ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2016-31

July 28, 2016

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number F7317

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Summary: An individual made a request to Alberta Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for access to all records relating to the investigation and prosecution of a complaint she had made against an individual, which ultimately resulted in his pleading guilty to a criminal offence.

The Public Body located 769 pages of responsive records and 11 DVDs, but severed much of the information under sections 4 (records to which the FOIP Act does not apply), 17 (disclosure harmful to personal privacy), 20 (disclosure harmful to law enforcement), 21 (disclosure harmful to intergovernmental relations) and 27 (privileged information) of the Act.

The Applicant requested an inquiry into the Public Body's response. The inquiry was divided into two parts. This Order concludes the first part of the inquiry, which addresses the Public Body's application of section 4(1)(a), its application of sections 17(1), 20(1)(g), 21(1)(b) and 27(1)(c) to three pages of records, as well as its claim of solicitor-client privilege. Part 2 of the inquiry will address the Public Body's application of section 27(1) more broadly, as well as its application of sections 17(1), 20, and 21.

The Adjudicator determined that some of the records at issue were excluded from the scope of the Act under section 4(1)(a).

The Adjudicator found that the Public Body did not meet its burden to show that it had properly claimed solicitor-client privilege over the information in the records at issue. The Adjudicator ordered the Public Body to review the relevant records at issue and respond to the Applicant and the Adjudicator without relying on that privilege.

The Adjudicator also found that section 17(1) applied to most of the information on pages 14, 616 and 645.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 17, 27, 71, 72.

Authorities Cited: AB: Orders 97-002, F2003-005, F2004-030, F2004-015, F2007-007, F2008-028, F2009-009, F2010-031, F2013-20, F2014-16, F2015-22, F2015-31, **Ont:** Orders MO-1663-F, MO-2953-R, PO-3372.

Cases Cited: *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (CanLII), 2003 ABQB **252,** *Canada v. Solosky* [1980] 1 S.C.R. 821, *Canada (National Revenue) v. Newport Pacific Financial Group SA*, 2010 ABQB 568, *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952, *R. v. Ahmad* 2008 CanLII 27470 (ON SC), *R. v. Campbell*, [1999] 1 SCR 565.

Other Sources Cited: Adam M. Dodek, *Solicitor-Client Privilege* (Markham, Ont.: Lexis Nexis, 2014).

I. BACKGROUND

[para 1] On April 2, 2013, an individual made a request to Alberta Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for access to all records relating to the investigation and prosecution of a complaint she had made against an individual, which ultimately resulted in his pleading guilty to a criminal offence.

[para 2] The Public Body located 769 pages of responsive records and 11 DVDs, but severed much of the information under sections 4 (records to which the FOIP Act does not apply), 17 (disclosure harmful to personal privacy), 20 (disclosure harmful to law enforcement), 21 (disclosure harmful to intergovernmental relations) and 27 (privileged information) of the Act.

[para 3] The Applicant requested a review of the Public Body's response. The Commissioner authorized an investigation to settle the matter. This was not successful; the Applicant requested an inquiry.

[para 4] Most of the records to which sections 17(1), 20(1)(g), 21(1)(b) and 27(1)(a), (b) and/or (c) have been applied are records over which the Public Body has claimed solicitor-client privilege; these records have not been provided to this Office for the inquiry. The inquiry has therefore been divided into two parts: Part 1 will address the

exceptions applied to records that were provided to this Office for the inquiry, as well as the Public Body's claim of solicitor-client privilege.

[para 5] If the Public Body's claim of solicitor-client privilege is found not to apply to some or all of the records to which it has been claimed, Part 2 of the inquiry will address the remaining exceptions applied to those records.

II. RECORDS AT ISSUE

[para 6] The records at issue for the first part of this inquiry consist of the records which the Public Body has withheld under section 4(1)(a), which were provided to me for this inquiry, and all of the records over which the Public Body has claimed solicitor-client privilege (under section 27(1)(a)), which have not been provided to me for this inquiry. I will also consider the Public Body's application of sections 17(1), 20(1)(g), 21(1)(b) and 27(1)(c) to three pages of records that have been provided to me.

III. ISSUES

[para 7] The issues as set out in the Notice of Inquiry are as follows:

1. Are records excluded from the application of the Act by section 4(1)(a) (information in court records)?

2. Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to information on pages 727 and 728 of the records?

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

[para 8] In its initial submission, the Public Body stated that it was no longer applying section 17(1) to information on pages 727 and 728; it also stated that these pages had been provided to the Applicant in their entirety.

[para 9] However, the Public Body applied section 17(1) to information over which it has also claimed solicitor-client privilege. I will consider the application of section 17(1) to that information in the second part of this inquiry.

[para 10] During the inquiry, the Public Body also decided that section 4(1)(a) does not apply to pages 14, 616 and 645; instead, it applied sections 17(1), 20(1)(g), 21(1)(b) and 27(1)(c). The Applicant was given an opportunity to respond to the Public Body's new application of exceptions but she did not provide a response. I will consider whether the Public Body properly applied sections 17(1), 20(1)(g), 21(1)(b) and 27(1)(c) to the information in those pages. The issues for this inquiry are now as follows:

1. Are records excluded from the application of the Act by section 4(1)(a) (information in court records)?

2. Did the Public Body properly apply section 27(1)(a) (privileged information) to the records?

3. Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to information on pages 14, 616, and 645 of the records?

4. Does section 20(1)(g) of the Act (disclosure harmful to law enforcement) apply to information on pages 14 and 645 of the records?

5. Does section 21(1)(b) of the Act (disclosure harmful to intergovernmental relations) apply to information on pages 14 and 645 of the records?

6. Does section 27(1)(c) of the Act (privileged information) apply to information on pages 14 and 645 of the records?

IV. DISCUSSION OF ISSUES

1. Are records excluded from the application of the Act by section 4(1)(a) (information in court records)?

[para 11] This section states:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> > *(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*

[para 12] This provision applies to information taken or copied from a court file (Order F2004-030 at para. 20 and F2007-007 at para. 25); it also applies to information copied from a court file to create a new document, such as a court docket (*Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (CanLII), 2003 ABQB 252). However, these orders state that records emanating from the Public Body itself or from some source other than the court file are within the scope of the Act, even though duplicates of the records may also exist in the court file (F2010-031).

[para 13] The Public Body states that this exclusion applies to pages 10, 11, 14, 16, 17, 593, 608-613, 616, 620, 626-638, 642, 645, 647, 648, 683-715, 743-747, and 753-757, in their entirety.

[para 14] The Public Body states that pages 10, 11, 14, 16, 17, 642, 645, 647, 648, 689-714 and 753-756 consist of "court information sheets, warrants, court orders and Affidavits regarding the accused. The Crown file also includes the transcript of the court proceeding." (Initial submission, at para. 12)

[para 15] Pages 14 and 645 (which are copies of the same record) consist of a form that has been half-filled by a police officer. It does not contain a court stamp, a signature of a judge, master, or justice of the peace, or any other information or mark that would identify it as having been from a court file. It may be that this form *is* from a court file; however, I could not determine this from the record itself. As this is a determination regarding my jurisdiction over pages 14 and 645, I asked the Public Body for further information on this matter. The Public Body responded on April 14, 2016, stating that it was 'withdrawing' its application of section 4(1)(a) to pages 14 and 645, and was instead applying sections 17(1), 20(1)(g), 21(1)(b) and 27(1)(c) to withhold the information in those pages.

[para 16] The remainder of the pages in this category are clearly records from a court file. Those pages therefore fall outside the scope of the FOIP Act.

[para 17] The Public Body states that pages 593, 608-613, 616, 620, 626-638, 683-688, 715, 743-747, and 757 are printouts from the Justice Online Information Network (JOIN) system. It states that JOIN records are electronic versions of court records.

[para 18] In Order F2010-031 I accepted that "a record created by copying a court docket into the JOIN database, essentially creating a digital copy that can be printed out, falls within the scope of section 4(1)(a) of the Act" (at para. 14).

[para 19] Page 616 consists of a letter that clearly relates to a court administration matter. However, this letter has handwritten notes on it; if these handwritten notes do not appear on the letter that was actually sent to the intended recipient (or otherwise part of the court file), then it is a new record. The Public Body has indicated that these records were from the Crown file, which may contain copies of records from court files; however, where someone has made notes on a copy of a record from a court file, that person has created a new record, that is not a copy of a record from a court file. I asked the Public Body to confirm whether page 616 is a copy of the records on the court file and not a copy that now contains additional information. The Public Body responded on April 14, 2016, stating that it was 'withdrawing' its application of section 4(1)(a) to page 616 and was instead applying section 17(1) to withhold the information on that page.

[para 20] I agree that the remaining pages in this category fall within the scope of section 4(1)(a).

[para 21] The fact that section 4(1)(a) applies to these records described above does not mean that the Public Body cannot disclose them to the Applicant; in means only that the FOIP Act does not govern how the Public Body is to deal with the records. It also means

that I do not have jurisdiction to review the Public Body's response with respect to those pages.

[para 22] I will consider below whether the Public Body has properly applied sections 17(1), 20, 21 and 27 to pages 14, 616 and 645.

2. **Did the Public Body properly apply section 27(1)(a) of the Act (legal privilege) to information in the records?**

[para 23] The Public Body applied section 27(1)(a) (solicitor-client privilege) to information on pages 1-9, 12, 13, 15, 18-227, 231-392, 395-453, 455-592, 594-607, 614, 615, 617-625, 639-641, 643, 644, 646, 649-682, 716-726, 740-742, 748-752, 758-769, and all 11 DVDs.

[para 24] In its additional submission (dated August 20, 2015), the Public Body stated that in again reviewing the records at issue, it determined that it should have applied section 27(1)(a) to the information in pages 15 and 646; it had already applied section 27(1)(b) and (c) to those pages. The Public Body stated in its rebuttal submission that since it ought to have applied section 27(1)(a), it would not be providing me with a copy of those pages. It is not clear to me why the Public Body did not provide me with a copy of those pages at the beginning of this inquiry (along with the copy of the records that were withheld under sections 4 and 17, and those that were disclosed to the Applicant), since it was not applying section 27(1)(a) (or presumably claiming solicitor-client privilege) at that time. In any event, as with the other records over which privilege has been claimed, I do not have copies to review.

[para 25] Section 27(1) states the following:

> *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 Attorney General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Attorney General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services, or*
>
> *(c) information in correspondence between*
>
> *(i) the Minister of Justice and Attorney General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Attorney General, or*
>
> *(iii) an agent or lawyer of a public body,*

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

Application of section 27(1)(a)

[para 26] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky* [1980] 1 S.C.R. 821. The Court said:

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

The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 27] In its initial submission, the Public Body states:

> A typical Crown Prosecution file is composed largely of material sent to the Crown by the police or other investigative agencies. Taken as a whole, the material is intended to demonstrate: (1) an offence has occurred; (2) the perpetrator (accused) is identified; and (3) there is sufficient evidence to justify a prosecution. Thus the material contains items such as statements from witnesses, victims and suspects; photographic or other scientific evidence; documentary evidence; and the notes and observations of the police investigators. By its nature, much of this material is very sensitive, containing private and personal details about people who have committed, witnessed or been victimized by a crime. (At para. 26)
>
> …
>
> After the crown file is received from the police it will grow, as a prosecutor works on it in preparation for trial. Typically, the file will eventually include correspondence (in various forms) between the prosecutor and his staff; with other prosecutors (e.g. seeking opinions/advice); with defence counsel; with witnesses and with the court. These records are almost always sensitive; they are likely to contain views about legal or other elements of the case. They may contain notes and legal research and the thoughts about the case and its possible outcomes. The sensitivity of this material means that it will rarely be shared. (At para. 31)

[para 28] The Public Body also provided arguments regarding its application of section 27(1)(b) and (c) (although these exceptions are not at issue in this part of the inquiry as the Public Body has not provided the relevant records to me pursuant to its concurrent claim of solicitor-client privilege). With respect to section 27(1)(c), the Public Body stated the information withheld under that provision "consisted of information in correspondence between the Crown Prosecutor and other persons (i.e. RCMP) in relation

to matters involving the prosecution case by the Public Body's Crown Prosecution Services. Correspondence includes letters, memorandums, emails, videos and other documents where legal services are being provided, whether internally or externally." (Initial submission, at para. 35).

[para 29] The Public Body's initial submission revealed that not all of the records withheld from me for this inquiry are likely to be subject to solicitor-client privilege (as some of them might consist of communications between a Prosecutor and defence counsel, or between a Prosecutor and the court). I said as much in a letter to the parties dated July 30, 2015; I also said:

> For example, the Public Body states:
>
> > A typical Crown Prosecution file is composed largely of material sent to the Crown by the police or other investigative agencies. (At para. 26)
> > …
> > After the crown file is received from the police it will grow, as a prosecutor works on it in preparation for trial. Typically, the file will eventually include correspondence (in various forms) between the prosecutor and his staff; with other prosecutors (e.g. seeking opinions/advice); with defence counsel; with witnesses and with the court. (At para. 31)
>
> Communications between a prosecutor and defence counsel are not subject to privilege, nor are the prosecutor's communications with the court likely to be privileged. Assuming the Crown prosecution file comprises the records not provided to me, and that it is a "typical" file in the sense used in the quotation above, it appears likely the records the Public Body has withheld from me are not all subject to solicitor-client privilege.
>
> A similar suggestion is contained in the Public Body's submission that sections 27(1)(b) and (c) apply to these records. In the affidavit provided by the Public Body, the affiant states of the records:
>
> > …it is my opinion that they are all properly the subject of a claim of privilege under one or more of paragraphs (a), (b) or (c) of S. 27(1) of FOIP. (At para. 6 of the affidavit at Tab 5 of the Public Body's initial submission)
>
> In withholding the records from me, the Public Body may be relying on the recent Court of Appeal decision, *University of Calgary v. JR*, 2015 ABCA 118, in which the Court concluded that section 56(3) of the FOIP Act does not authorize the Commissioner to compel records to which solicitor-client privilege applies.
>
> However, this decision is limited to a *subset* of records to which section 27(1)(a) may apply - specifically, records protected by solicitor-client privilege. This decision *does not speak to my ability to compel* records to which the Public Body has applied section 27(1)(b) or (c), or for which a legal privilege *other than* solicitor-client privilege has been claimed under section 27(1)(a).

> Therefore, I require the Public Body to provide me with a copy of the records (or parts of the records) over which it is *not* claiming solicitor-client privilege (including records over which it is claiming another legal privilege under section 27(1)(a)).
>
> If those records allow me to also review the Public Body's application of sections 27(1)(b) and (c), as well as sections 20 and 21, I will amend the Notice of Inquiry to add these issues.

[para 30] In its additional submission (dated August 20, 2015) responding to my letter, the Public Body stated that it was no longer relying on section 27(1) to withhold the information in pages 736-739; these pages were provided to the Applicant and to me, in their entirety. These pages consist of a letter written by the Applicant's counsel to the Chief Crown Prosecutor, expressing the Applicant's concerns about the prosecution undertaken by the Crown. It seems clear that this is a record over which solicitor-client privilege could not have been claimed. I have concerns about why it took the Public Body until the rebuttal submission stage of an inquiry to decide to provide the Applicant with a copy of correspondence sent to the Chief Crown Prosecutor by her own counsel, who was clearly representing her at the time.

[para 31] The Public Body also provided me with a new affidavit sworn by a solicitor in the Crown Prosecution's office. This affidavit again stated that all of the records over which privilege has been claimed "are all properly the subject of a claim of privilege under one or more of paragraphs (a), (b) or (c) of S. 27(1) of FOIP." (Additional submission, Tab 2, at para. 6)

[para 32] By letter dated September 2, 2015, I again informed the Public Body that it had not provided me with sufficient evidence for me to find that it properly claimed solicitor-client privilege over all of the relevant records. I said:

> The Public Body's submission also included a new affidavit, sworn by a lawyer employed by the Public Body. In that affidavit, the affiant swears that the relevant records "are all properly the subject of a claim of privilege under one or more of paragraphs (a), (b), or (c) of S. 27 of FOIP." As I pointed out in my letter of July 30, 2015, section 27(1)(b) and (c) are not exceptions for withholding privileged information. To say that one or more of sections 27(1)(a), (b) or (c) apply to information is not the same as saying that solicitor-client privilege applies to that information.
>
> Following the Court of Appeal's decision in *University of Calgary v. JR*, 2015 ABCA 118, I cannot rely on section 56(3) of the FOIP Act to compel records to which solicitor-client privilege applies. However, section 72(1) of the FOIP Act requires me to dispose of the issues at inquiry; in other words, I am still tasked with making a determination regarding the Public Body's application of section 27(1)(a) to the records at issue. Further, section 71(1) places the burden of proof on the Public Body to show that it properly applied that exception to the information in the records. The arguments and evidence provided to me by the Public Body so far in this inquiry are not sufficient for me to make an informed determination regarding the Public Body's claim of solicitor-client privilege under section 27(1)(a).

> In order for me to make my determination, I require the Public Body to tell me how *each* page of the records over which the Public Body is claiming solicitor-client privilege meets the test for that privilege, including (but not limited to) information regarding the solicitor-client relationship.

[para 33] The Public Body responded to this letter in its supplementary submission, dated October 7, 2015. In that submission, the Public Body stated that I made an error of law in requesting a page by page analysis of the records over which solicitor-client privilege had been claimed. It stated that this test is more stringent "than is required by the courts", and that a page by page analysis might reveal the content of the records themselves.

[para 34] Although the Public Body did not provide me with any authority for its position, I note that the Supreme Court in *Solosky* stated "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." The Public Body must satisfy me that each *record* meets the test for solicitor-client privilege. The intent of my letter was to solicit a record-by-record analysis, with an accounting of each page of the records at issue (in other words, satisfy me that every page has been encompassed by the explanations). It was clear from my letter that the Public Body had not yet met its statutory burden to satisfy me that solicitor-client privilege had been properly claimed over each record. Regardless of whether I ought to have requested a record-by-record analysis (as opposed to a page-by-page analysis), the Public Body could have provided me with a record-by-record analysis, which would have satisfied its burden.

[para 35] In its supplementary submission, the Public Body states:

> [t]he affidavits of [Public Body employee] (July 23, 2015) and [Public Body employee] (August 25, 2015) provide general descriptions and page numbers of the records for which the public body claims solicitor-client privilege. From the descriptions, it is evident that the records are documents exchanged and arising in the course of communications between "a solicitor and a client". Here, the relationship is between Crown Prosecutors and members of a Police Agency.

[para 36] I disagree from the Public Body's submissions that it is 'evident' from the Public Body's descriptions that the records at issue are subject to solicitor-client privilege. The following are the Public Body's descriptions for the records at issue over which solicitor-client has been claimed as provided with the affidavit in the additional submission dated August 20, 2015 (I have added an approximation of the number of records each description relates to):

- Documents provided to the Crown relating to the seeking or receiving of legal advice, *or the provision of legal services* (600 pages);
- Email correspondence to or from the Crown Prosecutor relating to the seeking or receiving of legal advice, *or the provision of legal services* (12 pages);

- Correspondence from Crown Prosecutor to Police Agency relating to the seeking or receiving of legal advice, *or the provision of legal services* (3 pages);
- Written notes from Crown Prosecutor relating to the seeking or receiving of legal advice, *or the provision of legal services* (4 pages);
- Internal email correspondence to Crown Prosecutor relating to the seeking or receiving of legal advice, *or the provision of legal services* (1 page);
- Internal memo correspondence to Crown Prosecutor relating to the seeking or receiving of legal advice, *or the provision of legal services* (5 pages);
- Photos provided to the Crown relating to the seeking or receiving of legal advice, *or the provision of legal services* (12 pages);
- Correspondence *from Defence Counsel to Crown Prosecutor* relating to the seeking or receiving of legal advice, *or the provision of legal services* (4 pages);
- Documents from the Crown relating to the seeking or receiving of legal advice, *or the provision of legal services* (14 pages);
- Correspondence from Crown Prosecutor to Third Party relating to the seeking or receiving of legal advice, *or the provision of legal services* (1 page);
- Correspondence *from Crown Prosecutor to Defence Counsel* relating to the seeking or receiving of legal advice, *or the provision of legal services* (9 pages); and
- DVDs provided to the Crown relating to the seeking or receiving of legal advice, *or the provision of legal services* (11 DVDs).

(emphasis mine)

[para 37] In its supplementary submission, the Public Body also referred back to paragraph 26 of its initial submission for an explanation of the type of information that moves from the police agency to the Crown Prosecutor "for the purpose of obtaining legal advice regarding the prosecution case at issue." This paragraph states:

> A typical Crown Prosecution file is composed largely of material sent to the Crown by the police or other investigative agencies. Taken as a whole, the material is intended to demonstrate: (1) an offence has occurred; (2) the perpetrator (accused) is identified; and (3) there is sufficient evidence to justify a prosecution. Thus the material contains items such as statements from witnesses, victims and suspects; photographic or other scientific evidence; documentary evidence; and the notes and observations of the police investigators. By its nature, much of this material is very sensitive, containing private and personal details about people who have committed, witnessed or been victimized by a crime.

[para 38] Past Orders of this Office have noted that solicitor-client privilege can encompass more than the question asked and answered by counsel; it can also encompass communications relating to that question and answer. Orders F2003-005, F2009-009 and F2013-20 stated:

> Privilege also attaches to information passing between a lawyer and his or her client that is provided for the purpose of giving the advice, as part of the continuum of solicitor-client communications. (At paras. 39, 119, and 70, respectively)

[para 39] More recently, in Order F2015-22, the adjudicator noted that

> [t]he [Solosky] test is not a narrow one. In *Blood Tribe v. Canada (Attorney General),* 2010 ABCA 112 (CanLII), 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.
>
> 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. (At para. 75-76)

[para 40] I agree with the above analyses. However, in my view, the descriptions provided by the Public Body, and cited above, do not clearly meet the test in *Solosky* for solicitor-client privileged information. In each description, the Public Body has described the information as relating to the seeking/receiving of legal advice *or the provision of legal services*. The latter phrase is too general to satisfy the *Solosky* test; it appears to be better encompassed by sections 27(1)(b) or (c), which is consistent with the Public Body's affidavits. As noted above, both affidavits state that the records at issue are "properly the subject of a claim of privilege under *one or more of* paragraphs (a), *(b) or (c)* of S. 27(1) of FOIP." (At para. 6 of each affidavit, emphasis mine) As I stated in correspondence with the parties, saying that sections 27(1)(b) or (c) apply to information is not sufficient to meet the *Solosky* test, as (b) and (c) cover information other than the

privilege. If any information relating to a legal service was encompassed by solicitor-client privilege, there would be no need for sections 27(1)(b) or (c) in the FOIP Act at all. Sections 27(1)(b) and (c) are cited above. In Order F2015-31, the Director of Adjudication discussed the scope of these provisions. She said (at paras. 72-75):

> 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.
>
> 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.
>
> 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.
>
> 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 41] It is also patently not the case that communications between a Crown Prosecutor and defence counsel, which accounts for approximately 13 pages of records, can be communications between a solicitor and client. One further page is described as correspondence from the Crown Prosecutor to a third party; I do not know who this third party is or how the third party relates to the solicitor-client relationship.

[para 42] The Public Body referred back to paragraph 31 of its initial submission for an explanation of the type of information "created as lawyer work product by Crown Prosecutors in the course of providing confidential legal advice to the Police Agency regarding the prosecution case at issue." That paragraph states (also cited above):

> After the crown file is received from the police it will grow, as a prosecutor works on it in preparation for trial. Typically, the file will eventually include correspondence (in various forms) between the prosecutor and his staff; with other prosecutors (e.g. seeking opinions/advice); with defence counsel; with witnesses and with the court. These records are almost always sensitive; they are likely to contain views about legal or other elements of the case. They may contain notes and legal research, and thoughts about the case and its possible outcomes. The sensitivity of this material means that it will rarely be shared.

[para 43] It seems highly likely that the records at issue will contain work product information as described above. (I note that the Public Body also applied section 20(1)(g)

to some information, which is an exception for information used in the exercise of prosecutorial discretion. The application of that exception will be considered in Part 2 of this inquiry.) However, for that information to fall within solicitor-client privilege, it still must meet the *Solosky* test. This is also consistent with a quote from *Canada (National Revenue) v. Newport Pacific Financial Group SA*, 2010 ABQB 568, cited by the Public Body: "Solicitor client privilege must be a communication between a lawyer and his or her client, or part of the lawyer's work product *in the giving of legal advice*" (my emphasis).

[para 44] At paragraph 4.4 of its supplementary submission, the Public Body clarified that the records described as "internal email" and "internal memo" are records of work performed by solicitors "in the course of providing advice to the client." This accounts for approximately 6 pages of the records at issue. I agree that this clarification is sufficient to meet the *Solosky* test, provided the Public Body is able to satisfy me that there is a relationship between a solicitor and a client. The only 'client' the Public Body has specifically referred to is a police agency; however, in its supplementary submission (dated October 7, 2015), the Public Body states:

> The relationship of Crown lawyers to their own departments or agencies, or to agencies with whom they work, resembles the relationship of in-house counsel to employer client more closely than the classically understood, traditional notion of a "solicitor-client" relationship. However, courts have recognized that the foundational principles which underlie the classification of solicitor-client privilege can and should apply equally to the communications and interactions between government lawyers and their "client" agencies (e.g. police agencies).
>
> The public body refers to *R. v. Ahmad* 2008 CanLII 27470 (ON SC), which builds upon *R. v. Campbell and Shirose*, [1999] 1 SCR 56. Both cases address solicitor-client privilege between a law enforcement agency and prosecutors employed by a justice department.
>
> 7.3 The court in *Ahmad* stated:
>
> > [77] In R. v. Campbell and Shirose, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, 133 C.C.C. (3d) 257 the court dealt with the existence of solicitor-client privilege within the prosecution side of a criminal case – specifically, between members of the RCMP and a Department of Justice lawyer. At para. 49 the court reiterated that the privilege is based on the functional needs of the justice system, which calls for professional expertise, and stated, "Access to justice is compromised where legal advice is unavailable." At para. 50 the court observed that the fact a lawyer was employed as a salaried employee of government made no difference to whether privilege applied. As long as the advice was legal advice and confidential, the privilege would attach.
> >
> > [78] The importance of legal advice and of solicitor-client privilege in the context of government was spoken of by Brennan J. in Waterford v. Australia (1987), 163 C.L.R. 54 (H.C.) at pp. 74-75:

> *... I should think that the public interest is truly served by according legal professional privilege to communications brought into existence by a government department for the purpose of seeking or giving legal advice as to the nature, extent and the manner in which the powers, functions and duties of government officers are required to be exercised or performed. If the repository of the power does not know the nature or extent of the power or if he does not appreciate the legal restraints on the manner in which he is required to exercise it, there is a significant risk that a purported exercise of the power will miscarry. The same may be said of the performance of functions and duties. The public interest in minimizing the risk by encouraging resort to legal advice is greater, perhaps, than the public interest in minimizing the risk that individuals may act without proper appreciation of their legal rights and obligations. In the case of governments no less than in the case of individuals, legal professional privilege tends to enhance the application of the law, and the public has a substantial interest in the maintenance of the rule of law over public administration. Provided the sole purpose for which the document is brought into existence is the seeking or giving of legal advice as to the performance of a statutory power or the performance of a statutory function or duty, there is no reason why it should not be the subject of legal professional privilege.*
>
> [79] It would seem to follow from such comments that the Attorney General, or Deputy Attorney General, when making important decisions within the scope of that high office, would quite naturally be entitled to receive professional legal advice about the decision he or she is charged with making. (At paras. 7.2 – 7.3, emphasis in original)

[para 45] It is not clear to me how the above-cited passage from *Ahmad* is relevant to the case at hand as the Public Body has not previously indicated that any of the records at issue contain advice provided to the Attorney General or Deputy Attorney General. Advice to those positions would require a different analysis than advice provided to a police agency.

[para 46] It may be the case that the Public Body believes that it – Alberta Justice and Solicitor General (the department) and/or the Attorney General – is the client of the Crown Prosecutor.

[para 47] I would not reject the possibility that a Crown Prosecutor can provide legal advice to the Attorney General or Deputy Attorney General, in some circumstances. However, that is different from the idea that the Crown Prosecutor's client is the Attorney General or Deputy Attorney General (or the department) when fulfilling his or her prosecutorial job duties. If this is the Public Body's position, it has not clearly stated as much, nor has it provided any support for such a notion. I also have not found any support for such a notion in case law.

[para 48] I note that in *Solicitor-Client Privilege,* Adam Dodek argues that solicitor-client privilege should protect working papers of a lawyer, but "a strict application of the Wigmore test is often applied to solicitors' notes or working papers resulting in the conclusion that they do not constitute communications between the solicitor and client

and therefore are not protected by the privilege" (at page 143). Even if the privilege ought to, or in some cases *does* encompass a lawyer's working papers (i.e. if those working papers constitute a 'continuum of communications'), the Public Body still needs to explain who or what the client is in this case, in order to claim solicitor-client privilege over the records.

[para 49] Further, the work product of a Crown Prosecutor is addressed elsewhere in the FOIP Act, specifically in section 20(1)(g), which applies to information that may reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion.

[para 50] Returning to the Public Body's arguments that a police agency is the client, the question of whether the relationship between the Crown Prosecutor and "police agency" is properly characterized as a solicitor-client relationship has not been sufficiently addressed by the Public Body. It is relevant to each record over which solicitor-client privilege has been claimed.

[para 51] In *R. v. Campbell*, [1999] 1 SCR 565 (*Campbell*), the Supreme Court of Canada found that communications between a Crown Prosecutor and a member of the RCMP could be subject to solicitor-client privilege in certain circumstances. In finding that solicitor-client privilege applied to communications between an RCMP member and a Crown Prosecutor, the Court said:

> The solicitor-client privilege is based on the functional needs of the administration of justice. The legal system, complicated as it is, calls for professional expertise. Access to justice is compromised where legal advice is unavailable. It is of great importance, therefore, that the RCMP be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings.

[para 52] In Order MO-1663-F, an adjudicator with the Office of the Ontario Information and Privacy Commissioner rejected the argument that *Campbell* stands for the proposition that a Crown Prosecutors' office acts as "in-house counsel" for municipal police services. She said:

> The Court [in *Campbell*] found that the consultation by an officer of the Royal Canadian Mounted Police (the RCMP) with a Department of Justice lawyer over the legality of a proposed "reverse sting" operation by the RCMP fell squarely within the functional definition. The Court emphasized that it is not everything done by a government (or other) lawyer that attracts solicitor-client privilege, providing some examples of different responsibilities that may be undertaken by government lawyers in the course of their work. The Court stated that
>
> > [w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

R. v. Campbell has been applied in orders of this office, such as in PO-1779, PO-1931 and MO-1241. In each of these orders, a solicitor-client privilege was found on the basis that the police (a municipal police service or the Ontario Provincial Police) sought legal advice from Crown counsel. All communications within the framework of this relationship were found to qualify for solicitor-client privilege under either section 12 of the Act, or section 19 of the provincial Act. In addition, in Order PO-1779, in relation to the OPP, Assistant Commissioner Tom Mitchinson analysed the relationship between the OPP and the Crown as follows:

> However, there is one further aspect to consider before concluding that solicitor-client communications privilege is established. In Order P-613, section 19 was not applied on the basis that there is no solicitor-client relationship between Crown counsel and the OPP. However, in my view, this interpretation is no longer supportable as a result of the recent Supreme Court of Canada decision in *R. v. Campbell*, [1999] 1 S.C.R. 565. In that case, the Court concluded that a solicitor-client relationship did exist between counsel with the federal Department of Justice and the R.C.M.P. The decision sees the R.C.M.P. as a "client department" of the Department of Justice and, therefore, it is difficult to see how the same conclusion could not apply vis à vis the Ministry of the Attorney General and the OPP. In my view, a solicitor-client relationship exists between the OPP and Crown counsel.

This analysis has been followed in subsequent orders applying the solicitor client privilege under the provincial Act to communications between the OPP and Crown counsel.

The circumstances described in Order PO-1779 do not apply to the relationship between a municipal police force and Crown counsel. Even the Police in this case do not assert that they can be viewed as a "client department" of Crown counsel. Therefore, whether a solicitor-client relationship can be established in a particular instance depends on the application of the functional definition set out in *Descôteaux v. Mierzwinski* and approved in *R. v. Campbell*, above. In MO-1241, former Adjudicator Holly Big Canoe specifically found that the Police sought legal advice from the assistant crown attorney. Other than MO-1241, I am not aware of any orders of this office which have applied *R. v. Campbell* to communications between a municipal police force and Crown counsel.

In the appeal before me, I find there is an insufficient basis to conclude that the communications on pages 122 and 123 were in relation to the seeking or giving of legal advice. It would not be surprising for the Police and the Crown to be in communication during any given prosecution, as they were here. However, there is nothing in the specific communications at issue, in the surrounding circumstances, or in the submissions before me, to establish that these communications occurred as part of the seeking of legal advice by the Police from the Crown. I find, accordingly, that the Police have not established that these communications occurred within the framework of a solicitor-client relationship.

[para 53] This analysis was also followed in Ontario Order PO-3372. I agree with the Adjudicator's reasoning in this order. Based on the information before me, I do not see any evidence of a functional need for the Crown Prosecutor and Public Body employees to enter a solicitor-client relationship.

[para 54] It is possible that some of the records for which solicitor-client privilege has been claimed are, in fact, subject to that privilege. However, it seems clear that at least some information (such as communications between the Crown Prosecutor and defence counsel or other third parties) is not. I am keenly aware of the importance of solicitor-client privilege, and the near-absolute protection it affords. However, the Commissioner has delegated to me her obligation under section 72(2) of the Act to make a finding with respect to the Public Body's application of section 27(1)(a), citing solicitor-client privilege. The Public Body's vague arguments regarding the application of this privilege simply do not satisfy its burden; were I to accept the Public Body's arguments as they are now stated, I would be merely accepting the Public Body's own assessment that it has properly claimed the privilege. To do so, rather than making the assessment myself, would amount to abdicating my duty to ensure the criteria for privilege have been met.

[para 55] For all of the foregoing reasons, I cannot find that the Public Body properly claimed solicitor-client privilege over the records at issue. I will therefore order the Public Body to review the records and respond to the Applicant without relying on that claim of privilege. However, for the reasons that follow, I will not order the Public Body to respond without giving it an opportunity to provide arguments regarding other possible grounds for claiming another legal privilege.

Litigation privilege

[para 56] The Public Body has not argued that litigation privilege applies to any of the records at issue; however, decisions from the Ontario Information and Privacy Commissioner's Office contain comments that might ground an argument that litigation privilege applies.

[para 57] In Ontario Reconsideration Order MO-2953-R, the adjudicator considered the application of section 19(b) of the Ontario legislation to "copies of original police investigation records and also copies of assembled packages of the same records that the police forwarded to the Crown for inclusion in the Crown brief."

[para 58] Section 19 of the Ontario legislation states:

> *19. A head may refuse to disclose a record,*
> *(a) that is subject to solicitor-client privilege;*
> *(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or*
> *(c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.*

[para 59] In that Reconsideration Order, the adjudicator cited an Ontario Divisional Court decision that upheld another Ontario Order in which the (then) Assistant Commissioner found that records held by police do not necessarily meet the test for section 19(b). He said:

> The police prepared all of the records at issue for the purpose of investigating the matter involving the appellant, and deciding whether to lay criminal charges against her. This purpose is distinct from Crown counsel's purpose of deciding whether or not to prosecute criminal charges and, if so, using the records to conduct the litigation.
>
> In effect, police investigation records such as officers' notes and witness statements found in a Crown brief are "prepared" twice: first, when the record is first brought into existence, and second when the police, applying their expertise, exercise their discretion and select individual records for inclusion in the Crown brief, and then make copies of those records to deliver to Crown counsel.
>
> The fact that copies of some of the records found their way into the Crown brief does not alter the purpose for which the records were originally prepared and are now held by the Ministry.
>
> There is no question that the *Act* contains provisions that protect the process where the police investigate potential violations of law and decide whether to lay criminal charges. This protection is found primarily in section 14 of the *Act*, the comprehensive "law enforcement" exemption.
> …
>
> Another difficulty with accepting the Ministry's position is that arguably police forces across Ontario would no longer have the discretion to disclose investigative records, out of a perceived obligation to "protect" the Crown's privilege.
>
> Historically, and in general, the police have not relied on the solicitor-client privilege exemption for this type of material (as opposed to the law enforcement and privacy exemptions). Accordingly, the police have used their discretion to disclose records where appropriate. If I were to find that privilege applies here, the result could be that records that the police now routinely disclose would be withheld in the future, fundamentally altering a long-standing disclosure practice of police forces across Ontario [see, for example, Orders M-193, M-564, MO-1759, MO-1791, P-1214, P-1585, PO-2254, PO-2342].

[para 60] In upholding this decision, the Ontario Divisional Court stated in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952:

> The [Ministry] submits that the IPC erred in the interpretation of s. 19(b), having misunderstood the role of the police: they are the investigative arm of the state, with the responsibility for investigating crime and compiling evidence for charges prosecuted by the Attorney General. Once copies of police records arising from an investigation are found in the Crown brief after criminal or quasi-criminal charges are laid, the records are exempt pursuant to s. 19(b). Such records were “prepared” for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.
>
> The respondent IPC submits that s. 19(b) applies only where the requester seeks access to the copies of the records contained in the Crown brief. It does not apply to records remaining in the hands of the police. To exempt those records from disclosure, the police must rely on other provisions of the *Act*, such as s. 14, which specifically deals with law enforcement.

> I agree with the submissions of the IPC. The [Ministry's] interpretation of s.19 of the *Act* is inconsistent with the terms of that provision and fails to take into account other provisions of the *Act* which provide exemptions that directly address the interests of the police in effective law enforcement.
>
> Section 19 has been held to have two branches, Branch 1 being solicitor-client privilege and Branch 2 (now s. 19(b)) being a statutory form of litigation privilege.
>
> The Court of Appeal, in its 2002 decision in *Ontario (Information and Privacy Commission), supra*, held that Branch 2 of s. 19 extends a permanent protection to records comprising Crown counsel's work product contained in the Crown brief. It protects material gathered in preparation for litigation (at paras. 11-13). See also *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) and *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457 (Div. Ct.). By its terms, Branch 2 of s. 19 does not exempt records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief.
>
> The records sought by the two requesters are held in police files, and they were gathered in the course of criminal investigations. The IPC in Order [PO-]2494 properly found that the records were created by police officers for the purpose of criminal investigation. The decision maker correctly understood the different, albeit related roles of the police and Crown prosecutors in the criminal justice system.
>
> ...
>
> In my view, the IPC orders to disclose the disputed records in the possession of the Ministry were correct. The fact that copies of the police records were in the possession of Crown counsel does not exempt the records from disclosure by the Ministry of Community Safety and Correctional Services, even though the same documents in the possession of the Ministry of the Attorney General would likely have been protected by Branch 2 of s. 19. (At paras. 13-18, and 24)

[para 61] In the Reconsideration Order, the adjudicator applied the above reasoning to find that the original records created by the police were not subject to section 19(b), while the records in the Crown's brief, even if copies of the same records, were subject to that exception. He also exercised his discretion to consider whether solicitor-client privilege could apply to any of those records at issue. He found only one record to which it applied: an email from the police's internal legal counsel to a detective relating to legal advice sought or given.

[para 62] While Ontario's Act appears to create a statutory litigation privilege specific to Crown prosecution files, it is possible that common law litigation privilege might apply to some or all of the information at issue in this case. If the Public Body believes that some or all of the information over which it has claimed solicitor-client privilege is protected by another legal privilege, such as litigation privilege, it is open to the Public Body to claim that privilege under section 27(1)(a) in its new response to the Applicant, and to this Office; any new decision (or claim of privilege) will be reviewed in Part 2 of this inquiry.

3. Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to information on pages 14, 616, and 645 of the records?

[para 63] Pages 14 and 645 are copies of the same document. In my letter to the parties dated March 24, 2016, I asked for further information about these pages. I described the records as follows:

> Pages 14 and 645 are included in the list of records described as "court information sheets, warrants, court orders and Affidavits regarding the accused." Pages 14 and 645 both consist of forms that have been partially filled in.

[para 64] In that letter, I described page 616 as follows:

> Page 616 is included in the list of records described as printouts from the JOIN system and electronic versions of court records. The typed content of page 616 clearly relates to a court administration matter. However, the page has handwritten notes on it; if these handwritten notes do not appear on the record that was actually part of the court file, then it is a new record. In other words, where someone has made notes on a copy of a record from a court file, that person has created a new record, that is not a copy of a record from a court file.

[para 65] Section 1(n) defines personal information under the Act:

> *1 In this Act,*
>
> …
>
> *(n) "personal information" means recorded information about an identifiable individual, including*
>
> *(i) the individual's name, home or business address or home or business telephone number,*
>
> *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
>
> *(iii) the individual's age, sex, marital status or family status,*
>
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
>
> *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
>
> *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
>
> *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
>
> *(viii) anyone else's opinions about the individual, and*
>
> *(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 66] The information withheld under section 17 includes the names of third parties, as well as the names of an RCMP officer, a court clerk, and a Crown Prosecutor, the latter names all appearing in the course of performing their duties. The context of the records also reveals general information about the third parties' criminal history. Pages 14 and 645 are comprised of a partially-filled form and page 616 is a letter to a court clerk from a Crown Prosecutor; these pages were withheld in their entirety.

[para 67] Names are personal information under the FOIP Act. However, previous orders from this Office have found that section 17(1) does not apply to personal information that reveals only that the individual was acting in a formal, representative, professional, official, public or employment capacity, unless that information also has a personal dimension (Order F2008-028, para. 54). This principle has been applied to information about employees of public bodies as well as other organizations, agents, sole proprietors, etc. (Order F2008-028). All names of individuals performing their job duties, as described above, are names that cannot be withheld under section 17(1), in the absence of a personal dimension.

[para 68] The header, footer, date, address and 'To' and 'From' line on page 616 are not personal information of an individual and cannot be withheld under section 17(1). The "Re" line and the body of the letter contain personal information of a third party to which section 17(1) may apply, and I will consider whether disclosing that information would be an unreasonable invasion of privacy. In many cases, severing the name and other identifying information about the third party will be sufficient to render the remaining information non-identifying. However, in this case, it is not sufficient to sever only the name of the third party appearing on this page, because the identity of that third party is obvious in the context of the record. The information in this page is sensitive in nature and reveals potential law enforcement actions involving the third party.

[para 69] The information comprising the prescribed form on pages 14 and 645 is generally not personal information about an individual. However, for the same reasons as above, it is not sufficient to sever only the name of the third party. I find that all of the information on pages 14 and 645 is information to which section 17(1) may apply, and will consider whether disclosing that information would be an unreasonable invasion of privacy.

[para 70] Section 17 states in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> …
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> …

(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,

…

(g) the personal information consists of the third party's name when

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party,

…

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

…

(c) the personal information is relevant to a fair determination of the applicant's rights,

…

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

…

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

…

[para 71] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 72] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 73] Neither party has argued that section 17(2) or (3) apply to any of the withheld information, and from the face of the records, neither provision appears to apply.

[para 74] Section 17(4)(b) weighs against disclosure of information that is an identifiable part of a law enforcement record. "Law enforcement" is defined in section 1 of the Act as follows:

1 In this Act,

…

(h) "law enforcement" means

…

(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred,

...

[para 75] The records at issue are part of the Crown file and are identifiable as part of a law enforcement record. Therefore this factor applies to create a presumption of unreasonable invasion with respect to disclosure of these records.

[para 76] Section 17(4)(g) creates a presumption of unreasonable invasion with respect to personal information where the name of a third party appears with other information or in a context that provides other information about the individual. On pages 14 and 645, the name appears in a form, and on page 616 it appears in the context of a court appearance. Therefore, section 17(4)(g) also gives rise to a presumption of unreasonable invasion of privacy.

[para 77] The Applicant did not provide specific arguments regarding the Public Body's application of section 17(1). With her Request for Review she attached a statement dated March 6, 2013 (provided to the Public Body) in which she expressed concerns about the way the Crown handled the prosecution of the individual who was ultimately convicted of assaulting the Applicant. For example, she asserted that the agreed statement facts entered into evidence omitted key facts, which may have led to a lesser sentence than was warranted. This may support the idea that the disclosure of personal information is warranted in order to provide public scrutiny of the Public Body's activities (section 17(5)(a)). I will consider whether section 17(5)(a) weighs in favour of disclosing the name of the third party as it appears in pages 14, 616 and 645.

Section 17(5)(a)

[para 78] In order for the desirability of public scrutiny to be a relevant factor, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information in order to subject the activities of the public body to public scrutiny. (See Order 97-002, at para. 94; Order F2004-015, at para. 88; Order F2014-16, at para. 34.)

[para 79] In Order F2014-16, the Director of Adjudication discussed appropriate factors to consider in determining whether public scrutiny is desirable. She said (at paras. 35-36):

> In determining whether public scrutiny is desirable, I may consider factors such as:
>
> 1. whether more than one person has suggested public scrutiny is necessary;

2. whether the applicant's concerns are about the actions of more than one person within the public body; and

3. whether the public body has not previously disclosed sufficient information or investigated the matter in question.

(Order 97-002, paras 94 and 95; Order F2004-015, para 88).

It is not necessary to meet all three of the foregoing criteria in order to establish there is a need for public scrutiny. (See *University of Alberta v. Pylypiuk* (cited above) at para 49.) For example, in Order F2006-030, former Commissioner Work said (at para 23) that the first of these factor "is less significant where the activity that has been called into question, though arising from a specific event and known only to those immediately involved, is such that it would be of concern to a broader community had its attention been brought to the matter", commenting that "[i]f an allegation of impropriety that has a credible basis were to be made in this case, this reasoning would apply".

[para 80] The Applicant seems to question the handling of a particular prosecution by a Crown Prosecutor. However, the third party personal information appearing on pages 14, 616 and 645 does not appear to be directly relevant to the actions of the Crown Prosecutor; indeed, these particular pages of records do not seem to be relevant to the Applicant's primary reason for making her access request. For this reason, I find that section 17(5)(a) does not weigh in favour of disclosing the personal information on these three pages.

Weighing factors under section 17

[para 81] The Applicant has not provided any other reasons weighing in favour of disclosing the names on pages 14, 616 and 645 to which section 17(1) could be applied. At least two factors weigh against disclosure and I cannot see any factors that weigh in favour. Therefore I find that section 17(1) applies such that the personal information, as described at paragraphs 68 and 69, must be withheld.

4. Does section 20(1)(g) of the Act (disclosure harmful to law enforcement) apply to information on pages 14 and 645 of the records?

5. Does section 21(1)(b) of the Act (disclosure harmful to intergovernmental relations) apply to information on pages 14 and 645 of the records?

6. Does section 27(1)(c) of the Act apply to information on pages 14 and 645 of the records?

[para 82] As I have found that section 17(1) applies to all of the information on pages 14 and 645 such that these pages must be withheld, I do not need to consider the application of sections 20(1)(g), 21(1)(b) or 27(1)(c) to information on those pages. The Public Body did not apply any of these provisions to page 616; therefore, I do not need to consider the application of sections 20(1)(g), 21(1)(b) and 27(1)(c) in the first part of this inquiry. Where the Public Body has also applied those provisions to information in the

records over which solicitor-client privilege has been claimed, I will consider the Public Body's application of those provisions in the second part of this inquiry.

V. ORDER

[para 83] I make this Order under section 72 of the Act.

[para 84] I find that pages 10, 11, 16, 17, 593, 608-613, 620, 626-638, 642, 647, 648, 683-715, 743-747, and 753-757 are excluded from the scope of the Act pursuant to section 4(1)(a) and are outside my jurisdiction.

[para 85] I find that the Public Body did not meet its burden to show that it properly claimed solicitor-client privilege over the information in the remaining records at issue. I order the Public Body to review those records and respond to the Applicant without relying on that privilege. The Public Body is to copy that response to me. I retain jurisdiction to review the Public Body's application of sections 17(1), 20(1) and 27(1) in Part 2 of this inquiry. In order that I may do so, the Public Body is to provide me with a copy of the unredacted records at issue with the redactions highlighted, or otherwise noted, and the relevant section numbers of the Act identified on the records.

[para 86] I find that section 17(1) applies to pages 14 and 645 in their entirety, and the information on page 616 as described in paragraph 68. I uphold the Public Body's decision to withhold that third party information. I order the Public Body to disclose the remaining information on page 616 to the Applicant.

[para 87] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator