ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2015-31

October 21, 2015

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number F6783

Office URL: www.oipc.ab.ca

Summary: The Applicant requested specified records about himself from the Public Body. The Public Body withheld all the records in reliance on section 27(1) of the Act.

The Adjudicator found the Public Body had not properly withheld the requested records on the basis of solicitor-client privilege, nor on the basis of settlement negotiation privilege, under section 27(1) of the Act. She also found that neither sections 27(1)(b), nor 27(1)(c) were properly applied. She ordered the Public Body to disclose the records to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 27, 27(1), 27(1)(a), 27(1)(b), 27(1)(c), 27(2), 72.

Court Cases Cited: *Canada v. Solosky* [1980] 1 S.C.R. 821; *Hospitality Corp. of Manitoba Inc. v. American Home Assurance Co*, 2002 MBQB 294, 2004 MBCA 47; *Ziegler Estate v. Green Acres (Pine Lake) Ltd.*, 2008 ABQB 552.

Authorities Cited: *The Law of Privilege in Canada*, looseleaf (Aurora, Ont.: Canada Lawbook, 2014).

I. BACKGROUND

[para 1] On November 6, 2012, the Applicant made an access request to the Public Body under the *Freedom of Information and Protection of Privacy* Act (the FOIP Act or the Act) for the following:

> Requesting all records in relation to [the Applicant], which would include but not limited to; emails, personal notes, meeting minutes, memorandums, letters, human resources records, professional standards records found within the following:
>
> Chief Crown Prosecutor [named]
> Assistant Chief Crown Prosecutor [named]
> Assistant Chief Crown Prosecutor [named]
> Assistant Chief Crown Prosecutor [named]
>
> Records are not limited to the above listed people, requests are subject to any other persons involved. As well as any other records being held by the Crown Prosecutors Office or outside agency.

[para 2] On December 18, 2012, the Public Body replied, informing the Applicant that all records were being withheld by reference to section 27(1) of the Act.

[para 3] The Commissioner appointed a mediator to try to resolve the matter, but this was not successful, and the Applicant requested an inquiry.

[para 4] This office received initial submissions from both the Applicant and the Public Body, as well as from the Affected Party Calgary Police Service (CPS), and it received answers to further questions from both the Affected Parties (CPS and the Calgary Police Association (CPA)) as well as from the Public Body.

II. RECORDS AT ISSUE

[para 5] The records at issue are all the records located by the Public Body as responsive to the Applicant's request.

III. ISSUES

[para 6] The Issue stated in the Notice of Inquiry is as follows**:**

Did the Public Body properly apply section 27(1)(a) of the Act (information subject to solicitor-client privilege) to the information in the records?

[para 7] The Public Body relied on section 27(1) to withhold the records. However, it says the client in the solicitor-client relationship it says existed is the CPS, and that the privilege it says existed is that of the CPS. The CPS is an affected party in this inquiry; it is not the public body claiming the privilege.

[para 8] It may have been appropriate for the Public Body to also refer to section 27(2), which is a mandatory exception for records described in section 27(1)(a) that relate to a person other than "a public body". "Public body" in section 27(2) possibly refers to the public body that is relying on section 27(1)(a) to withhold the records.

[para 9] However, since section 27(2) is a mandatory exception, I will treat this matter as though the Public Body had also placed reliance on section 27(2), in case the proper application of this section requires this.

[para 10] I will consider the issue in this case under the following headings:

A. Was there a solicitor-client privilege relationship with regard to matters concerning the Applicant between the Alberta Crown Prosecution Service (ACPS) and the CPS, and did the ACPS provide legal advice to the CPS on this topic?

[para 11] The Applicant has provided me with copies of two letters (dated September 26, 2011 and June 29, 2012), which he has in his possession and provided in his request for review, despite the fact they are among the records at issue. (I have not been told how they came into his possession. He did not provide two memoranda that were attached to the second letter.)

[para 12] These letters make the sequence of events clear. However, since they are at issue in this inquiry, I cannot disclose their contents in this Order. I will disclose as much information about the sequence of events as possible based on what the Public Body stated in its open submission.

[para 13] On September 19, 2011, the CPS wrote a letter to the Chief Crown Prosecutor. On September 26, 2011 the Chief Prosecutor responded. Subsequently, the Calgary Police Association (CPA) communicated by letter with the Chief Prosecutor.

[para 14] In June of 2011, at the Chief Crown Prosecutor's request, two Assistant Chiefs in the Crown Prosecution Service provided internal memoranda to him. On June 29, 2012, the Chief Prosecutor wrote to the CPS, enclosing the two memoranda, as well as the initial letter he had written to the CPS on September 26, 2011. This letter was copied to the CPA.

[para 15] In its submission of January 6, 2015, the Public Body describes the June 29, 2012 letter (and possibly also the September 26, 2011 letter) as "an opinion to CPS as to its view of the conduct of a CPS member and how that conduct would adversely affect the suitability of the member as an investigator or witness in criminal proceedings". The June 29, 2012 letter states it is not to be copied or disclosed to anyone without the written permission of the Chief Prosecutor.

[para 16] The records at issue were not provided for my review, but I am informed by the Public Body that the letters of September 26, 2011 from the Chief Crown Prosecutor to the CPS, and the subsequent letter between the same parties of June 29, 2012, with attachments, are the same documents which the Public Body describes in its submissions

as "legal advice" (for example, in para 9 of its January 6, 2015 submission). They are the same letters which the Applicant provided to this office with his request for review (though without the memoranda attached to the second letter).

[para 17] I have noted the Public Body says in its initial submission (para 31) that "CPS and CPA both requested a legal opinion in writing from the Crown Prosecution". I cannot quote from the Chief Prosecutor's letters, but I have seen the copies provided to me by the Applicant. Based on what is contained in the Chief Prosecutor's letters, neither the letter written by the CPS to the Chief Prosecutor (to which he responded with his letter of September 26, 2011), nor the letter written to him by the CPA (which prompted his second letter of June 29, 2012), were, in terms, requests for legal opinions. Rather, each contained a request (which is described in the Chief Prosecutor's two letters) that is for something *other than* a legal opinion.

[para 18] Further, the information in the two letters does not take a form that legal advice commonly takes. Both the letters (of September 26, 2011 and June 29, 2012) contain a decision that the ACPS has reached (the second confirming the decision expressed in the first), but neither contains suggestions as to how the CPS should respond to the opinion of the ACPS.

[para 19] These communications are 'advice' in the sense that they advise the recipient about something; however, they advise of a decision that has been made. While they may also have been intended to persuade the CPS that the decision was properly taken and implies that it should be accepted, possibly (though I have not seen the attachments) including legal reasons why this is so, it is not explicitly advice to the recipient as to any actions it should consider taking with respect to the matter. Moreover, the impetus for the second letter seems to have been prompted by the communication the Chief Prosecutor had received from the CPA, so any persuasive effect on the CPS seems only incidental (and indeed, both these letters were copied to the CPA – the first one as an attachment to the second one[1]).

[para 20] Thus, I believe the better view is that the letters communicated not legal advice intended to guide the CPS as client, but a decision that had been made by the ACPS, which the CPS would have to address and to which it would have to adapt and order its affairs as they related to the Applicant.

[para 21] A further problem with the idea that the second letter and attachments (of June 29, 2012) constituted legal advice is that this communication to the CPS appears to quite possibly have been on the ACPS' own motion rather than on request, and if that is so, the ACPS does not seem to have received the prior approval of the CPS – the body

[1] In its September 23, 2015 submission, the Public Body says the September 26, 2011 letter was not copied or disclosed by the ACPS to the CPA. However, the June 29, 2012 letter from the Chief Crown Prosecutor to the CPS, which was copied to the CPA, indicates the September 26, 2011 is attached. It appears, therefore, that the September 26 letter was also shared by the ACPS with the CPA. However, if that is in fact not the case, my conclusions below as to waiver of any privilege do not apply (although my conclusion that it does not consist of legal advice does apply).

the ACPS now (in its more recent submissions) says is the client and recipient of the legal advice, to share that advice with the CPA.[2]

[para 22] Conceivably, a request by CPS for the advice that was provided in the second letter (of June 29, 2012) could have included a consent to share the information with the CPA. However, the contents of the June 29, 2012 letter suggests there was no request by the CPS giving rise to this second letter: it seems the ACPS wrote it not in response to a request from the CPS, but rather, that it wrote to the CPS on its own motion, although prompted by the communication it had received from the CPA. Further, I have noted that the Public Body's submission dated January 6, 2015, which specifically discusses whether and how a solicitor-client relationship arose, does not assert that what it says was a 'legal opinion' was provided on request. As well, it speaks of a solicitor-client relationship existing "whether or not there is the immediacy of … a client seeking advice", and also says that: "The Crown may take the initiative in communicating advice or opinion to police services; it (Crown) need not passively wait for a police service to request advice". These latter arguments have relevance only if the CPS had not actively sought the advice contained in the second letter, and suggest it did not do so.

[para 23] The ACPS would have been aware that the privilege attaching to legal advice is that of the client, and that as legal adviser, it would need the client's consent to disclose privileged material outside of that relationship. It therefore seems untenable that the ACPS would send the letter to the CPS *as legal advice* while simultaneously disclosing it to a party outside this 'solicitor-client' relationship, without prior approval of the client in the relationship. (The idea that there is a common interest among all the parties to the correspondence such that privilege in the advice would not be waived by sharing is discussed further below. Even if this were the right conclusion [and I find it is not], I do not believe it is one that was considered at the time, and the Public Body has not suggested that it was).

[para 24] Thus, the fact the ACPS shared the information with the CPA, in the absence of any suggestion or likelihood that it received CPS' approval to do this, is in itself a strong argument against the idea that the ACPS was providing legal advice to the CPS.

[para 25] I accept there are other circumstances in which CPS is the client of ACPS. However, in this circumstance, I do not believe there was a solicitor-client relationship between them, and I believe the better view is that the communications were not legal advice. Furthermore, as discussed below, even if they were, I do not accept that there was a common interest between the CPS and the CPA such that the sharing with the latter body of legal advice intended for the former body could be done while still preserving the solicitor-client privilege the CPS would have had in the information.

[2] The Public Body initially took the position that CPA was also a client of the ACPS (initial submission at para 31; submission of September 15, 2014, at para 5), but subsequently withdrew from this position (submission of January 6, 2015, at para 13). In the CPA's submission, it says it was not the client of the ACPS.

B. Was there a solicitor-client relationship between the Chief Crown Prosecutor and the Assistant Chiefs when they provided memoranda to him associated with the present matter.

[para 26] I will assume, for the purposes of the following discussion, that the memoranda the Assistant Chief Prosecutors provided to the Chief were legal advice given for the purpose of helping him reach a final decision about the associated matter, that they were based on legal considerations, and that the relationship between the Assistants and the Chief in that context could be said to be a solicitor-client relationship.

C. Assuming there to be a solicitor-client privilege relationship between the ACPS and the CPS, and between the Assistant Crown Prosecutors and the Chief, and that legal advice flowed from the former to the latter in each case, was the solicitor-client privilege in this advice waived when the advice was disclosed to the CPA?

[para 27] As noted above, the initial submissions revealed that the communications from the Chief Crown Prosecutor to the Calgary Police Service, including the attached opinions of the Assistant Chiefs, were copied to the Calgary Police Association. The latter body did not appear to me to be the client in what the Public Body says is the solicitor-client relationship (between the ACPS and the CPS); I also noted that the CPA represents the interests of individual police officers, while the CPS is their employer.

[para 28] In view of this, I asked the Public Body to explain how the relationship between the Calgary Police Service and the Calgary Police Association is such that ACPS's sharing of the information with the CPA could have been done without breaching the confidentiality of the solicitor-client relationship (assumed for the purposes of this discussion) between the ACPS and the CPS.

[para 29] The Public Body responded by stating, first, that only a limited subset of the communications between the ACPS and the CPS had been copied to the CPA.

[para 30] However, I note that many of the emails are described by the Public Body as discussions of the legal advice. If it is the case (as I find below) that the advice was not privileged because the privilege was waived, it follows that discussions of that advice also cannot be withheld. Discussions of privileged material can be withheld because the discussion can reveal the privileged material. If there is no privilege in the material, there is no reason to treat the discussion of the material as privileged. (These comments do not necessarily apply to any internal discussions within the ACPS about the Assistant Chiefs' memoranda that took place before the memoranda were copied to the CPA. However, because there is nothing to suggest the Chief Prosecutor intended to keep them confidential as between himself and the CPS (the 'client'), I do not believe these memoranda were subject to solicitor-client privilege at that time in any event [see the discussion below at para 51 and following]. Therefore, any such internal discussions would not have been about privileged material, thus were not themselves privileged.)

[para 31] I did note that, conceivably, emails that discuss legal advice could also contribute to that advice. However, the Public Body has claimed with respect to these

emails only that they discussed legal advice; it does not suggest the discussions themselves consisted of or contributed to the advice.

[para 32] Consequently, because of my conclusions (as set out below) that the privilege was waived (or did not arise in the first place because confidentiality was not intended), I cannot find, without more, that the privilege was properly relied on with respect to these email records.

[para 33] As well, the index supplied by the Public Body dated May 21, 2015 reveals that some of the communications were made directly between the ACPS and the CPA (records 74-75, 76-77, 88-89, 90-93, 94-95, 99, 100, and 101-102).

[para 34] As to these records, considering the Public Body's more recent view that the CPA was not its client, the role and position of the CPA, and the CPA's own position that it was not a client in that relationship, I cannot find, without more, that these communications were the subject of solicitor-client privilege. I have noted that in its most recent response to my questions, the Public Body said with respect to the e-mails between the ACPS and the CPA (records 88 to 95 and 99 to 102) that they are "correspondence within the continuum of communications between the legal advisor (ACPS) and Calgary Police Association", on the basis that the latter was "a party having a common interest with ACPS' primary client – Calgary Police Service". It also says that these exchanges were "for the purpose of CPA and ACPS keeping each other informed of matters pertinent to the giving and receiving of legal advice related to the central issues of concern".

[para 35] Again, for the reasons set out immediately below, I do not accept there was a "common interest" in the sense set out in the related cases. As well, since CPA was not a client of the ACPS, I find that these communications were not part of the "continuum of communications" made for the purpose of giving and receiving legal advice.

[para 36] As already noted, the Public Body's other argument in response to my question is that there is a "singular common interest" among the ACPS and the CPA and the CPS, such that the privileged status of legal advice communications between ACPS and CPS is not waived by disclosure of records by ACPS to CPA. The common interest which the Public Body described is "maintaining and promoting an effective criminal justice system", and more specifically, in the present case "the credibility of police officer witnesses in criminal proceedings" and "police officer integrity and trust generally" as critical elements of the criminal justice system.

[para 37] The Public Body also cited a textbook containing an entry on "the common interest exception" to solicitor-client privileged information (*The Law of Privilege in Canada*), as well as a decision of the Alberta Court of Queen's Bench, *Ziegler Estate v. Green Acres (Pine Lake) Ltd.*, 2008 ABQB 552.

[para 38] I have reviewed the case and text authority cited by the Public Body in support of its view that disclosure by the ACPS of what it the Public Body says is legal

advice (created for CPS as a client) to the CPA did not constitute a waiver of privilege, by reference to the common interest among the ACPS, the CPS and the CPA.

[para 39] I begin by acknowledging the somewhat general statements made in the *Ziegler Estate* case (at para 58) relative to this "common interest" exception to waiver, which the Public Body quoted. These are:

- the common interest must already be established at the time at which the information is provided;
- the common interest can exist even if there is some issue outstanding between the parties;
- the legal advice sought to be protected by common interest must be relevant to the claim of the parties claiming the common interest, not just the one party.

[para 40] These principles pertain to a particular legal claim, but I also accept the point made by the Public Body by reference to *The Law of Privilege in Canada* (11-59) that common interest privilege can arise in the absence of specifically-contemplated litigation.

[para 41] Nevertheless, I reject the Public Body's contention that common interest privilege applies in the present case such that any privilege in the information was not waived when the ACPS communicated the information to the CPA.

[para 42] This is because, for the privilege to arise, there must be a common or self-same interest with regard to the very matter at hand, with regard to which the shared information is relevant. Thus, in *Hospitality Corp. of Manitoba Inc. v. American Home Assurance Co*., the Manitoba Court of Queen's Bench (upheld on this point by the Manitoba Court of Appeal) limited the common interest to legal advice "relevant to the claim of the parties claiming the common interest".

[para 43] The idea that there must be a mutuality of interest in information relevant to a particular issue, in contrast to a mutual interest in some broader goal, is variously stated in the materials supplied by the Public Body.

[para 44] For instance, in the *Ziegler Estate* case, the court quotes from cases offering the following examples or descriptions as to instances of common interest:

> Owners of adjoining houses complain of *a nuisance which affects them both equally*. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a *libel* or to be an *infringement of copyright*. *Both author and publisher* [*may be held responsible* and] take legal advice. Both exchange documents. But only one is made a defendant.
>
> … common interest privilege "is a privilege that permits legal counsel *on the same side of an issue* to share information without waiving privilege …"
>
> …it may be necessary for certain outsiders, *such as a co-accused* and counsel, to be present to assist in the preparation of a client's defence.
>
> [emphasis added in each case]

[para 45] I do not dispute that the CPS and the CPA (as well as the ACPS) have a common interest in effective criminal justice and police integrity.

[para 46] However, that common interest is one that operates at a much higher level of generality than the specific interests of the two institutions in the present case.

[para 47] The subject matter of the information was the Applicant's suitability as an investigator and witness for the prosecution. On that matter, the interests of the CPS and the CPA are not common, they are not "on the same side", and indeed they could be in direct opposition. The CPA had the goal, as its correspondence with the ACPS indicated, of supporting the interests of the Applicant in relation to his employment. It may be presumed the CPS had the goal of ensuring the Applicant's employment was dealt with in a manner that best suited the CPS as employer and as policing agent for the City, and the Public Body conceded that the consequence of the communication could have been some action by the CPS that was adverse to the employment interests of the Applicant (and consequently, would be adverse to the CPA as his representative)[3]. (Similarly, to the extent this is relevant, the interests of the CPA and the ACPS were not common, as is indicated by the content of the CPA's letter to the Chief Prosecutor (which prompted his June 29, 2012 letter to the CPS).

[para 48] To further illustrate this point, both an employer in a business setting and the union that represents its employees ordinarily have a common interest in the success of a business enterprise. It does not follow, nor do I believe it could sensibly be suggested, that an employer and union have a common interest in employment disputes such that solicitor-client privilege would not be waived if legal advice given to one were shared with the other.

[para 49] I have also noted the point that the cases in relation to "common interest" say that there may be a common interest despite some issue between the parties that remains outstanding. However, this is not a case in which the parties' interest is fundamentally mutual but there is some issue to be resolved, or there is an issue between them in some other context. Rather, the issue between CPS and the CPA in the present matter is one on which their interests markedly differ.

[para 50] For the foregoing reasons, I reject the Public Body's contention that the sharing of the information with the CPA (if that information were properly characterized as legal advice), did not involve waiver of privilege in the shared information. This conclusion applies to the memoranda that were prepared by the Assistant Chiefs for the Chief Prosecutor, that were attached to the letters. Once the information was shared by the Chief beyond the client, with someone lacking a common interest, it lost its status as subject to solicitor-client privilege.

Information not provided or received in confidence

[3] Public Body's submission dated May 21, 2015, at para 3.

[para 51] The sharing of the information outside the relationship between ACPS and CPS also has implications for the third element in the test for solicitor-client privilege set out by the Supreme Court of Canada in *Canada v. Solosky*: that the information be intended by the parties to be confidential.

[para 52] That is, quite apart from the waiver/common interest issue, another way of addressing the issue of whether the information (assuming it to be legal advice) was subject to solicitor-client privilege to begin with, is to ask whether information provided by the ACPS to the CPS, but provided at the same time to the CPA, could be said to have been intended by the ACPS and the CPS to be confidential.

[para 53] As just explained, I have found there is no common interest in the matter between the CPS and the CPA such that the privilege could be maintained despite the sharing of the information with the CPA. Thus, the information in the June 29, 2012 letter having been simultaneously shared with the CPA (as indicated to the CPS in the 'cc' line), could not be said to either have been provided to the CPS as client, or received by it as such, *in confidence*.

[para 54] Similar reasoning applies to the memoranda provided to the Chief Prosecutor by the Assistant Chiefs. The Chief provided these documents, in their original form, to the CPA, and it seems likely that in obtaining these memos he intended to do with them what he did do with them – share them with the CPS in explaining the decision the ACPS had made and why it was standing by that decision. This strongly detracts from the idea that the memos were provided to the Chief Prosecutor and received by him with an expectation they would not be shared outside that relationship. On this account it is reasonable to conclude the memoranda do not meet the third (confidentiality) part of the *Solosky* test. (In any event, even if these memoranda were provided in confidence, the privilege in them was lost when they were provided to the CPA.)

"Without prejudice" privilege

[para 55] I turn to the contention, made by the Affected Party the CPA in its letter to this office of December 9, 2014, that even though the CPA was not a client of the ACPS, it regarded the communications it received from the ACPS as subject to privilege on the basis that they were provided on a "without prejudice" basis.

[para 56] In this regard, I asked the CPA to provide further information to support this position, in the following terms:

> "Without prejudice" privilege usually refers to settlement negotiation privilege, which applies to communications made in order to try to settle a litigious dispute in a legal proceeding. In this regard, I would ask the CPA to advise if there was any legal dispute or anticipated legal proceeding relating to the subject of the information, to which the CPA and the ACPS were both parties, for which the communications in question could be regarded as efforts at settlement.

[para 57] The CPA did not reply to my question, nor did the Public Body make any comments about it.

[para 58] On this account, I cannot conclude that the communication from the ACPS to the CPA constitute information subject to settlement negotiation privilege. The fact the communication contained a clause to the effect the contents were not to be copied or disclosed to anyone without the consent of the Chief Crown Prosecutor provides some indication that it was provided to the CPA in confidence, but does not make it subject to legal privilege.

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

[para 59] These provisions, which the Public Body also relied upon, are as follow:

> *27(1) The head of a public body may refuse to disclose to an applicant …*
>
> > *(b) information prepared by or for*
> > *(i) the Minister of Justice and 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 60] I note with respect to each of these provisions that they apply to information that is either prepared by, or is in correspondence involving, one of the listed people, that is *in relation to a matter involving the provision of legal services, or of advice or other services*.

[para 61] The Public Body says it also applied sections 27(1)(b) and 27(1)(c) "to the records at issue" (although in the index it supplied in its initial submission it indicated it did not apply section 27(1)(b) to sixteen of the records). More particularly, it says in its initial submission (at para 25) that:

> The records withheld under subsection 27(1)(b) were prepared by lawyers of the Minister of Justice and Solicitor General in relation to matters involving the provision of legal services.

In its January 6, 2015 submission (at para 14), it adds to this explanation by saying that this provision was applied because the records "were prepared 'by or for' a lawyer of the Minister of Justice and Attorney General, in connection with the provision of a legal service, *i.e. the advice given by the Crown to the CPS as to the suitability of the Applicant as a witness in legal proceedings*".

[para 62] As to section 27(1)(c), in its initial submission (at para 26) the Public Body says that it relied on this provision:

> … to withhold information in correspondence between lawyers of the Minister of Justice and Solicitor General and other persons (i.e. CPS and CPA) in relation to matters involving the provision of advice and other legal services by the Public Body's Crown Prosecution. Correspondence includes letters, memorandums and emails where legal services are being provided, whether internally or externally.

[para 63] For the same reasons that I found above that these communications sent to the CPS and CPA by the Chief Crown Prosecutor do not consist of legal advice, I find that these letters do not consist of the provision of a legal service, or of advice or other services, by the ACPS to the CPS. In my view, "advice" in the context of section 27, whether legal or otherwise, is information that provides counsel or guidance, in the sense of giving options, recommendations and reasons as to what it is best to do.

[para 64] I cannot see that it can be characterized as either advice (legal or otherwise) or as a service (again legal or otherwise) for the ACPS to convey to the CPS a conclusion it has reached about one of CPS' employees relating to that person's suitability for some of the purposes for which he was employed. Though the CPS was thereby advised of a fact (a decision), and of the reasons for it, this communication did not advise, nor did it provide any other type of legal service. I say this whether or not the CPS may have taken some action based on what was communicated. Any action that followed would not have been pursuant to what is properly characterized as advice; it would have been to accommodate or otherwise deal with the ACPS' decision.

[para 65] Therefore, the information in the records at issue, whether created by or on behalf of the lawyer of the Minister of Justice and Solicitor General, or contained in correspondence with such a lawyer, was not information relating to a matter involving the provision of a legal service (or of advice or other service), and neither section 27(1)(b) nor section 27(1)(c) were properly applied. [4]

[4] Since in this part of its arguments the Public Body pointed only to records either made by or on behalf of a Public Body lawyer, or communications directly with such a lawyer, it appears it was supporting its application of these additional subsections only for records that *actually consisted of* the provision of what it characterizes as legal advice (this advice constituting the "legal service" referred to in sections 27(1)(b) and (c)). The Public Body did not provide a justification for applying these additional subsections to information *related to* those two letters, such as the CPS' letter of September 19, 2011 to the ACPS, or any subsequent communications discussing the letters. However, the same reasoning would also apply to such other information – that is, it is not information relating to a matter involving the provision *of a legal service*, or involving the provision of advice or some other service.

[para 66] Furthermore, sections 27(1)(b) and (c) are discretionary provisions. (Section 27(1)(a) is also discretionary, but many earlier decisions of this office have said appropriate discretion may be assumed for records subject to solicitor client privilege.) As to sections 27(1)(b) and (c), the Public Body must explain how it thought that withholding the records in reliance on these provisions would meet the purposes of these two provisions.

[para 67] The reason the Public Body gave in its initial submission (at para 25) for deciding to apply section 27(1)(b) to the records was, as stated above, that

> The records withheld under subsection 27(1)(b) were prepared by lawyers of the Minister of Justice and Solicitor General in relation to matters involving the provision of legal services.

In its January 6, 2015 submission (at para 14), it adds to this explanation by saying that this provision was applied because the records "were prepared 'by or for' a lawyer of the Minister of Justice and Attorney General, in connection with the provision of a legal service, *i.e. the advice given by the Crown to the CPS as to the suitability of the Applicant as a witness in legal proceedings*".

[para 68] As to section 27(1)(c), in its initial submission its explanation says no more than that it thinks the provision covers the information in question. It says it relied on this provision

> … to withhold information in correspondence between lawyers of the Minister of Justice and Solicitor General and other persons (i.e. CPS and CPA) in relation to matters involving the provision of advice and other legal services by the Public Body's Crown Prosecution. Correspondence includes letters, memorandums and emails where legal services are being provided, whether internally or externally.

These assertions are to the effect the provisions cover the information in question, but they reveal nothing about the Public Body's exercise of discretion.

[para 69] The only other part of the submissions that might be taken as explaining the application of these two provisions is in the Public Body's discussion of its exercise of discretion in its initial submission, where, after mentioning all three subsections, it says (at para 32): "… the Public Body maintains that disclosing the records at issue would reveal privileged information pursuant to section 27(1) of the FOIP Act".

[para 70] In my view, this justification for withholding the records might be adequate to explain its application of section 27(1)(a) to the records, but it does not explain its application of sections 27(1)(b) or (c). In my view, these latter provisions are different from section 27(1)(a), and must necessarily have different purposes. The Public Body has not suggested what those other purposes are, nor why it was necessary to withhold the records to meet these purposes, in addition to withholding the information under section 27(1)(a). (One relevant factor would be that the Applicant is already in possession of

some of the information.) Therefore, I cannot find it properly exercised its discretion under these provisions.

[para 71] Had I found the additional subsections applied to the information in the records to which the Public Body applied them, I would have ordered it to reconsider its exercise of discretion, and, having found that solicitor-client privilege does not apply to them, to also provide the records to me for my review. However, as I have found these subsections do not cover the information, I will not ask the Public Body to do these things.

[para 72] I will also take this opportunity to comment on a Public Body's application of all three of the provisions of section 27 to the same records.

[para 73] In my view, where the "legal services" or the "advice or other services" that are being provided by a public body's lawyer consist of legal advice, sections 27(1)(b) and 27(1)(c) are not intended to apply to the legal advice itself, nor to the communications made for the purposes of giving it, or the communications subsequently discussing it. Rather, these provisions are meant to cover other kinds of information, having some relationship to that advice, that needs to be freely prepared or exchanged.

[para 74] In other words, the parts of records that seek, provide or discuss legal advice, and thereby reveal it, themselves *constitute* the legal advice/service; they cannot sensibly be said to be 'information *in relation to* a matter involving the provision of legal services (or advice or other services)' within the terms of the latter two provisions. To say, for example, that legal advice prepared by a lawyer *relates to* a matter involving the provision (as a service) of that legal advice by that lawyer is to say something grammatically and logically incoherent.

[para 75] As well, if the converse were true, if it were the case, for instance, that section 27(1)(b) covered legal advice, or information that reveals legal advice, as one kind of information prepared by a public body or a public body's lawyer in relation to a matter involving the provision of legal services, the protection of solicitor-client privilege for public bodies under section 27(1)(a) would be largely redundant.

[para 76] Finally, I turn specifically under the heading of sections 27(1)(b) and (c) to the memoranda from the assistant Chiefs to the Chief Crown Prosecutor. These documents may have consisted of legal advice to the Chief. If it were proper to regard the communication from the Chief to the CPS as legal advice, the memoranda would arguably also be properly characterized as falling under section 27(1)(b) or (c), as relating to the matter about which the Chief was giving advice (although it would be equally arguable that once they were passed on to the CPS, they became *part of* the advice and on this account could not, as discussed in the preceding paragraphs, fall under section 27(1)(a) or (b) as merely *relating to* the matter.) However, as I have found that the Chief Prosecutor's letters to the CPS were not legal or other advice or a legal service but were the communication of a decision, these provisions could not be said to apply to the

memoranda in any event, since the "matter" did not involve the provision of a legal service to the CPS.

V. ORDER

[para 77] I make this Order under section 72 of the Act.

[para 78] I find the Public Body did not properly withhold the requested records on the basis of solicitor-client privilege, nor on the basis of settlement negotiation privilege, under section 27(1)(a) of the Act. I also find that neither sections 27(1)(b), nor 27(1)(c) were properly applied.

[para 79] I order the Public Body to disclose the records to the Applicant.

[para 80] I order the Public Body to notify me and the Applicant, in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Christina Gauk, Ph.D.
Adjudicator and Director of Adjudication