The notes are not a transcript of the conversation, but rather, the lawyer appears to have selected, recorded, and organized information from the conversation he considered to be relevant, for the purpose of preparing a legal opinion for the Public Body. While I find below that the representative of the Third Party was not acting as an agent of the Public Body when she contacted the lawyer and would herself be free to recount it, these findings do not affect my conclusion that record 3 is privileged, as the Third Party would not know what the lawyer considered relevant and decided to record or use for the legal opinion. The lawyer did not record the information at the Third Party's direction, but at his own. As a result, the confidentiality requirement of solicitor-client privilege does not fail by reason that a representative of the Third Party is the original source of the information.

[para 82] I find that record 3 falls within the continuum of communications between a lawyer and a client made for the purpose of providing legal advice.

*Records 6 – 12 and 16 – 22*

[para 83] Records 6 – 12 and 16 – 22 contain copies of the same attachment referred to in my analysis regarding the Public Body's decision to apply section 16. Records 6 – 12 differ from records 16 – 22, in that records 6 – 12 contain handwritten notes prepared by the Public Body's counsel.

[para 84] The Public Body argues that both the attachment and its lawyer's notes are subject to solicitor-client privilege. As discussed above, the attachment was provided to the Public Body's counsel by a representative of the Third Party and it contains information of other parties that the Public Body describes in paragraph 21 of its initial submission as revealing their commercial information.

[para 85] The Public Body relies on *Guarantee Co. of North America v. Beasse,* [1991] A.J. No. 1199 as authority for its position that information provided by a third party to its lawyer is subject to solicitor-client privilege. It drew my attention to paragraph 26 of this decision, in which Rooke J. states:

> I am of the opinion that the attitude that should be taken of a Counsel's file is that, absent of some demonstration that the Counsel's role is something other than a solicitor-client role vis à vis that client (e.g. in this case as an agent of Guarantee to carry out certain of Guarantee's activities, but outside the solicitor-client relationship, at least vis à vis Robdale, and provided that the 4 Wigmore principles are not abused, the whole file should be regarded, in so far as it is relevant, as privileged. This would include most communication by Counsel with any other person (there may be some exceptions, and I will later in this Memorandum review the status of communication by Counsel for Guarantee with the Receiver of Robdale, appointed on the application of Counsel's client) for the purpose of learning information that may assist his client or him in giving advice to his client. Further thereto, I am of the opinion that a lawyer should, in general, feel free to have unrestricted communication with others (or internally) and to document such communication on Counsel's file without having to analyze it to determine if it should be produced for some litigation purpose (except in the certain exceptional cases, such as in a suit between a client and its former counsel). I am not of the opinion that it is the function of other Counsel, or the Court, absent such demonstration, to delve into, or attempt to delve into, Counsel's file. This does not mean that in all cases the information itself is privileged, but rather that Counsel's collection and organization of it is. This, in my opinion, is consistent with the statements in *Susan Hosiery* and other relevant authorities.

[para 86] The foregoing case does not stand for the proposition that all communications between a lawyer and a third party are subject to solicitor-client privilege or any other privilege. Elsewhere in this judgment, the Court held that communications with a party who was not an agent of the client were not privileged. The Court said at paragraph 61:

> On the basis of these authorities, it is clear that a Court appointed Receiver is not an agent of the party on whose application (Guarantee's, in this case) the Receiver is appointed, and therefore Guarantee cannot, without some other basis for privilege, maintain a claim for privilege in communication between it and the Receiver, in litigation between Guarantee and the party in receivership (Robdale, in this case). Even more elementary, having regard to the aforementioned principles applicable to this court appointed receiver, Deloitte, in the aforementioned factual situation, none of the basis for privilege set out in Wigmore can be supported: (1) the communications did not originate in a confidence that they will not be disclosed; (2) no element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties - in fact, the opposite is the case; (3) no special relation with the receiver is one which in

> the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications is not greater than the benefit thereby gained for the correct disposal of litigation - in fact it is less. These fundamental prerequisites having been found wanting, and no other basis for privilege being claimed, I do not see how Guarantee can maintain a privilege of its correspondence with the Receiver of Robdale, to the exclusion of Robdale and its principals and related companies that are, in effect, the "remainder men" of what remains of Robdale after the receivership has ended. This is especially so when the very order appointing Deloitte provides:
>
> > The Receiver is ordered and directed to provide reasonable access to the books and records of the Defendant, Robdale . . ., by the said Defendant [Robdale] and its directors, officers or agents for the purpose of present and future litigation.

[para 87] I understand the Court in *Guarantee Co.* to say that communications between a lawyer and the lawyer's agents or the lawyer's client's agents are privileged, if the communication meets the criteria for Wigmore case-by-case privilege. However, where the third party is not an agent, or the Wigmore case-by-case criteria are not met, then the communication with a third party is not privileged.

[para 88] The evidence before me does not support finding that the Third Party was acting as an *agent* of the Public Body or of the Public Body's counsel when it sent the attachment to the Public Body. The records suggest that the Public Body and the Third Party are adverse in interest, in the sense that their interests are their own and do not necessarily align. For example, the outcome of the lawyer's opinion could have differing consequences for the Public Body and the Third Party, depending on what the lawyer found.

[para 89] The Wigmore criteria, to which the Court refers, are the following:

> (1) the communications must originate in a confidence that they will not be disclosed;
> (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
> (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and
> (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation[1].

[para 90] With regard to the first factor, I have already found in my analysis under section 16 that the communication – emailing the attachment to the Public Body – did not originate in confidence. With regard to the second, third, and fourth factors, I find that there is no relationship between the parties requiring an element of confidentiality or one that need be sedulously fostered. As the Wigmore criteria are not met, I find that the attachment is not privileged within the terms of the *Guarantee Co.* decision.

[para 91] As the Court recognized in *Guarantee Co.*, solicitor-client privilege will attach to information conveyed by a third party to a lawyer on behalf of a client in some circumstances, In *Solicitor-Client Privilege*, Adam Dodek notes that the circumstances in

[1] *R. v. Gruenke* [1991] 3 SCR 263

which third party communications to a lawyer are privileged is a confusing area of the law. However, he states:

> The general test to be applied to communications from third persons to solicitors is the functional test from *Chrusz*: the court must ask whether "the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship".[2]

[para 92] In this case, there is no evidence that the Third Party has a retainer with the Public Body or was, in any way, acting as the Public Body's agent, or on behalf of the Public Body, when it provided the attachment to the lawyer for the Public Body. Rather, it appears from the contents of records 4 and 5 that it may have supplied the information on its own behalf. In this situation, the Third Party, which provided the information, has its own interests which are different than those of the Public Body and which may be potentially affected, possibly in an adverse way, by the advice the lawyer would give to the Public Body regarding the information it provided.

[para 93] In addition, as the information was provided by a third party that was not acting on behalf of the Public Body when the information was provided to the lawyer, there would be no method by which the Public Body could require the attachment to be kept in confidence. Should the Third Party choose to make the attachment public, or the fact that it sent the attachment to the lawyer, there does not appear to be any means by which the Public Body could prevent it from doing so.

[para 94] I also find that the information in the attachment does not fall within the continuum of solicitor-client communications discussed in the Court of Appeal's decision in *Blood Tribe*, supra. I say this because it is not a communication between the Public Body and its lawyer, but is an email attachment sent by the Third Party (which was not acting as an agent of the Public Body or the Public Body's lawyer) to the Public Body's lawyer.

[para 95] That being said, I am in agreement with the Public Body that the notes of the solicitor appearing on records 6 – 12 are subject to solicitor-client privilege as they reflect the Public Body's lawyer's analysis, which he intended to provide to the Public Body in the form of legal advice. Moreover, in my view, these notes cannot be meaningfully severed from the records under section 6(2) of the FOIP Act, as severing them would reveal the location of the notes in the record, and therefore the areas of the attachment on which the lawyer focused his analysis, which would reveal something about the legal advice he provided to the Public Body. As a consequence, I find that records 6 – 12 are subject to solicitor-client privilege.

[para 96] Records 16 – 22 do not contain the lawyer's notes. As discussed above, I find that the attachment in these records does not meet the criteria for solicitor-client privilege, as it is not a confidential communication between a solicitor and a client made for the purpose of the seeking or giving of legal advice.

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[2] Adam Dodek, *Solicitor-Client Privilege* (Markham; Lexis-Nexis Inc. 2014) pp. 173 - 175

*Records 13 – 15*

[para 97] The Public Body has explained that records 13 – 15 are located in a legal file and provided evidence that these records were created by one of its lawyers who used them to provide a legal opinion to the Public Body. As noted above, the Public Body provided me with records 13 – 15.

[para 98] I am satisfied from the contents of records 13 – 15, and the context surrounding their creation, which was provided by the Public Body *in camera*, that these records are subject to solicitor-client privilege.

*Conclusion in relation to section 27(1)(a)*

[para 99] I find that records 1 – 3, 6 – 12, and 13 – 15 are subject to solicitor-client privilege. I have found that records 16 – 22 are not subject to solicitor-client privilege.

[para 100] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, 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*. [Emphasis added in original]
>
> (See also *Goodis*, at paras. 15-17, and *Blood Tribe*, at paras. 9-11.)

[para 101] 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 102] The Public Body withheld records 1 – 3, 6 – 12, and 13 – 15 on the basis that these records are subject to solicitor-client privilege. I consider that the public interest in withholding information subject to solicitor-client privilege outweighs any competing interests in disclosing it. I therefore confirm the Public Body's decision to withhold the information I have found to be subject to section 27(1)(a).

***Section 27(1)(b)***

[para 103] As I have found that records 1 – 3, 6 – 12, and 13 – 15, are privileged within the terms of section 27(1)(a), and I have confirmed the Public Body's exercise of discretion to withhold them from the Applicant is appropriate, I need not consider whether these records are also subject to section 27(1)(b). However, I must consider whether section 27(1)(b) applies to records 16 – 22.

*Records 16 – 22*

[para 104] Cited above, section 27(1)(b) applies to information prepared by or for the Minister of Justice and Solicitor General, an agent or lawyer of the Minister of Justice and Solicitor General, or an agent or lawyer of a public body, in relation to a matter involving the provision of legal services.

[para 105] Records 16 – 22 consist of a copy of an attachment between three parties sent by the Third Party to the Public Body's lawyer.

[para 106] The Public Body argues:

> The Public Body submits that the Records to which [it has] applied Section 27(1)(b) meet the criteria established in this subsection. The information was prepared by a lawyer for the Public Body and was used by the lawyer to provide legal services to the Public Body, the services were in the form of legal advice.
>
> The Public Body submits that the legislature worded Section 27(1)(b) to be broader in scope than Section 27(1)(a). The purpose of this exception to disclosure is to allow a lawyer to gather information that may be required in order for legal counsel to provide legal services for the client. Disclosing the information gathered by legal counsel would allow an astute observer to ascertain the nature of any legal advice or legal service provided.

In my view, the purpose the Public Body assigns to section 27(1)(b) is not supported by the language of this provision.

[para 107] In Order F2008-028, the Adjudicator said:

> 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.

Section 27(1)(b) applies to information that is prepared by or "on behalf of" a lawyer in relation to a matter involving the provision of legal services, as opposed to information that is sent or addressed to a lawyer.

[para 108] In Order F2013-51, the Director of Adjudication reviewed previous orders of this office and held that the information to which section 27(1)(b) applies is substantive information prepared by or on behalf of a lawyer so that the lawyer may provide legal services.

> Applying the reasoning in Orders 99-022, F2010-007, 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 a 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 by or 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.
>
> I am unable to identify information falling within the terms of section 27(1)(b) among the records to which the Public Body has applied section 27(1)(b). There is no information in the records that could be said to have been prepared by or on behalf of an agent or lawyer of a public body in order that the agent or lawyer may provide legal services.

[para 109] The fact that an employee of the Third Party sent the attachment to the Public Body's lawyer, does not bring the attachment, or a copy of it, within the terms of the section 27(1)(b). Section 27(1)(b) applies to *information prepared by or for a lawyer of a public body in relation to a matter involving the provision of legal services.* If the information in question was not prepared by or for a public body's lawyer in relation to a matter involving the provision of legal services, it does not matter that a public body's lawyer subsequently obtained a copy – the information does not fall within the terms of section 27(1)(b). In this case the information was not prepared by or for a lawyer of a public body and the subject matter of the agreement does not relate to the provision of legal services by a lawyer of a public body. Rather, the information was prepared by someone else for other purposes.

[para 110] I find that section 27(1)(b) does not apply to records 16 – 22.

***Section 27(1)(c)***

[para 111] Cited above, section 27(1)(c) applies to information in correspondence between the Minister of Justice and Solicitor General, an agent or lawyer of the Minister of Justice and Solicitor General, or an agent or lawyer of a public body, and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer. Section 27(1)(c) does not apply to *any* information appearing in correspondence between a lawyer and another person; rather, section 27(1)(c) applies to correspondence that is in relation to a matter involving the provision of advice or legal services by the lawyer.

[para 112] Records 4 and 5 consist of three emails sent by an employee of the Third Party to the Public Body's lawyer. The attachment in records 16 – 22 is forwarded to the Public Body's lawyer in an email appearing on record 5.

[para 113] The information in records 4 and 5 meets the requirement in section 27(1)(c) that correspondence be between a public body's lawyer and any other person. The question is whether the emails meet the requirement that they be "*in relation to a matter involving the provision of advice or other services by the lawyer*."

[para 114] The Public Body argues:

> For information to meet Section 27(1)(c) it must be in the form of correspondence, the correspondence must be between a lawyer of a public body and another individual, and the correspondence relates to the provision of services by the lawyer or advice by the lawyer.
>
> The Public Body submits that the Records to which it has applied Section 27(1)(c) meets these criteria. Disclosing the information, including the subject line, recipients, senders and dates contained in Records 4 – 5 would reveal the type of the documents reviewed by a lawyer for the Public Body and lead an assiduous observer to ascertain the nature of the legal advice contained in Record 1.

[para 115] As stated above, section 27(1)(c)(iii) contemplates information in correspondence between a public body's lawyer and any other person; the correspondence must be in relation to a matter in which involves the provision of advice or services by the lawyer.

[para 116] Here, the correspondence in question was between the Third Party and the Public Body's lawyer. The correspondence was in relation to a matter, and the matter, from the perspective of the Public Body, involved the provision of legal services to the Public Body.

[para 117] However, the correspondence was itself not in relation to the provision of advice or other services by the lawyer; the correspondence was in relation to the legal status of certain organizations and what the correspondent thought the significance of that status might be. Nothing in the content of the emails suggests that the correspondence was prepared for the purpose of directing how the lawyer might use the information to provide advice to the public body, or that this was even contemplated. If there were a prior exchange of information which could lead me to conclude that the correspondence was prepared for this purpose, then this was not stated or explained to me.

[para 118] To put this another way, I believe that the understanding of both parties to the correspondence must be that there is a matter involving the provision of advice or other services by the lawyer, and the correspondence is intended, if not to advance the matter, then to relate to that matter. For example, if a party were to send an offer of settlement to the lawyer of a public body, then such correspondence would be "in relation to a matter involving the provision of advice or other services" by the public body's lawyer. However, if a third party sends correspondence to a public body's lawyer and the third party does not contemplate that there is a matter involving the provision of a

lawyer's advice or services, then the correspondence cannot be said to be in relation to such a matter.

[para 119] That is not to say that a lawyer cannot obtain information on a confidential basis from a third party that the lawyer requires in order to provide advice or services. (Such information is typically covered by litigation privilege when it is obtained for the dominant purpose of preparing for litigation.) Rather, I mean that section 27(1)(c) is intended to allow parties to correspond freely in relation to matters about which they need to speak in order to allow the lawyer's advice or services to be provided.

[para 120] In my view, the fact that a "matter" within the terms of section 27(1)(c) is one "involving the provision of advice or other services" by a lawyer, indicates that the legislature is referring to a "legal matter", as this is the type of matter for which a lawyer might provide advice or services. The *Canadian Oxford Dictionary*[3] offers the following definition of "matter," where that term is used in a legal context: "*Law*: a thing which is to be tried or proved".

[para 121] It also seems to me that section 27(1)(c) is intended to address correspondence in which at least one of the parties is in a position to require that the information in the correspondence be kept in confidence, or certainly, not to be entered into evidence in court. I say this because section 27(1)(c) would serve little purpose if the information in question (i.e. the information in the correspondence) is publicly available, or the sender has the power to disclose the information unilaterally and the fact that it was sent. The purpose of allowing a public body's lawyers or agents to correspond freely without fear of interference (discussed above) would not be met if the sender could make the correspondence generally known. Again, here, there were no requests for, or assurances or expectations of confidentiality, or certainly, none that have been provided to me.

[para 122] I also note that the heading of section 27, of which section 27(1)(c) is a provision, is "Privileged Information". Section 12(2)(c) of the *Interpretation Act* states that headings do not form part of the provision; however, jurisprudence establishes that headings can be evidence of legislative intent when a provision is ambiguous, despite provincial interpretation acts.

[para 123] Pierre-André Côté notes the following on page 63 of his work, *The Interpretation of Legislation in Canada*:

> It is accepted today that headings and subheadings are part of a statute and thus relevant to its construction. Headings may help to situate a provision within the general structure of the statute: they indicate its framework, its anatomy. Headings may also be considered as preambles to the provisions they introduce. The heading is a key to the interpretation of the sections ranged under it.

[3] Katherine Barber ed., *The Canadian Oxford Dictionary* 2nd Edition (Don Mills; Oxford University Press, 2004) p. 955

> How much weight should headings be accorded? Some authorities maintain that headings may be looked at only where there is ambiguity in the enacting words. If these cases are meant to suggest that headings may be ignored, such a method of statutory interpretation is no longer followed. Because they are part of the statute, they must be taken into consideration as part of the context, even where the enactment itself is clear.[4]

[para 124] If one considers the context created by the heading of section 27, and also considers that sections 27(1)(a), 27(2), and 27(3) all address privileged information, it seems reasonably likely that sections 27(1)(b) and 27(1)(c) address similar kinds of information that are not necessarily caught by section 27(1)(a).

[para 125] Examples of such information might be communications that are considered privileged in the proceedings for which they were made, as well as related proceedings, but that would not be found privileged outside of those proceedings or in unrelated proceedings.[5] An inquiry conducted by this office would be an example of such a proceeding. Both litigation and settlement privilege are examples of such privileges, and it appears that most information that might fall within the scope of these privileges – but for the fact that a Commissioner's inquiry is unrelated to the matter giving rise to them – would fall within sections 27(1)(b) and (c).

[para 126] The exceptions to disclosure in the FOIP Act may be viewed as representing particular interests in withholding certain kinds of information (see *John Doe v. Ontario (Finance)*, [2014] 2 S.C.R. 3 at paragraph 2); there is no clear interest, public or private, served by authorizing a public body to withhold correspondence from a third party received by its lawyer and which the other party is free to disclose or enter into evidence whenever it chooses. However, if the purpose of section 27(1)(c) is to enable a public body to withhold correspondence it might be authorized to protect in proceedings unrelated to the Commissioner's inquiry, and to enable it to withhold information that might give an opposing party an advantage in unrelated proceedings in which the public body is involved, then the provision serves clear interests.

[para 127] Records 4 and 5 were created by an employee of a Third Party in circumstances in answer to the Public Body's lawyer's questions. While the lawyer may have been aware that a legal matter might arise, there is no evidence that he shared this awareness with the Third Party. Certainly, there is no evidence before me that the Third Party was aware of such a matter and the content of the Third Party's emails does not suggest that they were prepared in relation to such a matter. While the lawyer gathered the information from the Third Party in order to provide legal advice to the Public Body, it has not been established that he told the Third Party that he was providing legal advice to the Public Body or that he was gathering information from the Third Party for that purpose.

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[4] Pierre-André Côté, *The Interpretation of Legislation in Canada* 3rd Edition (Scarborough; Thomson Canada Ltd. 2000) pp. 63 - 64

[5] See *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319 paragraphs 35 – 38); see also Sopinka et al. *The Law of Evidence in Canada* 2nd Edition (Markham; Butterworths Canada Ltd. 1999) p.813

[para 128] I am also unable to say that the emails appearing in records 4 and 5 were confidential and could not be disclosed by either the sender or the recipient. As discussed above, the Third Party did not indicate that it was providing the records on terms of confidence, and there is nothing in the records to suggest that the Public Body accepted the emails on these terms.

[para 129] The emails appearing on records 4 and 5 appear intended to provide information to answer a question. As discussed above, the Third Party's correspondence does not indicate that the author was aware that a matter was in existence or contemplation, and therefore I find it unlikely that she wrote the emails "in relation to" such a matter, within the terms of section 27(1)(c). I therefore cannot conclude that the Third Party's correspondence was "in relation to a matter involving the provision of advice or other services" by the lawyer, and I am therefore unable to conclude that the information is protected from disclosure by the provision.

[para 130] I turn now to the Public Body's argument that the information in records 4 and 5 would reveal the legal analysis and advice provided by the lawyer if they are disclosed. From my review of records 4 and 5, I am unable to say that the contents of a legal opinion could be extracted from them. I have already determined that there is no basis for concluding that the author of the emails appearing on records 4 and 5 was aware of the lawyer's purpose in obtaining the information she provided, and so it is not the case that her emails inadvertently or deliberately refer to the contents of legal opinions. Additionally, if the lawyer had disclosed his opinions regarding the legal status of the entities referred to in records 4 and 5, then it would appear that his legal opinion was not provided to the Public Body in confidence, given that he would already have disclosed its contents to the Third Party prior to its preparation. From the other evidence and submissions of the Public Body, I conclude that this was not actually the case.

[para 131] I find that section 27(1)(c) does not apply to records 4 and 5.

## V. ORDER

[para 132] I make this Order under section 72 of the Act.

[para 133] I order the Public Body to take steps to clarify the scope of the access request by contacting the Applicant.

[para 134] Once the Public Body has clarified the scope of the access request, I order the Public Body to conduct a new search for responsive records. Any new decision regarding the scope of the access request and any new search conducted for responsive records, are subject to review by this office.

[para 135] I order the Public Body to produce records 4 – 5 and 16 – 22 to the Applicant.

[para 136] I confirm the decision of the Public Body to withhold records 1 – 3, 6 – 12, and 13 – 15 on the basis of solicitor-client privilege.

[para 137] I order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Teresa Cunningham
Adjudicator