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OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2016-35

September 14, 2016

CALGARY POLICE SERVICE

Case File Number F7696

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Summary: On August 2, 2013, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Calgary Police Service (the Public Body). He requested "all records, as defined by s.1(q) of [the FOIP Act] in relation to the processing of my request to the FOI Coordinator of the CPS dated February 20, 2013."

The law firm Bennett Jones responded to the Applicant's access request on behalf of the Public Body on September 20, 2013. It stated that responsive records had been located, but that it had withheld information from them under sections 24(1)(a), 24(b)(i), 27(1)(a), and 27(1)(b)(iii) of the FOIP Act.

At the inquiry, the Public Body indicated that it had applied subsections 24(1)(a) and (b), and subsections 27(1)(a), (b), and (c) to sever information from the records. The Public Body elected not to provide the records for the Adjudicator's review in the inquiry, on the basis that it was asserting solicitor-client privilege over the records.

After submissions were exchanged, the Adjudicator expressed concern regarding the sufficiency of the Public Body's evidence, and asked it to either provide the records or to provide more detailed evidence regarding the information to which it had applied exceptions to disclosure. The Public Body provided an additional affidavit.

The Adjudicator determined that the principles set out in *Pritchard v. Ontario (Human Rights Commission)* [2004] 1 SCR 809 applied in the case. This case states:

> Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered: *Campbell*, *supra*, at para. 50.

The Adjudicator found that the Public Body's evidence as to the nature of the relationship between those it described as lawyers and itself was insufficient evidence in most cases to enable her to understand the relationships. She also found that the Public Body's evidence regarding the subject matter of the advice and the circumstances in which any advice may have been sought and rendered was also insufficient in many cases to establish that the records were solicitor-client privileged communications. Finally, she found that the Public Body's application of multiple exceptions to the same information, all of which require a different factual foundation to apply, had the effect of giving the Public Body's evidence as to the facts an ambiguous quality.

The Adjudicator ordered the disclosure of most of the records to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2, 6, 16, 17, 24, 27, 71 and 72

Authorities Cited: AB: Orders 99-022, F2008-021, F2008-028, F2009-024, F2010-007, P2011-D-003, F2014-25, F2014-38, F2015-22, F2015-29, F2015-31

Cases Cited: *F.H. v. McDougall*, [2008] 3 S.C.R. 41; *Pritchard v. Ontario (Human Rights Commission)* [2004] 1 SCR 809; *R. v. Campbell* [1999] 1 SCR 565; *Moseley v. Spray Lakes Sawmills (1980) Ltd.*, 1996 ABCA 141; *Blank v. Canada (Minister of Justice)* [2006] 2 S.C.R. 319; *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112

I. BACKGROUND

[para 1] On August 2, 2013, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Calgary Police Service (the Public Body). He made this request directly to Bennett Jones LLP, counsel for the Calgary Police Service. He requested "all records, as defined by s.1(q) of [the FOIP Act] in relation to the processing of my request to the FOI Coordinator of the CPS dated February 20, 2013."

[para 2] Bennett Jones responded to the Applicant's access request on behalf of the Public Body on September 20, 2013. It stated that responsive records had been located, but that it had withheld information from them under sections 24(1)(a), 24(b)(i), 27(1)(a), and 27(1)(b)(iii).

[para 3] On October 21, 2013, the Applicant requested that the Commissioner review the Public Body's response. The Applicant stated:

> There are many pages that are severed and the only explanation is "redacted s. 27 *FOIPP*". It is unacceptable to simply cite a section of *FOIPP* when refusing disclosure. This is a very common practice on behalf of public bodies, although the information provided on this one is even more scant than is usual for public bodies.
>
> S.27 refers to privileged information but the CPS provides no clue about what specific part of s. 27 applies. In addition, this is a discretionary reason for refusing disclosure and there is no indication as to how it exercised discretion or even if it considered that it was discretionary.

The Commissioner decided to conduct an inquiry regarding the issues raised by the Applicant. The Commissioner delegated her authority to conduct the inquiry to me.

[para 4] Prior to conducting the inquiry, I noted that the Public Body had referred only to sections 24 and 27 in the severed records, despite the fact that it had referred to sections 24(1)(a), 24(b)(i), 27(1)(a), and 27(1)(b)(iii) in its letter to the Applicant. I also noted that there were references to information as having been severed as "nonresponsive" in the records. I asked the Public Body to provide an index of records indicating the provisions that were being applied so as to withhold each specific piece of information from the Applicant.

[para 5] The Public Body provided an index of records. In the index, it indicated that it was also applying section 27(1)(c)(iii) to information it had severed from the records, despite not having referred to this provision in its response to the Applicant.

[para 6] The Public Body elected not to provide any of the information to which it applied sections 27(1)(a), (b), and (c), for my review during the inquiry, but provided the affidavit of its former Information and Privacy Manager to establish that the records were subject to solicitor-client privilege. The Public Body applied section 27(1)(a) on the basis of solicitor-client privilege. In all cases, where it applied section 27(1)(a), it also applied sections 27(1)(b) and (c) to the same information. The Public Body applied sections 24(1)(a) or (b) in additions to sections 27(1)(a), (b), and (c) to information in records 11 and 12.

[para 7] As I was unable to find on the basis of the Public Body's arguments and affidavit evidence that the exceptions it had applied to the information did, in fact, apply, I asked it to provide more detailed evidence to support its claims, or to provide the information at issue in the alternative. The Public Body then provided a second affidavit from the former Information and Privacy Manager.

II. INFORMATION AT ISSUE

[para 8] The information severed from the responsive records under sections 24(1)(a) and (b), and 27(1)(a), (b), and (c) is at issue.

III. ISSUES

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

Issue B: Did the Public Body properly apply section 24(1)(a) and (b) (advice from officials) to information in the records?

[para 9] I have decided to proceed redaction by redaction, to determine whether the provisions of section 24(1) and 27(1) which the Public Body has applied to each of the redactions have been demonstrated to apply. Before proceeding with this analysis, I will review the relevant statutory provisions and discuss the application of these provisions in general terms and their legal interpretations as they relate to the issues. I will then apply these principles when I discuss the Public Body's application of these provisions to the redactions.

The Statutory Provisions

[para 10] Section 27(1) of the FOIP Act authorizes public bodies to withhold privileged information and information relating to legal services or legal matters from an applicant. This provision states:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
>
> *(b) information prepared by or for*
>
> *(i) the Minister of Justice and Solicitor General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services, or*
>
> *(c) information in correspondence between*
>
> *(i) the Minister of Justice and Solicitor General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer.*

[para 11] The Public Body also applied provisions of section 24(1). The relevant provisions state:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> > *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
> >
> > *(b) consultations or deliberations involving*
> >
> > > *(i) officers or employees of a public body,*
> > >
> > > *(ii) a member of the Executive Council, or*
> > >
> > > *(iii) the staff of a member of the Executive Council […]*

[para 12] Section 71 states:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*
>
> *(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.*
>
> *(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,*
>
> > *(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and*
> >
> > *(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.*

In this case, section 71(1) determines the burden of proof, as the Public Body has not severed information under sections 16 or 17. Section 71(1) places the burden of proving that an applicant has no right of access to a record on the public body.

[para 13] Section 6 establishes the circumstances in which an applicant has a right of access to records. It states, in part:

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

[para 14] Section 6 establishes that an applicant has no right of access to a record when an exception under Division 2 of Part 1 of the FOIP Act applies to information. Section 27(1)(a) is an exception under Division 2 of Part 1. As a result, the Public Body must prove that this exception applies to the information to which it has applied it, with the result that the Applicant has no right of access to the information.

The Burden of Proof

Section 27(1)(a)

[para 15] The standard of proof imposed on a public body is not the criminal standard, which requires proof beyond a reasonable doubt, but the civil standard, which requires proof on the balance of probabilities. In other words, a public body must prove that it is more likely than not that an exception under Division 2 of Part 1 applies.

[para 16] In *F.H. v. McDougall*, [2008] 3 S.C.R. 41, the Supreme Court of Canada described the qualities of evidence necessary to satisfy the balance of probabilities. The Court stated:

> Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

In an inquiry under the FOIP Act, a public body must provide sufficiently clear, convincing, and cogent evidence to discharge its burden of proving that a discretionary exception to disclosure applies to information. As the Public Body decided to apply sections 27(1)(a) to withhold information from the Applicant, it must prove that section 27(1)(a) applies to this information with evidence that is sufficiently clear, convincing, and cogent to meet this purpose.

What must the Public Body prove to establish that the records are subject to solicitor-client privilege?

[para 17] The Public Body states the following principles regarding solicitor-client privilege:

> Solicitor-client privilege is a class-privilege that provides a "blanket" presumption of privilege over solicitor-client communication made for the purpose of seeking legal advice unless the applicant can show why the communication cannot be privileged. The protection is based on the fact that the relationship and the communications between a solicitor and client are essential to the effective operation of the justice system. The protection is available to all who fall within the class.
>
> *R. v. McClure,* [2001] 1 SCR 445 at paras 27 and 31.
>
> Not all communication between a solicitor and a client is protected, but any communication made for the legitimate purpose of obtaining lawful professional advice or assistance is privileged. Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are permanently protected from disclosure. *McClure* at paras 36 - 37
>
> Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. It attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, even before a formal retainer is established provided legal advice is sought or offered, the communication is intended to be confidential, and the communication is not made to further unlawful conduct. *Prichard v. Ontario* [2004] 1 SCR 809 at para 16

[para 18] I agree with the Public Body that once it is established that a communication falls within the framework of the solicitor-client relationship, the communication is considered privileged.

[para 19] In this case, the communications at issue are those between the Public Body's Freedom of Information and Privacy Manager (FOIP Manager) and other employees and lawyers of the Public Body. Where government lawyers are concerned, it is not always the case that communications involving such lawyers are made within the solicitor-client framework. In *Pritchard v. Ontario (Human Rights Commission)* [2004] 1 SCR 809, the Supreme Court of Canada held as follows (at paragraphs 19 and 20):

> Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency: see *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, at para. 49. In *Campbell*, the appellant police officers sought access to the legal advice provided to the RCMP by the Department of Justice and on which the RCMP claimed to have placed good faith reliance. In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply. However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.
>
> Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach

> depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered: *Campbell*, *supra*, at para. 50. [my emphasis]

[para 20] In *R. v. Campbell* [1999] 1 S.C.R. 565 the Supreme Court of Canada stated:

> It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations. Solicitor-client communications by corporate employees with in-house counsel enjoy the privilege, although (as in government) the corporate context creates special problems: see, for example, the in-house inquiry into "questionable payments" to foreign governments at issue in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), *per* Rehnquist J. (as he then was), at pp. 394-95. In private practice some lawyers are valued as much (or more) for raw business sense as for legal acumen. No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer. As Lord Hanworth, M.R., stated in *Minter v. Priest*, [1929] 1 K.B. 655 (C.A.), at pp. 668-69:
>
> > [I]t is not sufficient for the witness to say, "I went to a solicitor's office." ... Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office.
>
> Whether 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 […].

[para 21] From the foregoing authorities, I conclude that communications to and from a lawyer that are not made in the lawyer's capacity as a legal advisor, but in another capacity, are not protected by solicitor-client privilege. The Courts in *Pritchard* and in *Campbell* acknowledged that government lawyers may have functions other than providing legal advice, even when they draw on their legal expertise. For example, even when a FOIP coordinator uses legal expertise, the FOIP coordinator is not advising a public body as to what the public body should decide, but is making decisions on behalf of the public body.

[para 22] In Decision P2011-D-003, former Commissioner Work stated:

> An illustration of the kind of information that will be satisfactory to establish a solicitor-client privilege claim is found in *Ansell Canada Inc. v. Ions World Corp.*, [1998] O.J. No. 5034 (Ct. J.). In that case, the Court quoted prior cases asserting that a party cannot avoid production by giving an "unadorned assertion that the documents are subject to solicitor and client privilege". It said that the degree of detail required "should include the function, role and status of the receiver and sender of the documents in question and their relationship to the party to the action, the grounds for the claim of privilege, and a description of each document consistent with the law which renders it privileged" (paras. 10, 19). See also the "Record Form" portion of the Protocol, and accompanying instructions. (At para 127)

[para 23] From the authorities I have cited, I understand that questions may be asked (and answered) as to the purposes for which, and the circumstances in which, communications over which a public body asserts privilege took place. Whether solicitor-client privilege attaches to a communication between the public body and in-house counsel depends on the nature of the relationship, the subject matter of any advice, and the circumstances in which any advice is sought and rendered. To meet its burden under section 71, it is not enough for a public body to state generally that the communications to which it has applied section 27(1)(a) are privileged or relate to privileged matters; a public body must provide persuasive evidence regarding the nature of the relationship between itself and the lawyer, the subject matter of the advice, and the circumstances in which it sought advice, sufficient to allow a decision as to whether the information is subject to the claimed exception.

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

[para 24] In Order F2015-31, the Director of Adjudication discussed the application of sections 27(1)(b) and (c), stating:

> 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*.
>
> 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*".
>
> 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.
>
> 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 25] The term "legal services" is undefined in the FOIP Act. In Order F2008-028, the Adjudicator reviewed past orders of this office interpreting this phrase and said:

> Section 27(1)(b) gives a public body the discretion to refuse to disclose to an applicant information prepared by or for certain persons in relation to a matter involving the provision of legal services. Those persons are the Minister of Justice and Attorney General, his or her agent or lawyer, or an agent or lawyer of a public body. The term "legal services" includes any law-related service performed by a person licensed to practice law (Order 96-017 at para. 37; Order F2007-013 at para. 67).
>
> Pages 298 and 299 are memoranda that refer to proposals, recommendations and options for government. In the absence of more specific submissions from the Public Body, I find that the information is not in relation to a matter involving the provision of legal services. There is no evidence, on the face of pages 298 and 299, that the information on them relates to a law-related service performed by a person licensed to practice law. While one of the pages refers to amendments, these are stated as being proposed by a public body, rather than being prepared by a lawyer. Legislative amendments can also be proposed from a policy – rather than legal – perspective. Although the reference in section 27(1)(b) to information "in relation to" legal services has been recognized as quite broad (Order 96-017 at para. 38), a public body must provide evidence that the information in the particular record is indeed in relation to legal services[…]

In the foregoing order, the Adjudicator followed previous orders and determined that the term "legal services" includes any law-related service performed by a person licensed to practice law. He also determined that a public body must provide evidence that information in the particular record is in relation to legal services in order to succeed. Finally, he decided at paragraph 157 that information must be "substantive" in order to fall within the terms of section 27(1)(b).

[para 26] Order F2009-024 states:

> Information "prepared for an agent or lawyer of the Minister of Justice and Attorney General" then, is information prepared on behalf of an agent or lawyer so that the agent or lawyer may provide legal services. Information sent to an agent or lawyer of the Minister of Justice and Attorney General in circumstances where the sender is seeking to obtain legal services, is not captured by section 27(1)(b), as the information is not prepared on behalf of the agent or lawyer.
>
> It also follows that section 27(1)(b) does not cover the situation where a person, even a person who is one of the persons listed in subclauses i – iii, creates information that is connected in some way with the provision of legal services but is not created for that purpose. For example, section 27(1)(b) does not apply to information that merely refers to or describes legal services without revealing their substance.

[para 27] In Order F2014-25, the Adjudicator reviewed decisions of this office relating to section 27(1)(b). She said:

> In Order F2008-021, the adjudicator discussed the scope of section 27(1)(b)(ii). She said:
>
> > It follows, then, that the person contemplated by the provision who is preparing the information, is doing so for the purpose of providing legal services, and therefore must

> be either the person providing the legal service or a person who is preparing the information on behalf of, or, at a minimum, for the use of, the provider of legal services, who is, in this case, an Alberta Justice lawyer.

In Order F2009-024 she stated:

> Information "prepared for an agent or lawyer of the Minister of Justice and Attorney General" then, is information prepared on behalf of an agent or lawyer so that the agent or lawyer may provide legal services.

The Public Body did not provide specific arguments regarding the application of section 27(1)(b)(ii) to the information in the records at issue generally, or page 12 specifically. As I discussed above, it is not clear to me that the briefing note was created in relation to a legal service, as opposed to being created for the purpose of providing policy advice. Further, section 27(1)(b) applies only to substantive information, and not to information such as dates, letter head, names and business contact information (see Orders F2008-028 and F2013-51). For these reasons, the Public Body has not met its burden to show that section 27(1)(b)(ii) applies to the information on page 12. I will therefore order the Public Body to disclose the information on page 12 that I have found is responsive, and to which section 24(1)(a) does not apply.

[para 28] In Order F2008-028, the Adjudicator considered that the Legislature's use of the term "prepared" in section 27(1)(b) meant that section 27(1)(b) applies to substantive information about the legal services being provided only, and did not apply to information such as dates. The term "prepared" in section 27(1)(b) in its ordinary sense means "made or got ready for use."[1] The term "prepared" is not synonymous with "writing" or "creating", and "writing an email" is not the same thing as "preparing an email." Had the Legislature worded section 27(1)(b) so that it encompassed any information "written by an agent or lawyer of a public body in relation to a matter involving the provision of legal services" it could have easily done so . However, the Legislation chose the word "prepared" to describe the lawyer's interaction with the information covered by this provision. To put the point differently, section 27(1)(b) is intended to encompass information such as a lawyer's work product, although it is not necessarily restricted in its application to such information.

[para 29] In any event, to fall within section 27(1)(b), information must be prepared by, or at the direction of, a lawyer or agent, or the Minister of Justice and Attorney General, in relation to a matter involving the provision of legal services. At a minimum, to establish that this provision applies, a public body must provide clear evidence that the information was prepared by or for one of the persons enumerated in the provision, and that the purpose for preparing the information was for use in the provision of legal services.

[para 30] Section 27(1)(c) contemplates information in correspondence between a public body's lawyer or agent, and any other person; however, the correspondence must be in relation to a matter which involves the provision of advice or services by the

[1] Kathleen Barber, ed. *Canadian Oxford Dictionary* 2nd Edition (Don Mills; Oxford University Press, 2004) p. 1224

lawyer. At a minimum, a public body seeking to rely on this provision must establish that the lawyer (or agent) involved in the correspondence in question is providing advice or services that relate to the matter that is the subject of the correspondence. As a result, a public body must provide convincing evidence regarding the matter, the subject of the correspondence, and the role of the lawyer or agent, in order to meet its burden.

[para 31] In Order F2015-22 I interpreted the word "matter" in section 27(1)(c) in the following way:

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

In my view, where section 27(1)(c) refers to a "matter" it is referring to a legal matter, in which something is to be tried or proved, and in relation to which a lawyer may provide advice or services.

[para 32] Section 27(1)(c) applies, then, to information in correspondence between a lawyer or agent and someone else, in relation to a legal matter, such as litigation, for which the lawyer or agent is providing advice or other services.

Sections 24(1)(a) and (b)

[para 33] In Order F2015-029, the Director of Adjudication interpreted sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said:

> The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. So long as the information described in section 24(1)(a) is developed by a public body, or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a).
>
> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 34] I agree with the analysis of the Director of Adjudication as to the purpose and interpretation of sections 24(1)(a) and (b), and agree these provisions apply to information generated when a decision maker asks for advice regarding a decision, or evaluates a course of action.

[para 35] To establish that section 24(1)(a) applies, a public body must establish that the advice it seeks to withhold has been developed for a public body, either as part of a person's responsibilities to the public body, or at the request of a public body. To establish that section 24(1)(b) applies, a public body must establish that one of the entities enumerated in section 24(1)(b) was responsible for making a decision and either deliberated with respect to this decision, or sought advice regarding it, and that these consultations or deliberations would be revealed by disclosing the information in question.

The Evidence

[para 36] From the evidence available to me, I understand the sequence of events leading to the creation of the records was the following:

- On February 20, 2013, the Applicant wrote a letter to the Public Body inquiring as to whether a search for records responsive to a previous access request had included the Police Chief's office. The letter was addressed to the "FOIP Coordinator".

- The Public Body's Freedom of Information and Privacy Manager (FOIP Manager) reviewed this letter. She contacted the Chief regarding this letter at 2:39 on February 20, 2013. She asked the Chief whether she should respond or whether he wanted the letter "kicked up to Bennett Jones."

- At 5:08PM on February 20, 2013, the Chief decided to "kick this to Bennett Jones".

- On February 25, 2013, a lawyer for the law firm Bennett Jones wrote the Applicant with regard to his letter of February 20, 2013. This letter states:

  > I have received a copy of the enclosed letter dated February 20, 2013 addressed to the Calgary Police Service FOIP Coordinator. It continues to spread gossip, supports your pet innuendo, and makes specific reference to the *Arkinstall* matter.
  >
  > On December 18, 2012 I wrote to you advising that we were retained by Calgary Police Service in the *R. v. Arkinstall* matter.
  >
  > On January 8, 2013 you sent a letter confirming your understanding that our office has been retained by the Calgary Police Service on this matter.
  >
  > On February 20, 2013 you wrote to our office as well as 3 others again detailing on page 2, last paragraph, you understood that our office had been retained by the Calgary Police Service in the *R. v. Arkinstall* matter.
  >
  > In light of this can you kindly explain on what basis you saw fit to write to my client directly […]

- On August 2, 2013, the Applicant wrote a letter to Bennett Jones and requested "all records […] in relation to the processing of my request to the FOI

Coordinator [the FOIP Manager] of the CPS dated February 20, 2013". He also sought to impose trust conditions.

- On August 6, 2013 Bennett Jones wrote the Applicant to inform him that it would not accept the trust conditions he proposed, but that it would process his access request for records in the custody or control of the Public Body responsive to his request.

- On September 20, 2013, Bennett Jones responded to the Applicant's request for records.

[para 37] The FOIP Manager supplied affidavit evidence to establish that she is also in-house legal counsel for the Public Body, in addition to being the FOIP Manager.

[para 38] In her initial affidavit of May 19, 2015, which was contained in the Public Body's open submission, the FOIP Manager states:

> I was involved in the process of responding to the applicant's access to records request including the decisions to sever certain information and withhold them from disclosure. I was also involved in many of the discussions and matters that are noted in the records. Many of the records were either sent by me or sent to me, amongst others.
>
> I have reviewed the redacted records provided to the applicant against the unredacted version. I provide an explanation of why each redaction was made in a document entitled "Reasons for Redactions" that forms part of my sworn affidavit as if it was incorporated herein. The explanation is necessarily somewhat generic in order to preserve the privilege that protects the redacted material. None of the explanations are intended to waive any privilege that applies.
>
> […]
>
> In the case of every record that has been redacted:
>
> (a) the client in the solicitor-client relationship is the CPS;
>
> (b) the redacted portion is
>
> (i) legal advice,
> (ii) seeks legal advice or assistance,
> (iii) discusses, consults about or deliberates on legal advice,
> (iv) reports on litigation matters, or is
> (v) a combination of the above;
>
> (c) the records are all emails (except for pages 33-35 that are excerpts from the notebook of [an inspector];
>
> (d) the records are all authored by lawyers of the CPS, officers of the CPS, or administrative staff of lawyers of the CPS;
>
> (e) the records are all addressed to lawyers of the CPS, officers of the CPS, or administrative staff of lawyers of the CPS (except for pages 33-35 that are the excerpts of [an inspector's] notebook and were not addressed to anyone);

> (f) if and when the records were copied or forwarded to other people, all the people copied or so forwarded the records were lawyers of the CPS, officers of the CPS or administrative staff of lawyers of the CPS;
>
> (g) all the portions of the records that were redacted as being privileged are and were intended to be confidential and have not been made public or shared outside of the CPS and its counsel;
>
> (h) all of the portions of the records that were redacted as being privileged were part of an exchange of information the object of which was the giving of legal advice;
>
> (i) all the portions of the records that were redacted were made in the usual and ordinary scope of the professional relationship between the CPS and its counsel and within the ordinary framework of the solicitor-client relationship; and
>
> (j) none of the portions of the records that were redacted were made to further any unlawful conduct.

[para 39] As I was unable to determine whether the records were privileged based on the initial affidavit the FOIP Manager provided, I asked specific questions regarding the severing in each case and the FOIP Manager's description of the severed information. I asked the Public Body to provide either the records themselves for my review, or additional evidence to ground its arguments.

[para 40] The FOIP Manager provided an additional affidavit dated August 10, 2015 on an *in camera* basis. She prefaced this affidavit stating:

> I provide a further explanation of why each redaction was made in the *In Camera* Reasons for Redaction column of the attached table. For the convenience of the reader, the table also notes the pages being discussed, the original reasons for the redactions, and the response by Ms. Cunningham. On occasion, the table includes material that may be more submissions than evidence […]

[para 41] I turn now to the question of whether the Public Body has met the burden of establishing that the exceptions to disclosure it applied do apply.

The Records

Record 2, First Redaction, Record 15, First Redaction, Record 21, First Redaction

[para 42] Records 2, 15, and 21 are duplicates of the same document.

[para 43] The Public Body redacted the first part of a sentence in an email on these records under section 27(1)(a), (b), and (c). The remainder of the sentence, which was not redacted, states "[…] this is his response to the limited disclosure we gave him referencing Judge Semenuk's comments in R. v. Arkinstall." The email is written by the FOIP Manager to the Chief of the Public Body.

[para 44] Both the FOIP Manager's affidavits state that the redacted portion of this sentence reports on a different litigation proceeding. In her affidavit of May 19, 2015, the FOIP Manager describes the qualities of the severed information in the following terms:

> The information redacted was prepared by a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and officers of the CPS in relation to matters involving the provision of advice or other services by the lawyer.

[para 45] In my letter of July 24, 2015, I expressed the following concerns regarding the Public Body's evidence. I stated:

> The affiant asserts that the first half of the first sentence of an email is subject to solicitor-client privilege. Exhibit 1 explains that this portion of the sentence "reports on a different litigation proceeding". That a communication reports on a different litigation proceeding does not, in and of itself, mean that the communication is subject to solicitor-client privilege. Rather, there must be evidence as to the purpose of the individual in reporting on the status of the proceeding, and the purpose must be to serve the ultimate goal of giving or receiving legal advice.
>
> Moreover, the portions of the emails I have been given do not indicate that any of the employees who participated in the email exchange were seeking or providing legal advice, or understood that the objective of writing the emails was to facilitate doing so. It is also unclear why the expectations and purposes of the employees in communicating with the affiant would be different in relation to the redacted and unredacted portions of the emails.
>
> The affiant's supplementary affidavit indicates that the Public Body is not waiving privilege. Where it has claimed privilege it has chosen *not* to waive it. The Public Body has not waived privilege over the unredacted contents of record 2; rather, it is not claiming it at all. The first half of the sentence, which the Public Body has severed, and the conclusion of the sentence, which it did not sever, form part of the same communication. On the evidence and argument of the Public Body, it appears that I am being asked to find that a communication is at once privileged and not privileged. I acknowledge that it is possible that the first part of the sentence marks a radical departure from the remainder of the sentence and the body of the email, and that on reviewing it I might be able to determine that the affiant had a clearly different purpose in writing the first part of the sentence which would have been apparent to the recipients of the email; however, I am told only that the communication reports on a different litigation proceeding. The second part of the sentence also does this [report on a litigation matter]; however, the Public Body is not claiming privilege over this part of the sentence. Without more evidence, whether in the form of the information severed from the records or a more detailed affidavit, I am unable to find that the first redaction meets the requirements of section 27(1)(a).

[para 46] In the *in camera* affidavit the FOIP Manager provided to answer my concerns regarding the sufficiency of the Public Body's evidence, the FOIP Manager stated that her dominant purpose for creating the first part of the sentence was to report on a different litigation. She notes that the Chief was responsible for providing instructions in the litigation. She reasons in the affidavit that the first part of the sentence is therefore subject to litigation privilege. She also argues that the redacted part of the sentence forms part of the "continuum of communications made for the purpose of seeking and giving legal advice." She indicates that it is her responsibility generally to report to the Chief the status of ongoing litigation as he may seek further legal advice and she may provide it if he does.

[para 47] I am unable to find on the evidence before me that the first redaction on record 2 is subject to litigation privilege or solicitor-client privilege.

[para 48] Litigation privilege is a privilege that applies to third party communications and to documents prepared for the "dominant purpose" of use in litigation. In *Moseley v. Spray Lakes Sawmills (1980) Ltd.,* 1996 ABCA 141, the Alberta Court of Appeal described the difference between solicitor-client privilege and litigation privilege, and explained the types of communications that fall within the scope of litigation privilege.

> […] As this Court stated in *Opron Construction Co. v. Alberta* (1989), 1989 ABCA 279 (CanLII), 100 A.R. 58 at p. 60 (C.A.):
>
> > If the dominant purpose for creating a paper is privileged, the paper need not be shown: *Nova*… One such privileged purpose is to run or defend civil or criminal litigation, then existing or contemplated: *Phipson on Evidence,* ss. 15-18 (13th Ed.); *Cross on Evidence,* pp. 388-89 (6th Ed. 1985). This litigation privilege is completely separate from privilege from communications to or from a lawyer to get or receive legal advice. One does not need both situations to withhold papers: either one suffices. [Emphasis added in original]
>
> At p. 61 of *Opron,* the Court again noted that a litigant claiming privilege need not overcome the "double hurdle" of litigation privilege and "legal advice" or solicitor-client privilege. The solicitor-client privilege and the litigation privilege are distinct, and should not be confused. The former attaches to all confidential communications made between lawyer (or lawyer's agent) and client, where the client is seeking the lawyer's advice. Litigation privilege is broader in scope, in that it attaches even to communications with, or documents prepared by, third parties. Litigation privilege is limited, though, to situations where the dominant purpose for the communications or *creation of the document* [my emphasis] was, at the time of its creation, use in relation to litigation.

[para 49] In *Blank v. Canada (Minister of Justice)* [2006] 2 S.C.R. 319 the Supreme Court of Canada confirmed the "dominant purpose" test. Fish J., speaking for the majority, stated:

> The question has arisen whether the litigation privilege should attach to *documents* [my emphasis] created for the substantial purpose of litigation, the dominant purpose of litigation or the sole purpose of litigation. The dominant purpose test was chosen from this spectrum by the House of Lords in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169. It has been adopted in this country as well: *Davies v. Harrington* (1980), 115 D.L.R. (3d) 347 (N.S.C.A.); *Voth Bros. Construction (1974) Ltd. v. North Vancouver School District No. 44 Board of School Trustees* (1981), 1981 CanLII 506 (BC CA), 29 B.C.L.R. 114 (C.A.); *McCaig v. Trentowsky* (1983), 148 D.L.R. (3d) 724 (N.B.C.A.); *Nova, an Alberta Corporation v. Guelph Engineering Co.* (1984), 1984 ABCA 38 (CanLII), 5 D.L.R. (4th) 755 (Alta. C.A.); *Ed Miller Sales & Rentals*; *Chrusz*; *Lifford*; *Mitsui*; *College of Physicians*; *Gower*.
>
> I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.

As the email appearing on record 2 is not a third party communication, it appears that the Public Body is relying on the principle that documents created for the dominant purpose of preparing for litigation are subject to litigation privilege. From my review of the

portions of the email that the Public Body has submitted for the inquiry, and from the FOIP Manager's evidence and submissions, I find that the email was not prepared for the dominant purpose of litigation. Rather, it was prepared to inform the Chief that a letter from the Applicant had been received and to indicate how the FOIP Manager had responded to the Applicant's access request in the past. There is nothing in the email to suggest that it was created for the dominant purpose of preparing for litigation regarding the matter that the FOIP Manager apparently referred to in this first redaction. I therefore find that the email is not subject to litigation privilege.

[para 50] Alternatively, if it is the case that the dominant purpose test is to be applied by reviewing all the clauses of a document and to determine whether each clause was individually prepared for the dominant purpose of use in litigation, I note that there is no evidence before me that the redacted clause was prepared for the dominant purpose of use in litigation. I am told only that it reports on a litigation matter, but I have not been shown how the severed sentence could be said to have been made for the "dominant purpose of *use in* litigation".

[para 51] I turn now to the question of whether the Public Body has established that the first redaction is subject to solicitor-client privilege. As noted above, the Public Body characterizes the severed information in its open affidavit as reporting on "a different litigation proceeding to which the CPS is a party."

[para 52] The Public Body reasons that the redacted information is privileged because it falls within the continuum of communications made for the purpose of seeking and giving legal advice. The FOIP Manager explains that she provides information to the Chief about the progress of litigation so that he may seek her legal advice and so she may give it.

[para 53] The FOIP Manager did not say that the Chief asked for her legal advice in this case, or that she provided it. Instead, she states she provided him with an update regarding a litigation matter, with the implication that she did so in order that he might seek her legal advice. It is conceivable that a lawyer may provide an update regarding litigation and that conveying such information may give rise to the giving and seeking of legal advice, with the result that the update could be said to fall within the "continuum of communications made for the purpose of seeking and giving legal advice". However, I am unable to say on the basis of the FOIP Manager's statements regarding the redacted information that this is the case here. It is also conceivable on the facts I have been given that the information regarding the litigation was the kind of information that could not, and did not, lead to the seeking or giving of legal advice. For example, if the FOIP Manager reported on scheduled dates for litigation, she could be said to be reporting on a litigation proceeding, but the information she provided would not be legal advice and would not necessarily give rise to the giving or seeking of legal advice. Without more evidence as to the nature of the matter that is the subject of the redacted phrase, the identity of the solicitor representing the Public Body with regard to the matter, or the relationship between the redacted phrase and the matter it describes, I am unable to make

an independent finding that the severed sentence falls within the continuum of communications between solicitor and client.

[para 54] The Public Body also applied sections 27(1)(b) and (c) to the first redaction on record 2.

[para 55] Turning to the question of whether the evidence establishes that the first redaction on these records was made ready by the FOIP Manager for use in a matter related to the provision of legal services, I am unable to say that it was or was not. The FOIP Manager has not provided evidence as to what use was to be made or was made of the email. I acknowledge that the FOIP Manager swore the following in her affidavit:

> The information redacted was prepared by a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and officers of the CPS in relation to matters involving the provision of advice or other services by the lawyer.

[para 56] My interpretation of the FOIP Manager's affidavit is that she is making the argument that writing the first part of the first sentence in the email to report to the Chief falls within the terms of section 27(1)(b) and (c), given that her evidence combines the terms of section 27(1)(b) and (c). As noted above, the FOIP Manager explained that her affidavit of August 10, 2015 contains submissions in some places. However, there is insufficient explanation in the affidavits of the FOIP Manager to establish that the redaction was prepared or made ready for use by the FOIP Manager (or for that of another lawyer or agent) in relation to a matter involving the provision of legal services, or that she was providing advice or services in relation to a matter referred to in the first redaction. I say this because I have not been told who was representing the Public Body in that matter. However, section 27(1)(c) requires that the lawyer who is part of the correspondence in question is providing advice or services in relation to the matter that is the subject of the correspondence. I am unable to make an independent finding on the evidence before me that section 27(1)(b) and (c) apply to the first redaction.

[para 57] For these reasons, I find that section 27(1) does not apply to the first redaction on record 2.

Record 2, Second Redaction, Record 15, Second Redaction, Record 21, 2nd Redaction

[para 58] The FOIP Manager states in her affidavit that the second redaction in these records "provides legal advice to the CPS". She also states the following in relation to the redacted information:

> The information redacted was prepared by a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and officers of the CPS in relation to matters involving the provision of advice or other services by the lawyer.

[para 59] I wrote the Public Body to express the following concerns regarding the sufficiency of evidence in relation to the second redaction. I stated:

> The "second redaction" refers to the Public Body's decision to redact what appears to have been the final sentence in an email entitled "Another salvo from [the Applicant]". Except for the first part of the first sentence, the Public Body has not withheld any other information from the email.
>
> The affiant swears she was providing legal advice in the final sentence of the email. In the introductory part of her affidavit, reproduced above, the affiant states that she was "involved in" making decisions as to the redactions of the material. It is therefore unclear in what capacity she was acting when writing the emails, i.e. as counsel, or as decision-maker. The context created by the portions of the emails that were provided adds to this lack of clarity, as the emails indicate she was contacting senior officials of the public body to apprise them of an issue and to seek a decision regarding it. The response to the email from the Chief, which is not severed, does not refer to any legal advice having been given or received, but answers the question posed in the email.
>
> I accept that the affiant believes that the second redaction is appropriately severed as legal advice; however, it is not clear to me from the affidavit as to what kinds of information the affiant believes constitute legal advice.
>
> In *Blood Tribe*, supra, the Alberta Court of Appeal refers to legal advice as "telling the client the law, including advice as to what should prudently and sensibly be done in the relevant legal context". It also recognized that solicitor-client privilege could extend to any communications made to facilitate giving or obtaining legal advice
>
> If the affiant is describing information documenting the making of decisions in relation to a response under the FOIP Act, then the Public Body must explain how this role can be construed as giving legal advice, and to whom this legal advice is given; if the affiant is not describing making decisions under the FOIP Act, but a situation in which she, or someone else, provided legal advice to the Public Body, then more information is required as to the subject matter of the advice and the context of the advice.
>
> The second redaction is also described as "prepared by a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and officers of the CPS in relation to matters involving the provision of advice or other services by the lawyer." I accept this statement to be true; however, that information is prepared by a lawyer in relation to a matter involving the provision of legal services does not bring the information within the scope of solicitor-client privilege.
>
> Finally, I have the same concerns regarding the second redaction as I do the first redaction. The final sentence of the email forms part of the same communication as do the sentences in the body of the email. It is unclear to me that the final sentence of the email would be intended to serve a radically different purpose than does the body of the email. It may, but there is insufficient evidence before me to find this to be the case.

[para 60] In response to my concerns regarding the final redaction in the email, the FOIP Manager explained that the final sentence was written in her capacity as in-house counsel to the Public Body. She states that it her role to provide legal advice when she thinks it is warranted. She also provided a general description of the topic of the last sentence.

[para 61] I accept that the FOIP Manager has a dual role within the Public Body: that of FOIP Manager and that of in house counsel. I also accept that she wrote the second redaction in her capacity as in-house counsel as she states she did.

[para 62] The portions of the email I have been provided are portions that the Public Body either considers were not privileged, or are portions over which the Public Body decided to waive privilege, with the result that these portions could be provided to the Applicant, while the portions it considered privileged could be severed from the email pursuant to section 6 of the FOIP Act. The portions of the email I have been shown provide some context as to the circumstances which led the FOIP Manager to write the redacted information.

[para 63] From the description of the subject matter of the redaction, which the FOIP Manager provided *in camera,* I agree that the redacted information, as it has been described to me, can be described as advice or a recommendation provided to the Chief in the FOIP Manager's capacity as in-house counsel. I also find that the redacted information was intended to be confidential.

[para 64] I find that the Public Body has established that the second redaction is likely subject to solicitor-client privilege. I therefore find that the Public Body's application of section 27(1)(a) to the second redaction is appropriate. As discussed in previous orders of this office, if solicitor-client privilege applies to information, a public body's exercise of discretion to withhold the information from an application is justified by the important public interest served by this privilege. (See Orders F2010-007, F2014-38, F2015-22). As the Public Body has established that the second redaction is likely subject to solicitor-client privilege, I am satisfied that its exercise of discretion to sever this information is appropriate.

Records 3 - 4, First and Second Redactions

[para 65] Records 3 - 4 contain the same content as record 2 and the Public Body redacted the same information from these records as it did from record 2. My conclusions regarding the redactions on these records are therefore the same as they are for the redactions where they appear on record 2.

Records 5 – 6, First Redaction, Records 37 – 39, First Redaction

[para 66] The FOIP Manager's affidavit describes the first redaction as "in relation to seeking legal advice by the CPS". The first redaction appears at the end of a paragraph which was not redacted and which states:

> Hi [name of an Inspector], we have received the attached missive from [the Applicant]. As per the Chief, [the Deputy Chief], and [a superintendent] they would like Bennett Jones to respond. [redaction]

[para 67] As I was not convinced that the descriptor "in relation to seeking legal advice by the CPS" necessarily led to the conclusion that the redacted information was likely to be subject to solicitor-client privilege, I wrote the Public Body and asked it to provide this record or provide more detailed evidence. I stated:

> The first redaction is described in the affidavit as information "in relation to seeking legal advice". Information that is prepared "in relation to seeking legal advice" is not necessarily information "being or consisting of" legal advice or the seeking of legal advice. Moreover, the phrase, "in relation to legal advice" does not necessarily reveal legal advice between a solicitor and a client or communications made for the purpose of giving or receiving legal advice. It may, but equally, it may not. More detailed information as to whether the information in fact reveals confidential communications between a solicitor and a client for the purpose of giving/obtaining legal advice, or the records themselves, would be necessary before I could reasonably find that the redacted information is subject to solicitor-client privilege.
>
> The second redaction is described in the following terms: "provides legal advice to the CPS and also involves the seeking of legal advice by the CPS".
>
> However, the Public Body disclosed the remaining information in the email, including the portion of the email in which it is decided that a specific law firm will respond on its behalf. The information in the email that has been disclosed could be described as "in relation to seeking legal advice", which suggests that the subject matter of the redaction is the same or related to the subject matter of the unredacted information. It will therefore be necessary for the Public Body to establish that it can maintain privilege, should any attach to the first redaction, despite the disclosure. In other words, it may be necessary for it to establish that it has not waived privilege by disclosing the unredacted information, assuming that privilege applies to the redacted information.

[para 68] In response, the Public Body provided *in camera* evidence regarding the subject matter of the information. The information related to the fact that something had not yet happened. I am told by the FOIP Manager that the reason she made this statement was to enable the acting superintendent to make a determination.

[para 69] The FOIP Manager also characterizes the statement as "made for the purpose of deciding whether legal advice should be sought." From this characterization, I understand that the FOIP Manager submits that the redacted information falls within the "continuum of communications" between solicitor and client; i.e. communications 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[2].

[para 70] The email in question was written by the FOIP Manager to an acting superintendent. She wrote the email to the acting superintendent, after she received an email from the superintendent (who responded while on vacation), which states, "you can update [the acting superintendent] but I think between [a lawyer] and I we should have it covered."

[para 71] The unredacted content of records 5 – 6 adds some ambiguity as to what the FOIP Manager was responsible for doing, and her affidavit evidence does not entirely resolve the issue. However, I accept that the FOIP Manager recalls her reasons for communicating with the acting superintendent. The FOIP Manager's evidence is that she made a statement that she had not yet done something, so that the acting superintendent could make a decision regarding seeking legal advice

[2] *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112

[para 72] If that is the case, then the redacted information falls within the continuum of communications described by the Alberta Court of Appeal in *Blood Tribe, supra*.

Records 5 - 6, Second Redaction, Records 37 – 39, Second Redaction

[para 73] The FOIP Manager's initial affidavit states that second redaction "provides legal advice to the CPS and also involves the seeking of legal advice by the CPS". As it was unclear to me how the redacted information could serve this dual function of both providing and seeking legal advice, I requested further particulars from the Public Body.

[para 74] The FOIP Manager explained that the redacted information is comprised of two sentences, one in which the FOIP Manager characterized a matter in legal terms, and the second, in which she made a recommendation to seek legal advice.

[para 75] I draw the inference from the FOIP Manager's evidence and from the unredacted portions of the emails that the information in the second redaction is the same information that appears in the second redaction on record 2, which she provided as legal advice to the Chief. I note that the Chief did not forward the FOIP Manager's email from record 2 to the acting superintendent, but to the superintendent, and it appears from the unredacted information in the email that the FOIP Manager was forwarding the legal opinion she provided to the Chief (or a version of it) to the acting superintendent to update him. The Chief's action of forwarding the email to the Superintendent suggests that he wanted the superintendent to deal with the matter in the email, rather than the acting superintendent.

[para 76] As I have found on the balance that the second redaction on record 2 is subject to solicitor-client privilege, I find that disclosing the second redaction on records 5 – 6 and 37 – 39 would similarly reveal information subject to solicitor-client privilege. As I find the redaction is likely subject to solicitor-client privilege, it follows that I find the Public Body exercised its discretion appropriately when it redacted the information.

Records 5 - 6, Third and Fourth Redactions, Records 37 – 39 Third and Fourth Redactions

[para 77] The FOIP Manager's initial affidavit describes the third redaction on record 5 as "discloses legal advice provided to the CPS and discusses that advice with the lawyer and other officers of the CPS." The redacted portion of the email appears in an email written by the superintendent to whom the FOIP Manager reports addressed to the FOIP Manager, and states:

> You can update [the acting superintendent] but I think between [a CPS lawyer] and I we should have it covered.

[para 78] The third redaction is described in the initial affidavit as:

> […] prepared for a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and officers of the CPS in relation to matters involving the provision of advice or other services by the lawyer.

[para 79] I expressed the following concerns regarding the Public Body's explanation of the redaction:

> The second redaction is described as "disclosed legal advice provided to the CPS and discusses that advice with the lawyer and other officers of the CPS." The third redaction is from an email written by a superintendent of the CPS to the affiant. The unsevered portion of the email and the email to which it responds indicate that the superintendent did not feel that another employee needed to contact a law firm, because he and another employee could do so. It does not appear possible for the superintendent to provide legal advice to the affiant as he is not described as a lawyer. Rather, he is described as a superintendent to whom the affiant reported at the time the email was written.
>
> The Public Body severed the first portion of a sentence contained in a one-sentence email. The email was created by the affiant's supervisor and sent to the affiant. It provides direction to the affiant in relation to a question she had posed in the email that is the source of the fourth redaction, below. The affiant explains that this information "discloses legal advice provided to the CPS and discusses that advice with the lawyer and other officers of the CPS." The email does not indicate that it was copied or sent to anyone other than the affiant, and so it is unclear why the affiant refers to "other officers" in her description. If the beginning of the sentence was written for the same purpose as the end of the sentence, or conveys similar information, then the information in the third redaction may not be privileged. It is possible that the first part of the sentence marks a departure from the second part of the sentence and contains or refers to legal advice, but if that is so, no information has been provided as to who gave the legal advice or in what circumstances. Either the records themselves, or more detailed evidence as to their content, are required before I would able to find that the redacted information is privileged.

[para 80] In response to my letter of July 24, 2015, the FOIP Manager explained that the third redaction discusses legal advice provided in the fourth redaction.

[para 81] The fourth redaction is described in the initial affidavit as "provides legal advice to the CPS and also involves the seeking of legal advice by the CPS".

[para 82] As discussed above, the context created by the unredacted portions of the emails indicates that the FOIP Manager wrote the superintendent to whom she reports, to find out whether she should contact Bennett Jones regarding the Applicant's correspondence as the Chief had requested, or whether another lawyer should do it, and whether she should update the acting superintendent. The FOIP Manager also states that the email she sent contains legal advice and a recommendation to seek legal advice. From the context provided by the redacted information it appears that the Superintendent's role included making decisions as to whether obtain legal advice or not, and so it appears that redacted information can reasonably be characterized as the "necessary exchange of information between the solicitor and client for the ultimate objective of the provision of legal advice", as discussed by the Alberta Court of Appeal in *Blood Tribe, supra*. In addition, it is reasonable to assume that the superintendent would repeat the advice in the third redaction,

[para 83] I find that the Public Body has established that the third and fourth redactions on record 5 are likely to be subject to solicitor-client privilege.

Records 5 – 6, Fifth and Sixth Redactions, Records 37 – 39, Fifth and Sixth Redactions

[para 84] The emails appearing on records 6 and 38 are duplicates of emails appearing on record 2. My decision regarding the redactions is the same.

Records 7 – 10

[para 85] The Public Body severed records 7 – 10, in their entirety under sections 27(1)(a), (b), and (c).

[para 86] The initial affidavit of the FOIP Manager describes the redacted records in the following terms;

> The redacted material consists of a number of emails dated March 14, 2013 amongst various lawyers of the CPS and officers of the CPS that provide legal advice to the CPS and also involve the discussion of and seeking and giving legal advice to and for the CPS.
>
> The information redacted was prepared by or for a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and officers and / or other lawyers of the CPS in relation to matters involving the provision of advice or other services by the lawyer.

[para 87] As I was unable to conclude the records 7 – 10 were subject to any of the provisions of section 27(1) on the basis of the foregoing description, I wrote the Public Body to express the following concerns:

> The Public Body redacted records 7-10 in their entirety. These records are described as consisting of "a number of emails dated March 14, 2013 amongst various lawyers of the CPS and officers of the CPS that provide legal advice to the CPS and also involve the discussion of and seeking and giving legal advice to and for the CPS." The affiant also states:
>
> > The information redacted was prepared by or for a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and officers and / or other lawyers of the CPS in relation to matters involving the provision of advice or other services by the lawyer.
>
> There appears to be tension in the descriptions of the records. I am first told that the records contain emails between various lawyers and officers and that the emails provide or discuss legal advice. However, the redacted information is then described as prepared by or for a lawyer of the CPS in relation to a matter involving the provision of advice and services. The first description suggests that the emails are communications between officers and lawyers containing discussions of legal advice; the second suggests that the information is prepared by one lawyer and involves generally the provision of services, which may be legal or "other", which is not the same thing as providing legal advice. A discussion of legal advice or the seeking of legal advice is not the same thing as information "prepared by or for a lawyer of the CPS".
>
> The term "involving", where it appears in the affidavit, is ambiguous. I am not told that the redacted communications "consist of" or "are" communications between a lawyer client for the

> purposes of giving/receiving legal advice. Communications that are made in relation to a matter involving the provision of legal services may not reveal privileged information. Merely referring to giving or obtaining legal advice does not necessarily meet the test for privilege, particularly in a situation where the Public Body has already disclosed the fact that it retained a law firm to provide legal advice.
>
> For these reasons, I am unable to find, on the evidence before me, that the records are subject to solicitor-client privilege. While it is possible that the records contain information that has been inaccurately described and which may be privileged, I will be unable to find that this is so unless the contradictions and ambiguities are clarified and explained or I am provided with the records.

[para 88] The Public Body provided an *in camera* affidavit to respond to the issues I had raised.

[para 89] As set out in *Campbell*, *supra*, to establish that privilege applies to communications between itself and in-house counsel, a public body must provide evidence as to the nature of the relationship between it and the lawyer, the subject matter of the advice, and the circumstances in which advice is sought and rendered. As discussed by former Commissioner Work in Decision P2011-D-003, the evidence required to establish privilege "should include the function, role and status of the receiver and sender of the documents in question and their relationship to the party to the action, the grounds for the claim of privilege, and a description of each document consistent with the law which renders it privileged".

[para 90] I am unable to conclude from the Public Body's additional evidence that records 7 – 10 are subject to solicitor-client privilege. The Public Body describes the records as "from an officer of the CPS to another officer of the CPS and two lawyers of the CPS that discusses the legal advice and provides legal instructions", and as "an email from a lawyer of the CPS to two officers of the CPS and to one lawyer of the CPS providing legal advice and seeking further discussion and legal advice". However, the Public Body provides no evidence as to the role of the lawyers and the officers within its organization, or explanation as to its reasons for referring to the information in the records as legal advice or "legal instructions". I am left to guess at the subject matter of what is described as "legal advice" and the circumstances giving rise to the email communications. While I am able to draw the inference that the subject matter of the emails relates in some way to the Applicant's correspondence of February 20, 2013, given that records 7 – 10 have been selected by the Public Body as responsive to his access request, drawing this inference does not assist me to find that these records are privileged.

[para 91] I acknowledge that the affiant, who is a lawyer, has sworn that the emails ask for and provide "legal advice". However, beyond swearing that this is so, she provides no other information about the redacted records or the circumstances surrounding them that would permit me to make an independent judgment about this issue; she merely tells me that the information in the records was conveyed among various parties, some of whom were lawyers, for the purpose of obtaining and providing legal advice, and discussing it. There must be sufficient evidence of the circumstances to

enable me to reach a conclusion that the characterization of the advice being sought or given as legal advice is appropriate. I must be able determine that the circumstances are such there is a reasonable likelihood that legal advice was being sought, in the context of a solicitor-client relationship. Accepting the affiant's conclusions about the legal status of the records requires me to abdicate my responsibility under the Act to make this determination myself on the basis of the relevant circumstances. Since I have insufficient information about the circumstances, knowing only that they related in some way to matters involving the Applicant, I have no basis upon which to agree with her conclusions.

[para 92] Moreover, the affiant does not indicate the source of her knowledge as to the intentions of the parties who wrote the emails and their roles in relation to whatever the matter that was the subject of the emails was. The affiant does not state that she wrote the emails, but indicates that others wrote them. It is also unknown whether she contacted any of the authors to find out what their purpose in writing was. It appears to be possible that she reviewed the records and that her affidavit evidence provides her opinion that these records are privileged. While her opinion may be correct, as discussed in the paragraph above, I have not been provided with sufficient facts to be able to decide that it is.

[para 93] In addition, given the vague and generic quality of its explanation regarding its position that the records are privileged, the Public Body's description of the records as falling within the terms of section 27(1)(b) and (c), which are provisions that do not address or encompass legal advice itself, creates tension in its evidence. In Order F2015-31, the Director of Adjudication commented on Alberta Justice's application of sections 27(1)(a), (b), and (c), to the same information, stating:

> 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.

> 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.

[para 94] Ultimately, the Director of Adjudication found that none of the exceptions on which the Public Body had relied to resist disclosure applied.

[para 95] I accept that the Public Body applied section 27(1)(b) and (c) on the theory that if section 27(1)(a) does not apply to the information it withheld under this provision, then sections 27(1)(b) and (c), which the Public Body considers to be broader in application, may. However, asserting facts intended to make the point that the information falls within sections 27(1)(b) and (c) when these provisions are primarily intended to encompass such things as a lawyer's work product and third party communications, serves to undercut the Public Body's claim of solicitor-client privilege over the same records. If the facts the Public Body asserts are to be accepted, then section 27(1)(a) might not apply, given that information prepared by or for a lawyer in relation to the provision of legal services may encompass non-privileged information.

[para 96] There is insufficient evidence before me as to the subject matter of the information in records 7 – 10, the context in which the records were created, and the relationship between the Public Body and the persons it refers to as lawyers, to ground the Public Body's claim of privilege over the information in records 7 – 10. I therefore find that section 27(1)(a) has not been shown to apply to the information the Public Body severed under this provision.

[para 97] With regard to the Public Body's application of sections 27(1)(b) and (c), it is unclear to me from its evidence that these provisions can be said to apply. While it has repeated the terms of sections 27(1)(b) and (c) in its evidence, I am unable to say that a lawyer prepared or made records 7 – 10 ready for use in providing legal services to the Public Body or that the lawyer(s) involved in creating the records provided advice or other services to the Public Body in relation to the matter that was the subject of the records. The Public Body's evidence does not support finding that any of the lawyers to which it refers had carriage of the matters that were the subject of the records. Moreover, as some of the emails are described as having been sent by officers to discuss information described as legal advice it appears that the emails *cannot* be the subject of either section 27(1)(b) or (c).

[para 98] Normally, when a public body applies exceptions, the Commissioner has the records at issue available to review. The records themselves often establish the facts necessary to support finding that the exception applies. However, where, as here, the

Public Body simultaneously claims solicitor-client privilege, in addition to other exceptions, the Public Body, must, at a minimum, provide evidence sufficient to establish both: 1) the kinds of facts that the Court has said are required to permit a finding that solicitor-client privilege applies to records that are not available for review, and 2) the facts necessary to find that the other exceptions apply. Otherwise, the burden of proof is not met.

[para 99] The Public Body has not provided facts to support its assertion that the terms of section 27(1)(a), (b), and (c) are met in this case.

Record 11, First Redaction

[para 100] The Public Body severed information from record 11 under section 24(1)(b) and sections 27(1)(a), (b), and (c). The first redaction is from an email sent by the former Chief of the Public Body to two lawyers and a superintendent. The FOIP Manager states in her initial affidavit:

> The redaction discusses legal advice provided to the CPS and the seeking of legal advice for the CPS. It includes consultations and deliberations involving officers of the CPS and lawyers of the CPS concerning that advice.
>
> The information redacted was prepared for lawyers of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between lawyers of the CPS and officers of the CPS in relation to matters involving the provision of advice or other services by the lawyers.

[para 101] In my letter of July 24, 2015, I stated:

> A discussion of "the seeking of legal advice" may or may not reveal an actual instance in which legal advice was sought.
>
> In addition, it is unclear why, if the redacted information is a solicitor-client communication, the phrase "consultations and deliberations" concerning it is used to describe "discussions" of that advice. I gather that this description is meant to support the Public Body's application of section 24(1)(b) to the information to which it has applied section 27(1)(a); however, "consultations and deliberations" in the context of section 24 often refers to decision making in the area of policy development, and is not limited to discussing legal advice and may not involve doing so. Finally, discussions about policy advice may not be "prepared by or for lawyers of the CPS" within the terms of section 27(1)(b).
>
> The fact that information appears in correspondence and is in relation to a matter involving the provision of advice or other services does not bring the information within the scope of solicitor-client privilege. In addition, the reference to "advice or other services" suggests that the affiant is unclear as to whether the information is advice, or in some way relates to a service, the nature of which is described as "other". In order to find that an exception to disclosure applies, I must have some certainty as to the kind of information to which the exception is being applied.
>
> I acknowledge that some of the statements were made to support the application of sections 24(1)(b), 27(1)(b), and 27(1)(c); however, the Public Body's decision to exercise discretion to withhold the information in the records, including those to which it has applied section 24, is based entirely on the application of solicitor-client privilege to the records (see paragraphs 4 and 5 of the supplementary affidavit). However, while there is potentially room for some overlap

> between information to which sections 24(1)(b), 27(1)(b) and 27(1)(c) apply, in theory, and information that is subject to solicitor-client privilege, these provisions also very clearly apply to information that is not subject to solicitor-client privilege. As a result, statements describing information with a view to establishing that these provisions apply will not serve to establish that solicitor-client privilege applies.
>
> If the information discussed in the first redaction of page 11 is legal advice then the information may well be subject to solicitor-client privilege; however, if it is policy advice or information that only "relates to" the provision of legal services, then it may not be.
>
> I am unable to find that the information in the first redaction on record 11 is subject to solicitor-client privilege in the absence of the records or more detailed evidence regarding the circumstances in which the redacted communication was created and the purpose of the police chief in writing it.
>
> I am also unable to determine that the Public Body's application of the other exceptions is appropriate in the absence of the records. Review of the provisions of section 24(1) and the other provisions of section 27 also requires review of a public body's decision to sever, and review of the public body's exercise of discretion with regard to each piece of information withheld. That cannot be done in the absence of the records.

[para 102] In response to my request for additional evidence, the FOIP Manager stated: "The email discusses legal advice provided to the CPS. The email also asks whether further legal advice and assistance be sought." The FOIP Manager also indicates that the email involved consultations and deliberations among employees of the Public Body.

[para 103] As discussed above, whether solicitor-client privilege exists in communications between employees of a public body and in-house counsel, depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered. In this case, I do not know what the role of the recipients of the email was in order to determine the nature of the relationship, what the nature of the matter was under discussion, or in what circumstances the former Chief wrote to the recipients. As a result, I have insufficient information before me to determine whether the first redaction on record 11 is privileged. I acknowledge that it is possible the Chief was discussing legal advice provided by the FOIP Manager or another lawyer to the Public Body, or alternatively, from Bennett Jones; however, the Public Body has not provided enough evidence as to the facts to enable me to come to this conclusion. I am unable to draw an inference that the matter under discussion related to any of these possibilities.

[para 104] The Public Body has also applied section 27(1)(b) to withhold this email. The FOIP Manager makes the argument in her *in camera* affidavit that the word "for" can, in some contexts, mean "addressed to". She argues that a plain reading of section 27(1)(b) requires finding that information that is sent to a lawyer falls within its terms. As a result, she reasons that an email written by the Chief to two lawyers falls within the terms of section 27(1)(b).

[para 105] Past orders of this office have held that the term "for" in section 27(1)(b) means "on behalf of" as it does elsewhere in the FOIP Act. (See Orders 99-022, F2008-021, F2008-028 and 2010-007). I agree with the reasoning in these orders. Moreover, I

am unable to see what purpose would be served by creating an exception for information that is merely sent to a lawyer. If the information entails the seeking of legal advice, then section 27(1)(a) would apply to it. If the information relates to the a legal matter over which the lawyer has carriage, then section 27(1)(c) would apply. As noted above, in my view, the proper interpretation of section 27(1)(b) is that it applies to information prepared by or at the direction of a lawyer so that the lawyer may provide legal services. This interpretation enables each of the three subsections (a), (b) and (c) to have discrete meanings (thereby avoiding redundancy), and it enables a public body to sever the work product of a lawyer that might not meet the terms of either section 27(1)(a) or (c).

[para 106] The FOIP Manager also argues in her affidavit that the term "agent" can apply to any employee of a public body. I believe she means to suggest that that the Chief is an "agent or lawyer" within the context of section 27(1)(b) or (c). However, I note that this position is contrary to interpretation of the term "agent" in section 27(1) adopted by this office. In Order F2008-028, the Adjudicator said:

> Even if the sender or recipient of correspondence is not a lawyer, section 27(1)(c) permits the withholding of information sent to or from an "agent". In my view, the reference to "agent" is not intended to include *everyone* employed by or otherwise acting on behalf of the Minister of Justice and Attorney General or another public body. If that were the case, section 27(1)(c) would shield a great many records of a public body from disclosure under the Act, given that a great many records consist of correspondence from employees in relation to the advice or other services that they provide. The Legislature may have cast a wide net in section 27(1)(c), but it could not have intended to cast such a wide net. If it had so intended, it would have used the word "employee" – as done elsewhere in the Act – rather than the word "agent".
>
> A basic rule of interpretation is that it is presumed that Parliament or a Legislature uses language carefully and consistently, and that within a statute, the same words are taken to have the same meaning and different words have different meanings [*Winko v. British Columbia (Forensic Psychiatric Institute)*, 1999 CanLII 694 (SCC), [1999] 2 S.C.R 625 at para. 133, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at pp. 163 to 65]. Given this rule of interpretation, the fact that the word "agent" is used in section 27(1)(c) – as well as 27(1)(b) – shows that the Legislature intended for the term "agent" to mean something different than the broader term "employee". ("Employee" is already defined in section 1(e) of the Act to include a person who performs a service for the public body under a contract or agency relationship, so use of the term "employee" would not have excluded outside legal and non-legal agents).

[para 107] I agree with the analysis of the Adjudicator in Order F2008-028 and agree that the term "agent" where it is used in sections 27(1)(b) and (c) is not intended to be synonymous with the term "employee". Given the fact that the term "agent" appears only in section 27 and is used in the context of the provision of legal services within section 27(1)(b), and in the context of the provision of advice or services in relation to a matter in which a lawyer or the Minister of Justice and Attorney General may also provide advice or services within section 27(1)(c), I conclude that the term "agent" refers to a "legal agent". If the term "agent" does not refer to a legal agent of some kind, then it is unclear how such an individual could provide advice or services that a lawyer of the Minister of Justice and Attorney General, or the Minister herself, are also uniquely qualified to provide.

[para 108] I am unable to find that the Chief is an "agent or lawyer" within the context of section 27(1)(b) or (c).

[para 109] In addition, with regard to the Public Body's application of section 27(1)(c) to this email, I note that section 27(1)(c) applies to information "in correspondence between an agent or lawyer and any other person in relation to a matter involving the provision of advice or other services […] *by the agent or lawyer*." In my view, section 27(1)(c) has not been established as applying to the first redaction on record 11 as there is no indication (other than the Public Body's recitation of some of the language of section 27(1)(c) in the affidavit) that the correspondence in question was in relation to a matter in which either the sender or the recipients was providing advice or services. The Public Body describes the information as correspondence "in relation to a matter involving the provision of advice or other services by *a* lawyer", but section 27(1)(c) requires that the lawyer involved in correspondence be the lawyer providing advice or services regarding the matter. The Public Body's evidence fails to establish that the terms of section 27(1)(c) are met, as it is unclear that any of the parties to the correspondence were providing advice or services in relation to the matter that was the subject of the correspondence.

[para 110] The Public Body has also applied section 24(1)(b) to sever the first redaction on page 11. As discussed above, section 24(1)(b) authorizes a public body to withhold information revealing consultations or deliberations of persons enumerated in this provision.

[para 111] The Public Body describes the emails of which the first redaction on record 11 forms part as "ultimately leading to a decision." This may be so, but I have no persuasive evidence before me that the Chief, as an employee of the Public Body, was making a decision on behalf of the Public Body, or that any consultations as to what he should decide are recorded in the first redaction on record 11, or that the information in the records can be properly characterized as deliberating a particular decision or action. Elsewhere in the affidavit the information in the record is described as "correspondence between a lawyer of the CPS and officers of the CPS in relation to a matter involving the provision of legal services by a lawyer" which is not synonymous with "consultations or deliberations" among a public body's employees, as those terms have been interpreted in prior orders.

[para 112] In my letter of July 24, 2015, I said:

> In addition, it is unclear why, if the redacted information is a solicitor-client communication, the phrase "consultations and deliberations" concerning it is used to describe "discussions" of that advice. I gather that this description is meant to support the Public Body's application of section 24(1)(b) to the information to which it has applied section 27(1)(a); however, "consultations and deliberations" in the context of section 24 often refers to decision making in the area of policy development, and is not limited to discussing legal advice and may not involve doing so. Finally, discussions about policy advice may not be "prepared by or for lawyers of the CPS" within the terms of section 27(1)(b).

> The fact that information appears in correspondence and is in relation to a matter involving the provision of advice or other services does not bring the information within the scope of solicitor-client privilege. In addition, the reference to "advice or other services" suggests that the affiant is unclear as to whether the information is advice, or in some way relates to a service, the nature of which is described as "other". In order to find that an exception to disclosure applies, I must have some certainty as to the kind of information to which the exception is being applied.
>
> I acknowledge that some of the statements were made to support the application of sections 24(1)(b), 27(1)(b), and 27(1)(c); however, the Public Body's decision to exercise discretion to withhold the information in the records, including those to which it has applied section 24, is based entirely on the application of solicitor-client privilege to the records (see paragraphs 4 and 5 of the supplementary affidavit). However, while there is potentially room for some overlap between information to which sections 24(1)(b), 27(1)(b) and 27(1)(c) apply, in theory, and information that is subject to solicitor-client privilege, these provisions also very clearly apply to information that is not subject to solicitor-client privilege. As a result, statements describing information with a view to establishing that these provisions apply will not serve to establish that solicitor-client privilege applies.

[para 113] In response to the issue I raised, the FOIP Manager provided the argument in her affidavit that because there is room for overlap between information to which sections 24(1)(b), 27(1)(a),(b), and (c) apply "it is not a contradiction to say that information, here solicitor-client privileged information in email, falls within the literal and ordinary meaning of all four".

[para 114] I agree that it is not necessarily a contradiction to argue that all four provisions apply at once, given that it may be possible to imagine information simultaneously meeting the requirements of all four provisions. However, it is also possible to imagine information that does not meet the requirements of all these provisions, given that they encompass different kinds of information, or information that does not meet the requirements of any of them, on the description I have been given. As discussed above, a public body bears the burden of proving on a balance of probabilities that an exception to disclosure applies to information. Again, this means establishing that information is more likely than not subject to an exception.

[para 115] I have been told that the first redaction is an email written by the Chief and sent to lawyers and a superintendent. I am told that it is privileged, but I have not been told the relationship between the lawyers and the Chief or the subject matter of the email. I am also told that the email can simultaneously be characterized as consultations or deliberations, or as relating to advice or other services, or as having been "prepared in relation to a matter involving the provision of legal services", which suggests that the person preparing the email did so to provide legal services.

[para 116] Ultimately I find that the Public Body has not established that the information it has severed meets the terms of any of the provisions it has applied. Because other possibilities i.e., that the information is not privileged and does not fall within the exceptions the Public Body has applied, have not been ruled out by the Public Body's evidence (independent of its sworn assertions as to the status of the evidence), I find that the Public Body has not met its burden.

Record 11, Second Redaction

[para 117] In my letter of July 24, 2015, I expressed the following concerns regarding the Public Body's evidence:

> The Public Body has redacted an email under section 24(1)(a) 24(1)(b), and section 27(1)(a), (b) and (c). This letter was created by the affiant. The affiant explains in her affidavit:
>
> > The redaction is legal advice provided to the CPS.
> >
> > It also includes consultations and deliberations involving officers of the CPS and lawyers of the CPS concerning that advice. The information redacted was prepared by a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and officer of the CPS and another lawyer of the CPS in relation to matters involving the provision of advice or other services by the lawyer.
>
> Information cannot, at the same time, be legal advice and be consultations and deliberations concerning that advice. Similarly, information cannot be a discussion by police officers and at the same time be information prepared by a lawyer. It is unclear from the affidavit whether the redacted information is legal advice, or is a discussion of legal advice or services, or, whether the redacted information is instead prepared by a lawyer in relation to a matter that involved provision of legal services, or possibly, other services.
>
> I require either the records or more detailed and precise evidence as to the purpose of communications and the role of the parties involved in the communications before I can find that the information redacted from the records is subject to solicitor-client privilege. As discussed above, I am unable to confirm any of the Public Body's decisions to sever under section 24(1)(a) or (b), or section 27(1)(b) or (c) unless the records are available to me.

[para 118] The FOIP Manager stated in her affidavit of August 10, 2015 that the redacted information is legal advice. She noted that the severed information consists of email chain and added:

> By this stage in the email conversation, the legal advice consists, among other legal advice, of legal advice upon and that discusses other legal advice. The chain of emails ultimately leads to a decision[…]

[para 119] I have been provided with insufficient evidence regarding the subject matter of the information described as legal advice, the roles of the lawyers involved in the email exchange, and the context in which the emails were written, to be able to make an independent finding that the information severed by the Public Body is legal advice.

[para 120] I am also unable to conclude that the information meets the terms of section 27(1)(b), as there is no evidence before me that the information was prepared by any of the lawyers for use in providing legal services.

[para 121] As I do not know what the matter was under discussion, or the specific role of the lawyers in relation to it, I am unable to make an independent finding that any of the lawyers who participated in the email exchange were providing advice or other

services in relation to the matter. I am therefore unable to support the Public Body's application of sections 24(1)(a) and 27(1)(c).

[para 122] Finally, I do not know what was to be decided, or how any consultations or deliberations involving the person charged with making a decision would be revealed by the contents of the email. I am therefore unable to support the Public Body's application of section 24(1)(b).

Record 11, Third Redaction, Record 12, First Redaction, Record 12, Second Redaction, Record 12, Third Redaction, Records 13 - 14

Record 11, Third Partial Redaction

[para 123] The FOIP Manager's initial affidavit states:

> The redaction is legal advice provided to the CPS.
>
> The information redacted was prepared by a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and officers and a lawyer of the CPS in relation to matters involving the provision of advice or other services by the lawyer.

[para 124] I expressed the following concerns regarding the sufficiency of the Public Body's evidence:

> It is unclear to me from this description who wrote the email and for what purpose. The information is described as "legal advice", but then it is also described as information prepared by a lawyer of the CPS in relation to a matter involving the provision of legal services, and then again as information in correspondence between a lawyer of the CPS and officers in relation to matters involving the provision of advice or other services by the lawyer. It may be the case that the information is privileged; however, while some of the descriptors in the affidavit suggest privilege, others suggest that the information may relate to obtaining services from a law firm, which is information that the Public Body did not consider to be privileged elsewhere in the records.
>
> In the absence of detailed and precise evidence as to the purpose of the redacted information and the circumstances in which it was written, I am unable to find that the information is subject to solicitor-client privilege.

[para 125] The FOIP Manager repeated in her affidavit of August 10, 2015 that the third redaction is legal advice. She also argued that because the information appears in a series of emails, that sections 27(1)(b) and (c) are engaged if the literal and ordinary meaning of these provisions is applied.

[para 126] As I find that the evidence is insufficient to meet the standards set out in *Pritchard* and *Campbell, supra*, it follows that I find that the Public Body has not established that the information it has severed from these records under section 27(1)(a) is subject to this provision. Moreover, I am unable to say on the evidence before me that the information was prepared or made ready by or for a lawyer for use in providing legal services, within the terms of section 27(1)(b) or that any of the lawyers who participated

in the email exchange were providing advice or services within the terms of section 27(1)(c) in relation to the matter that was under discussion in the email.

Record 17

[para 127] The FOIP Manager's initial affidavit describes record 17 in the following terms:

> Email is dated February 21, 2013.
>
> The redaction concerns and elaborates upon legal advice provided to the CPS.
>
> The information redacted was prepared by a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and an officer of the CPS in relation to matters involving the provision of advice or other services by the lawyer.

[para 128] In my letter of July 24, 2015, I expressed the following concerns regarding the Public Body's evidence in relation to record 17.

> The Public Body applied sections 27(1)(a), (b), and (c) to withhold an email from page 17. The Public Body states that the redacted information "concerns and elaborates upon legal advice provided to the CPS". The information is also described as "prepared by a lawyer of the CPS in relation to a matter involving the provision of legal services" and as being "in correspondence (email) between a lawyer of the CPS and an officer of the CPS in relation to matters involving the provision of advice or other services by the lawyer."
>
> It is unclear from this description who elaborated on the legal advice provided to the CPS and whether the elaboration reveals legal advice. Elaborating upon advice may reveal the original advice or it may be a discussion of it; but elaboration may not be, in and of itself, legal advice. In any event, there is no discussion of the purpose of the writer in elaborating on the legal advice, so I am unable to say that the email was created for the purpose of giving or receiving legal advice.
>
> The information is also described as having been prepared by a lawyer in relation to a matter involving the provision of advice or other services. As discussed above, this description does not bring information within the continuum of legal advice and does not establish that the information is subject to solicitor-client privilege. On the evidence before me, I am unable to find that the information in the records has been properly withheld under any of the provisions of section 27.

The FOIP Manager replied in her affidavit of August 10, 2015 that record 17 is not legal advice but is "part of the continuum of communications between a lawyer and a client for the purpose of seeking and providing legal advice." She also argues that because it is part of the continuum of communications, it falls within "the literal and ordinary meaning of all of s. 27(1)(a), (b)(iii), and (c)(iii)".

[para 129] The Public Body has not provided evidence as to who created the information redacted from record 17, who received it, the context in which the email was written, or the purpose for which it was created (other than by asserting it was for seeking and providing "legal advice)". I am therefore unable to make an independent finding that

it falls within the "continuum of communications" between solicitor and client. Moreover, the absence of this evidence also makes it impossible to find that section 27(1)(b) or (c) apply to the information in this record, given that I cannot say that it was prepared so that legal services could be provided, or that a lawyer who may have received or sent the correspondence was providing advice or services in relation to the subject matter of the information in the record.

Records 18 - 20

[para 130] The Public Body states:

> The first redaction on page 18 concerns seeking legal advice by the CPS.
>
> The information redacted was prepared for a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and an officer of the CPS in relation to matters involving the provision of advice or other services by the lawyer.
>
> The remaining redactions are the same redactions as those made to the email at pages 5 – 6. The explanation for the redactions is the same.

[para 131] In my letter of July 24, 2015, I expressed the following concerns about the foregoing evidence:

> The Public Body notes that the first redaction from these pages "concerns seeking legal advice". That information concerns seeking legal advice does not necessarily mean that the seeking of legal advice is set out or revealed. In addition, I am told that in the second paragraph that the information was prepared for a lawyer in relation to legal advice, or alternatively, in relation to matters involving the provision of advice or other services. These descriptions are inconsistent: someone seeking legal advice is not preparing information by or on behalf of a lawyer within the terms of section 27(1)(b). (See Orders F2008-028, F2009-024.) Moreover, it is unclear whether the information has been severed because it "relates to" legal advice or because it consists of advice or other services. Neither description establishes that the severed information is subject to solicitor-client privilege.
>
> The Public Body states that the remaining information severed is identical to the information severed from records 5 and 6. The same comments apply.

[para 132] The FOIP Manager explained that an officer of the CPS wrote the email to a lawyer for the CPS and indicated in the *in camera* affidavit that the officer would take a particular step relating to the matter. The FOIP Manager also referred me to her response in relation to records 5 – 6.

[para 133] The unredacted information establishes that this email was sent from the acting superintendent referred to in my discussion of records 5 – 6, to the FOIP Manager. I am told that the redaction "advises" that the [acting superintendent] will take a particular step for either one "and / or" another of two stated purposes. The inclusion of the word "or" in this statement by the affiant makes it a possibility that the acting superintendent intended to take the step for either of these purposes, with the result that it is possible he advised that he would be contacting a lawyer to seek legal advice but also

possible that he advised he would be contacting a lawyer for another reason. The affidavit also does not state whether the acting superintendent revealed in the redacted information which topic the step he would be taking concerned. Whether he did or did not is unclear to me from the context provided by the email chain. In addition, I cannot say whether the topic was other than that which is discussed in the unredacted portions of the email chain.

[para 134] What flows from this uncertainty is that I lack sufficient information to be able to say whether the redacted information is privileged. This is in part because I lack the necessary context in terms of the subject matter of the discussion for determining whether the circumstances were such that there is a reasonable likelihood that legal advice was being sought. The FOIP Manager refers to "legal advice" in her statement, but may be her own interpretation, or that of the acting superintendent. She alternatively characterizes the information as something other than legal advice, given her use of the connector "and / or". However, it is my responsibility to make the judgment independently whether particular information constitutes "legal advice", and I lack sufficient information about what topic was being discussed to do so. Another difficulty is that, while it is not clear what the FOIP Manager means when she states the second of the two purposes, it is possible, the second one being different from the first and ambiguous in its meaning, that the second step would not involve solicitor-client privilege. Given the FOIP Manager's use of "and / or" to characterize the information she describes, the acting superintendent's purpose may have been *only* the second one, which is something other than seeking legal advice. Finally, it is possible that what the acting superintendent stated in his email, or some of it, had already been disclosed in the unredacted portions of the email, and that to this extent, any privilege in the records has been waived. The remainder of the email chain makes this a possibility.

[para 135] Given the lack of clarity on all these points, I am unable to make an independent finding that the first redaction on record 18 is privileged.

[para 136] The FOIP Manager also reasons that the officer prepared the record "for" a lawyer in the sense that the officer sent it to her, and that section 27(1)(b) applies for this reason. She also argues that an officer is an agent of the public body and that section 27(1)(b) also applies for this reason. (This argument is made in the *in camera* affidavit, but does not reveal anything about the records.)

[para 137] As discussed above, I do not agree that section 27(1)(b) can be applied to information that is not prepared by or on behalf of a lawyer or legal agent. In this case, the acting superintendent, who is not a lawyer or legal agent, and was not acting at the direction of one, emailed the FOIP Manager to indicate a step he would take. In addition, neither the acting superintendent nor the FOIP Manager can be said to have prepared the email for use in providing advice or legal services. As a result, I find that that this redaction does not fall within the terms of section 27(1)(b) or (c).

[para 138] The remaining records are duplicates of records 5 – 6. My decisions regarding the redactions are the same.

Record 22

[para 139] The Public Body's evidence in relation to this record is the following:

> The redacted material consists of a number of emails dated February 25, 2013 amongst various lawyers of the CPS and officers of the CPS that involve the seeking and giving of legal advice by and to the CPS[.]
>
> The information redacted was prepared by lawyers for the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between lawyers of the CPS and officers and lawyers of the CPS in relation to matters involving the provision of advice or other services by the lawyers.

[para 140] In my letter of July 24, 2015 I stated:

> The Public Body applied sections 27(1)(a), (b), and (c) to sever emails from record 22. The Public Body states that the redacted information "consists of a number of emails dated February 25, 2013 amongst various lawyers of the CPS and officers of the CPS that "involve" the seeking and giving of legal advice by and to the CPS". The fact communications "involve" giving and seeking legal advice does not necessarily mean that they "are", "consist of" or "reveal" these things.
>
> The Public Body also describes the information as prepared by or for lawyers of the CPS in relation to a matter involving the provision of legal services and as information in correspondence between lawyers and officers and other lawyers in relation to matters involving the provision of advice or other services by the lawyers.
>
> The descriptions provided by the Public Body do not establish that the information severed from the emails is subject to solicitor-client privilege. In the absence of the records or more detailed affidavit evidence, I am unable find that the information redacted by the Public Body is subject to solicitor-client privilege or has been properly withheld under an exception to disclosure.

[para 141] The Public Body's FOIP Manager provided the further explanation that the redacted information is an email sent by a lawyer to two officers of the CPS and another lawyer, which forwards an email sent by the secretary of another lawyer. She argues that this email is part of the continuum of solicitor-client communications and falls within the literal and ordinary meanings of sections 27(1)(a), (b), and (c).

[para 142] The Public Body's evidence fails to establish the nature of the relationship between the officers and the lawyers receiving the email, or the relationship between the lawyers involved in the email exchange and the Public Body. The evidence does not establish the subject matter of any advice that was going to be sought or given, or the circumstances in which any advice would be sought and rendered. I am therefore unable to say, based on what has been submitted, that record 22 reveals solicitor-client communications.

[para 143] The absence of evidence in this case also makes it impossible to find that section 27(1)(b) or (c) apply to the information in this record, given that I cannot say, on the basis of the evidence before me, that the record was prepared so that legal services could be provided, or that a lawyer who may have been received or sent the

correspondence was providing advice or services in relation to the subject matter of the information in the record.

Record 23

[para 144] The Public Body's evidence regarding the content of this record is the following:

> The redacted material consists of a number of emails dated February 25, 2013 amongst various lawyers of the CPS and officers of the CPS that involve the seeking and giving of legal advice by and to the CPS[.]
>
> The information redacted was prepared by lawyers of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between lawyers of the CPS and officers and lawyers of the CPS in relation to matters involving the provision of advice or other services by the lawyers.

[para 145] In my letter of July 24, 2015, I expressed the following concerns:

> The Public Body applied sections 27(1)(a), (b), and (c) to emails on record 23. Exhibit 1 explains that the emails were "amongst various lawyers of the CPS and officers of the CPS that *involve* the seeking and giving of legal advice by the CPS". As with the other information severed from the records, the information is described as having been prepared by lawyers *in relation to a matter involving* the provision of legal advice, or alternatively, information in correspondence between lawyers of the [CPS] and officers and lawyers of the CPS *in relation to matters involving* the provision of advice *or* other services by the lawyers; however; the Public Body does not explain which of these options is accurate. The language used by the Public Body is too ambiguous to enable me to conclude that the information it has severed is subject to solicitor-client privilege. In the absence of the records, or more detailed and specific affidavit evidence regarding the contents of the records and the purpose for which they were created, I am unable make a finding that solicitor-client privilege attaches to the information severed from page 23 or that the emails on page 23 have been properly withheld under the exceptions the Public Body has applied.

[para 146] In response to the concerns I expressed, the FOIP Manager provided an explanation that is identical to her explanation of the severing she provided in relation to record 22.

[para 147] For the same reasons I provided in relation to the Public Body's application of section 27(1) to record 22, I am unable to find that any of the provisions of section 27(1) apply to the information severed from record 23.

Record 24

[para 148] The Public Body describes record 24 in the following terms:

> The redacted material consists of a number of emails dated March 14, 2013 amongst a lawyer of the CPS and officers of the CPS that provide and discuss legal advice given to the CPS.
>
> The information redacted was prepared by or for a lawyer in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the

> CPS and officers of the CPS in relation to matters involving the provision of advice or other services by the lawyer.

[para 149] In my letter of July 24, 2015, I stated the following regarding the Public Body's description of the record:

> The Public Body applied sections 27(1)(a), (b), and (c) to emails on page 24. The Public Body describes the redacted information as consisting of a number of emails between lawyers and officers of the CPS that "provide and discuss legal advice provided to the CPS".
>
> The information is then described as information prepared by or for lawyers of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between lawyers of the CPS and officers and lawyers of the CPS in relation to matters involving the provision of advice or other services by the lawyer.
>
> To the extent that the email is described, the description is confusing. It is unclear from the email who prepared the legal advice referred to in the first sentence. If all the lawyers involved in the email chain created the legal advice, then it is unclear how they could be said to be discussing it. Moreover, the information is then described as having been prepared by or for lawyers, yet the description of the record I have been provided indicates that officers may have themselves created the email, in which case, the emails were not prepared "by or for" a lawyer. In the absence of the records, or more detailed and specific affidavit evidence regarding the contents of the records and the purpose for which they were created, I am unable to find that solicitor-client privilege attaches to the information severed from page 24 or that the emails on page 24 have been properly withheld under the exceptions the Public Body has applied.

[para 150] The FOIP Manager responded that record 24 contains two emails. She refers to the first email as one from a lawyer written to two officers of the CPS and another lawyer of the CPS that provides legal advice. She describes the second email as not containing legal advice or revealing it, but as forming part of the continuum of communications between solicitor and client. She also puts forward the position that the second email cannot be severed from the first email as it would be "unfairly confusing" if the Public Body did so. The FOIP Manager also provides the opinion that both emails fall within the terms of sections 27(1)(b) and (c).

[para 151] As discussed above, the Supreme Court of Canada has stated that where government lawyers are involved, evidence must be provided regarding the nature of the relationship between the parties for whom a solicitor and client relationship is claimed, the subject matter of any advice, and the circumstances in which any advice is sought and rendered. I am unable to answer any of these questions based on what the Public Body has provided. I am therefore unable to say that record 24 contains communications that are the subject of solicitor-client privilege or fall on the continuum of such communications. I am therefore unable to find that section 27(1)(a) applies.

[para 152] I am also unable to say that section 27(1)(b) applies to the information as I do not know that the emails were created for a lawyer's use in the provision of legal services. In addition, it is unclear, on the evidence before me, that the email refers to a matter that involves the provision of advice or other services by any of the lawyers who were parties to the email for the purposes of the application of section 27(1)(c). As discussed above, when a public body does not provide the records at issue for review, it

still bears the burden of proving the facts necessary to establish that the exceptions it has applied do apply. That burden has not been met.

Records 25 – 28, 29 – 32, 36

[para 153] The Public Body states that the first seven emails appearing on these records are identical to the first seven emails on records 7 – 10.

[para 154] I have already decided that the Public Body has not established that records 7 – 10 contain information subject to section 27(1).

[para 155] With regard to an eighth email appearing on these records, the FOIP Manager indicates that it is from an officer of the CPS to two lawyers of the CPS and another officer of the CPS that comments upon and gives instruction regarding the legal advice provided in the email chain and as such is part of the continuum of communication the purpose of which is obtaining and giving of legal advice and instructions.

[para 156] The FOIP Manager argues that both section 27(1)(a) and (c) apply to the email. The FOIP Manager states that although the email was intended to be sent to lawyers, it was not actually prepared by one, or at the direction of one. However, she argues that the officer is an agent of the Public Body and that under the literal and ordinary meaning of the words of section 27(1)(b), the email is caught by this provision.

[para 157] As discussed above, the Supreme Court of Canada has stated that where government lawyers are involved, evidence must be provided regarding the nature of the relationship between the parties for whom a solicitor-client relationship is claimed, the subject matter of any advice, and the circumstances in which any advice is sought and rendered. I am unable to answer any of these questions based on what the Public Body has provided. I am therefore unable to say that record 25 – 28 contain communications that are the subject of solicitor-client privilege.

[para 158] I am also unable to say that section 27(1)(b) applies to the information as I do not know that the emails were created for a lawyer's use in the provision of legal services. In addition, it is unclear, on the evidence before me, that the email refers to a matter that involves the provision of advice or other services by any of the lawyers who were parties to the email for the purposes of the application of section 27(1)(c).

[para 159] For the reasons given above, and discussed in Order F2008-028, I have already rejected the argument that an officer of a public body is necessarily an agent of a public body within the terms of section 27(1)(b) or (c). There is no evidence before me that the officer who wrote the eighth email was acting as an agent as that term has been interpreted in past orders of this office. In other words, there is no evidence before me that the officer was acting as a legal agent or as agent of the Minister of Justice and Attorney General.

[para 160] For the foregoing reasons, I find that it has not been established that section 27(1) applies to records 25 – 28, 29 – 32, and 36.

Record 35

[para 161] Record 35 contains the notes of an inspector of the CPS. The FOIP Manager states that the notes reveal legal advice provided to the CPS by a lawyer of the CPS and also involves the seeking of legal advice by the CPS. The FOIP Manager also states that the notes were prepared by the inspector as an "agent of CPS", in relation to a matter involving the provision of legal services.

[para 162] As discussed above, the Supreme Court of Canada has stated that where government lawyers are involved, evidence must be provided regarding the nature of the relationship between the parties for whom solicitor and client privilege is claimed, the subject matter of any advice, and the circumstances in which any advice is sought and rendered. I am unable to answer any of these questions based on what the Public Body has provided. I am therefore unable to say that record 35 contains communications that are the subject of solicitor-client privilege.

[para 163] I am also unable to say that section 27(1)(b) applies to the information as I do not know that the notes were created for a lawyer or agent's use in the provision of legal services.

[para 164] I have already rejected the argument that an officer of a public body is necessarily an agent of a public body. As discussed above, this argument neglects the context of section 27(1)(c), which indicates that an agent within the terms of this provision is one that can provide the same kinds of advice and services that a lawyer or the Minister of Justice and Attorney General can provide. There is no evidence before me that the inspector who created the notes was acting as a legal agent or as an agent of the Minister of Justice and Attorney General in the context in which record 35 was created.

[para 165] For the foregoing reasons, I find that it has not been established that section 27(1) applies to the notes redacted from record 35.

Records 40 – 44, 45 – 49, 50 – 52, and 53

[para 166] The Public Body describes the records as a chain of ten emails. As with records 25 – 28, 29 – 32 and 36, the FOIP Manager states that the first seven emails in these records are identical to the first seven emails severed from records 7 – 10.

[para 167] My reasons for finding that section 27(1) does not apply to the first seven emails on these records are those I have already stated in relation to records 7 – 10.

[para 168] The Public Body indicates that the eighth email is from a lawyer of the CPS to two officers of the CPS and "the other lawyer of the CPS that provides legal advice".

[para 169] The Public Body describes the ninth email as from a lawyer of the CPS to another lawyer of the CPS that provides legal advice.

[para 170] The tenth email is described as an email from a lawyer of the CPS to his secretary forwarding the chain so that the lawyer would retain an organized copy of it.

[para 171] Finally, the Public Body explains that record 53 contains a chain of two emails, the first being an email from an officer of the CPS to a lawyer of the CPS, copied to another officer of the CPS and another lawyer of the CPS, commenting on legal advice (although it does not disclose that advice). The Public Body also states that the email discusses legal strategy and gives legal instructions.

[para 172] As discussed above, the Supreme Court of Canada has stated that where government lawyers are involved, evidence must be provided regarding the nature of the relationship between the parties for whom solicitor-client privilege is claimed, the subject matter of any advice, and the circumstances in which any advice is sought and rendered. I am unable to answer any of these questions based on what the Public Body has provided. I am therefore unable to say that these records contain communications that are the subject of solicitor-client privilege.

[para 173] While the Public Body has stated that one of the emails on record 53 contains legal instructions, I do not know who the instructions are to, who they are from, or what the significance of the modifier 'legal' is in the context of the phrase "legal instructions", particularly since lawyers in a solicitor-client relationship typically receive instructions rather than give them. If it had been established that someone with sufficient authority to give instructions on behalf of CPS to a lawyer, had given instructions, and what the subject matter of the instructions was, and the source of the affiant's knowledge as the intentions of the authors of the emails, then I might be able to find reasonably that this email reveals a client's seeking of legal advice. However, the Public Body has not stated this to be the case or explained the source of the affiant's knowledge.

[para 174] As I have not been told about the subject matter of the records or the nature of the issue discussed in the records, I am unable to say that the correspondence is in relation to a matter for which any of the lawyers who sent and received the emails were providing advice or services, or legal services. It appears to be possible that the lawyers may have sent and received the emails for information purposes or to "retain an organized copy of the emails" as the Public Body suggests, rather than because they were providing advice or services in relation to a matter in the correspondence.

[para 175] I am unable to find that section 27(1) applies to records 40 – 44, 45 – 49, 50 – 52 and 53.

Records 54 – 55, 56 – 57

[para 176] The FOIP Manager states in her initial affidavit:

> The redacted material consists of a number of emails dated February 22 and 26, 2013, between a lawyer of the CPS and his secretary, between a lawyer of the CPS and an officer of the CPS, and between a lawyer of the CPS and the secretary of another lawyer of the CPS for the provision of legal advice and legal instructions.
>
> The information redacted was prepared by or for a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and an officer of the CPS and / or another lawyer of the CPS and / or a lawyer of the CPS' secretary in relation to matters involving the provision of advice or other services by a lawyer of the CPS.

[para 177] In my letter of July 24, 2015, I stated:

> The Public Body applied sections 27(1)(a), (b), and (c) to withhold the emails in these pages. The Public Body describes the redacted information as email chains "between lawyers of the CPS, between a lawyer of the CPS and an officer of the CPS, and between a lawyer of the CPS and the secretary of the CPS for the provision of legal advice and legal instructions." The redacted information is also described as "prepared by or for a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and an officer of the CPS or another lawyer of the CPS (copied also to the first lawyer's secretary) or the secretary of another lawyer of the CPS's secretary in relation to matters involving the provision of advice or other services by a lawyer of the CPS".
>
> It is unclear how emails can at once provide legal advice and also provide legal instructions. Typically, a lawyer provides legal advice while the client provides the lawyer with instructions. I understand that it is possible that an email could be said to contain both in cases where information from one party to a communication is repeated by another, although the information could still be characterized as "advice" or "instruction" depending on who authored the email and their purpose in creating it. In any event, I have insufficient information to determine whether this is the case.
>
> The reference to the information being sent "to an officer or to another lawyer" is too vague to convey meaning about the context in which the emails were created or their purpose. Finally, the reference to the CPS's secretary, while possibly a reference to a person involved in conveying communications rather than sending or receiving them personally, also serves to add confusion. Without evidence as to the purpose in sending […] the information to the secretary and the circumstances in which it is sent, information sent or copied to a secretary does not fall under section 27(1)(a), (b), or (c).
>
> In the absence of the records, or more detailed and specific affidavit evidence regarding the contents of the records and the purpose for which they were created, I am unable to find that solicitor-client privilege attaches to the information severed from these pages or that the information has been properly withheld under the exceptions the Public Body has applied.

[para 178] The FOIP Manager responded to my concerns, explaining that the records contain a chain of three emails. The first email is described as an email "on behalf of a lawyer of the CPS sent by the lawyer's secretary to a lawyer of the CPS that provides legal advice and seeks legal instructions." The FOIP Manager reasons that this email falls under the "literal and ordinary meaning" of sections 27(1)(a), (b), and (c). The second email is described as "from a lawyer of the CPS to an officer of the CPS that forwards the first email in order to convey the legal advice and the request for instructions." The FOIP Manager also characterizes this email as falling within the "literal and ordinary" meaning

of sections 27(1)(a), (b), and (c). The third email is described as being from a lawyer of the CPS to his secretary forwarding the chain so that the lawyer would retain an organized copy. The FOIP Manager asserts that this email also falls within the literal and ordinary meaning of sections 27(1)(a), (b), and (c).

[para 179] As already noted above, there is tension in the idea that a record at once provides legal advice and instructions, and also is "prepared in relation to a matter involving the provision of legal services". As the Director of Adjudication noted in Order F2015-31:

> 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.

[para 180] I would add to her discussion that the word "prepared" in section 24(1)(b) which means "made ready for use" also argues against finding that section 27(1)(b) is intended to capture legal advice. Section 27(1)(b) encompasses information a lawyer or agent has made ready for use in relation to the provision of legal services, such as the information the lawyer has prepared in order to provide legal advice, rather than the legal advice itself; as the Director of Adjudication notes, legal advice is the service that a lawyer provides to a client and does not merely "relate to it".

[para 181] The Public Body essentially asserts that the records may be characterized as two potentially conflicting things: legal advice, on the one hand, and information a lawyer has made ready for use in providing legal advice on the other. It is not clearly the case that a record can have both these characteristics. If the record contains confidential legal advice from a lawyer to a client then section 27(1)(a) applies, but section 27(1)(b) and (c) do not. If section 27(1)(b) applies, then it is possible that the information does not fall within the scope of section 27(1)(a) or section 27(1)(c). If section 27(1)(c) applies to information, then sections 27(1)(a) and (b) likely do not.

[para 182] In this case, the first email is described as legal advice from a lawyer that is sent to someone else who is also described as a "lawyer". Without more information as to the purpose of the email and the relationship between the two lawyers to each other and their roles within the Public Body, I cannot say whether this information is subject to solicitor-client privilege. In addition, as there is no evidence before me as to the roles of the lawyers with regard to these emails, I cannot say that any of the lawyers prepared them in relation to a matter involving the provision of legal services within the terms of section 27(1)(b).

[para 183] Finally, section 27(1)(c) applies when the matter in the correspondence is one in relation to which the lawyer, who is engaged in the correspondence, is providing advice or services. Again, because the roles of the lawyers has not been explained for the inquiry, I cannot independently determine whether either of the lawyers is providing advice or other services in relation to the matter that is the subject of the email. It is also by no means clear what the Public Body means when it characterizes information in its evidence as "advice *or other* services".

[para 184] As with other records, I have not been told the position of any of the parties to this email within the Public Body. I have not been told any details about a matter that may be the subject of the email. I have been provided some context with regard to why the email was created; but in the absence of evidence regarding the role of the persons who wrote the email and the subject matter of the email, I am unable to say that records 54 – 55 and 56 – 57 are privileged or fall within the terms of any of the provisions of section 27(1).

Records 58 – 59, 60 – 61, 62 – 63, 64 – 65, 66 - 68

[para 185] The Public Body's evidence in relation to records 58 – 59 is the following:

> The redacted material consists of a number of emails dated February 21, 2013, between lawyers of the CPS, between a lawyer of the CPS and an officer of the CPS, and between a lawyer of the CPS and the secretary of another lawyer of the CPS for the provision of legal advice and legal instructions.
>
> The information redacted was prepared by or for a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and an officer of the CPS or another lawyer of the CPS (copies also to the first lawyer's secretary) or the secretary of another lawyer of the CPS in relation to matters involving the provision of advice or other services by a lawyer of the CPS.

[para 186] Records 60 – 61 are described in the following terms:

> The redacted material consists of a number of emails dated February 22 and 26, 2013, between lawyers of the CPS and between a lawyer of the CPS and the secretary of another lawyer of the CPS for the provision of legal advice and legal instructions.
>
> The information redacted was prepared by or for a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and another lawyer of the CPS or the secretary of another lawyer of the CPS in relation to matters involving the provision of advice or other services by a lawyer of the CPS.

[para 187] Records 62 – 63 are described as:

> The redacted material consists of two emails dated February 25 and 26, 2013, between a lawyer of the CPS and his secretary and the secretary of another lawyer of the CPS for the provision of legal advice and legal instructions.
>
> The information redacted was prepared by or for a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a

lawyer of the CPS and his secretary or the secretary of another lawyer of the CPS in relation to matters involving the provision of advice or other services by a lawyer of the CPS.

[para 188] Records 64 – 65 are described as:

> The redacted material consists of a number of emails dated February 21, 2013, between lawyers of the CPS, between a lawyer of the CPS and an officer of the CPS, and between a lawyer of the CPS and the secretary of another lawyer of the CPS for the provision of legal advice and legal instructions.
>
> The information redacted was prepared by or for a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and an officer of the CPS or another lawyer of the CPS (copied also to the first lawyer's secretary) or the secretary of another lawyer of the CPS in relation to matters involving the provision of advice or other services by the lawyer of the CPS.

[para 189] Records 66 – 68 are described as:

> The redacted material consists of a number of emails dated February 22 and 26, 2013, between a lawyer of the CPS and his secretary and the secretary of another lawyer of the CPS as well as that other lawyer of the CPS for the provision of legal advice and legal instructions.
>
> The information redacted was prepared by or for a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and his secretary or the secretary of another lawyer of the CPS or that other lawyer in relation to matters involving the provision of advice or other services by a lawyer of the CPS.

[para 190] I expressed the following concerns about the Public Body's evidence:

> *Pages 58-59, 60-61, 62-63, 64-65, 66-68:* The Public Body applied sections 27(1)(a), (b), and (c) to withhold the emails in these pages. The Public Body describes the redacted information as email chains "between lawyers of the CPS, between a lawyer of the CPS and an officer of the CPS, and between a lawyer of the CPS and the secretary of the CPS for the provision of legal advice and legal instructions." As I noted above, it is unclear how emails can at once provide legal advice and also provide legal instructions. Typically, a lawyer provides legal advice while the client provides the lawyer with instructions. In the absence of detailed evidence serving to explain how the information can be said to be both advice and instructions, I am unable to find that it is either.
>
> The information is also described as having been copied to a lawyer's secretary and in some cases, emailed to a lawyer's secretary. Again, the Public Body's evidence is silent as to why the lawyer's secretary was copied or sent emails. Without evidence as to the purpose in sending information to a secretary and the circumstances in which it was sent, and the identity of the sender, information sent or copied to a secretary does not fall within sections 27(1)(a), (b), or (c).
>
> In the absence of the records, or more detailed and specific affidavit evidence regarding the contents of the records and the purpose for which they were created, I am unable to find that solicitor-client privilege attaches to the information severed from these pages or that the information has been properly withheld under the exceptions the Public Body has applied.

[para 191] In response to the concerns I expressed, the Public Body's FOIP Manager clarified that there are four emails on records 58 – 59, the first three of which are the

same emails that appear on records 56 – 57. The fourth email is described as having been sent from one lawyer of the CPS to another lawyer of the CPS forwarding legal instructions and providing further legal advice. The emails are also described as falling within the "literal and ordinary meaning" of sections 27(1)(b) and (c). As I have already determined that it has not been established that records 56 – 57 are subject to section 27(1), I shall confine my analysis to the fourth email.

[para 192] The term "lawyer", where it is used by the Public Body to explain the history of the fourth email on records 58 – 59, appears to refer to the professional qualification of the lawyer, rather than the role of the lawyer in a solicitor-client relationship. No explanation is provided as to the role of the lawyers in relation to the emails. Similarly, no information has been provided as to the subject matter of the information that is described as legal advice or legal instructions. A lawyer from the CPS is described as forwarding legal instructions and providing further legal advice; however, as discussed above, "whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered". I have not been provided any evidence regarding the subject matter of any advice, the nature of the relationship between the lawyers, and the lawyers and the Public Body, and I have not been provided any information regarding the circumstances in which any advice was sought or rendered.

[para 193] Ultimately, I am left uncertain as to what the roles of the lawyers were in relation to the fourth email on record 59 or the purpose and subject matter of the email and the context in which it was created. I am unable to find reasonably or independently, that any of the provisions of section 27(1) apply to it.

[para 194] The FOIP Manager explains that records 60 – 61 consist of three emails. One is sent by the secretary of one lawyer to "another lawyer of the CPS that seeks legal instructions".

[para 195] The second email is described as "*providing*" legal instructions, although it appears possible from the FOIP Manager's description that she means, as with the other emails, that the information she describes as legal instructions were "*forwarded*" and chose to use different language. Again, it is not clear what is meant by "legal instructions" – whether this is meant to suggest a lawyer is providing them in the same way a lawyer gives 'legal advice', and if so, how this relates to any solicitor-client relationship, or whether it means a client is giving instructions regarding a legal matter. Alternatively, it these words could also be used to describe the situation in which may one lawyer directs or instructs another lawyer in a supervisory capacity.

[para 196] The third email is from a lawyer of the CPS to his secretary in order that the lawyer could keep an organized copy of the email. The FOIP Manager adds that the emails fall within the literal and ordinary meaning of sections 27(1)(b) and (c).

[para 197] The Public Body has not provided sufficient evidence of the role of the lawyers who created and received the emails, the nature of the matter they were

discussing, or their purpose in doing so, such that I could find any of the provisions of section 27(1) apply.

[para 198] The FOIP Manager clarified that records 62 – 63 contain a chain of two emails. She indicates that the first email was sent to another lawyer of the CPS by his secretary to another lawyer of the CPS (and copied to the first lawyer). She states that the purpose of the letter was to provide information. She indicates that this is "part of the continuum of communication[,] the purpose of which is providing and obtaining legal advice". The FOIP Manager also states that the emails fall within the "literal and ordinary meaning of the words in each of s. 27(1)(a), (b)(iii) and (c)(iii)."

[para 199] As with records 58 – 59 and 60 – 61, the Public Body has provided insufficient evidence regarding the roles of the lawyers in relation to the emails and the subject matter of the emails. Without more information as to the role of the lawyers and the subject matter of the communications, and the context in which they were made, I am unable to find independently that the emails on records 62 – 63 are subject to section 27(1).

[para 200] The Public Body states that records 64 – 65 are duplicates of records 58 – 59. I have already found that it has not been established that these records are subject to section 27(1).

[para 201] The FOIP Manager clarified that records 66 – 68 contain an email chain of five emails. She notes that the first two emails are duplicates of emails appearing on records 60 – 61. I have already found that the Public Body has not established that the emails on records 60 – 61 are subject to a provision of section 27(1).

[para 202] The Public Body describes the third email as "on behalf of a lawyer of the CPS," sent by his secretary, to another lawyer of the CPS in order to confirm legal instructions. The fourth is described as confirming the instructions, and the fifth is described as being from a lawyer of the CPS to a secretary in order to retain an organized copy. The Public Body states that each of the emails in the chain falls "within the literal and ordinary meaning of the words in each of sections 27(1)(a), (b), and (c)."

[para 203] If it is the case that the Public Body's lawyers were circulating proposed instructions to the Public Body's legal counsel that were developed on behalf of the Public Body, then it might be possible to say that the information is privileged, provided that sufficient evidence was available regarding the subject and context of any such instructions, and the role of the lawyers who reviewed the email. However, the Public Body has not done so in this case. I have not been given any evidence as to what the information described as "legal instructions" refers, who created the instructions, and for whom they were ultimately intended. I have also not been told what the role of the lawyers was in relation to the email or the source of the FOIP Manager's knowledge about the intentions of the lawyers who wrote these emails, when they wrote them.

[para 204] In the FOIP Manager's initial affidavit it was asserted that the information that is characterized in the in camera affidavit as "legal instructions" is information "prepared by or for a lawyer in relation to the provision of legal services". This characterization makes it unclear as to what the FOIP Manager means by "legal instructions": whether it is direction from one lawyer to another lawyer in a supervisory capacity, or direction from a client to a solicitor. In her *in camera* reference to "legal instructions" the FOIP Manager describes one lawyer as seeking legal instructions from another lawyer, and receiving them. This also makes it unclear whether the "legal instructions" that are described are made by a lawyer's supervisor to a lawyer, or whether they are the client's instructions being relayed through several lawyers.

[para 205] I am unable to say that section 27(1)(b) applies, as I do not know that any of the lawyers involved in the email chain prepared these records for use in the provision of legal services. Rather, if they are the instructions of a supervisor to an employee, or alternatively a client's instructions to a lawyer, it would appear that the terms of section 27(1)(b) cannot be met.

[para 206] Section 27(1)(c) could potentially apply if it were the case that at least one of the lawyers was providing advice or services in relation to the matter for which the legal instructions were prepared. Again, the Public Body does not state that any of the lawyers involved in the email exchange was providing advice or services in relation to the matter that is the subject of the emails, or explain what any such advice or services might have been, in order to enable me to find independently that section 27(1)(c) applies.

[para 207] While I acknowledge that it is possible that these records may be subject to an exception to disclosure set out in section 27(1), I am unable to say, based on the Public Body's evidence and the vague and potentially conflicting descriptions of the facts it asserts, that an exception does, in fact apply to records 66 – 68.

Records 69 – 71

[para 208] The FOIP Manager describes records 69 – 71 in the following terms:

> The redacted material consists of a number of emails dated February 20 and 21, 2013, between various lawyers of the CPS and various officers of the CPS providing and discussing legal advice to and with the CPS and also involves the seeking of legal advice by the CPS.
>
> The information redacted was prepared by or for a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and officers and other lawyers of the CPS in relation to matters involving the provision of advice or other services by the lawyer.

[para 209] I expressed the following concerns regarding this evidence in my letter of July 24, 2015:

> The Public Body applied sections 27(1)(a), (b), and (c) to withhold the emails in these pages. As with other emails, it describes the emails as between lawyers of CPS and officers, that discuss

> and provide legal advice and involve the seeking of legal advice. Again, it is unclear how these records can be both advice and discussion, and provide legal advice and seek it at the same time. The records are also described as prepared by or for a lawyer, even though the first part of the description indicates that officers may have created the emails. The emails are also described as having been created in relation to the provision of "advice or other services", without indicating which of these two options is accurate.
>
> In the absence of the records, or more detailed and specific affidavit evidence regarding the contents of the records and the purpose for which they were created, I am unable to find that solicitor-client privilege attaches to the information severed from these pages or that the information has been properly withheld under the exceptions the Public Body has applied.

[para 210] The FOIP Manager provided the following clarification of records 69 – 71. She indicated that they contain a chain of seven emails; the first five emails are the same as those appearing elsewhere in the records.

[para 211] I have already found that it has not been established that all of the emails are privileged. In addition, the Public Body did not assert privilege over all of their contents, only over some of the information they contain. However, the Public Body has now applied the provisions of section 27(1) to these records in their entirety, as it asserts these records were exchanged between lawyers so that "further legal advice could be provided regarding the matters raised."

[para 212] I have already found that some of the redactions in the first five emails in these records are subject to privilege, while I have found that others had not been established as privileged.

[para 213] The sixth email is described as "from an officer of the CPS to a lawyer of the CPS, and copied to another lawyer of the CPS, forwarding the first five emails to that further legal advice "could be provided regarding the matters raised." A seventh email is described as being from one lawyer of CPS to another lawyer of CPS forwarding the first six emails so that "further legal advice could be provided regarding the matters raised".

[para 214] My decisions regarding what the Public Body describes as the first five emails remain the same as they did elsewhere in the records. However, with regard to the other emails, I am unable to make an independent finding that their contents are privileged. As discussed above, whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered. Here, while I know something of the subject matter of the first five emails, I do not the role or identity of the officer who forwarded the emails within the Public Body's organization or his or her role with regard to the subject matter of the records. Moreover, I have not been told the role of the lawyers to whom the emails were forwarded within the Public Body's organization or in relation to the records. It is also unclear to me from the affidavit what the source of the FOIP Manager's understanding is as to the purpose of the officer in forwarding the emails to the lawyers. It may be the case that the officer and the lawyers told her their purpose, or that this purpose was patent from the information in the email. Alternatively, it may be the case

that she has drawn an inference as to the purpose of the officer in forwarding the email, but one that I might not draw if I were to review the email.

[para 215] For all these reasons, I am unable to conclude independently that the email was forwarded to the two lawyers so that legal advice could be provided. I am therefore unable to find that section 27(1)(a) applies to the two emails that did not appear on records 5 – 6.

[para 216] There is insufficient evidence before me to ground the Public Body's claim that sections 27(1)(b) and (c) apply to these two emails, given that is has provided no evidence as to the purpose of the individuals who created the records or their relationship or responsibilities regarding any matters under discussion.

Record 72

[para 217] The Public Body provided the following evidence regarding record 72:

> Email dated February 21, 2013 from a secretary of a lawyer of the CPS to another lawyer of the CPS regarding legal advice and instructions.
>
> The information redacted was prepared for a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence (email) between a lawyer of the CPS and the secretary of another lawyer of the CPS in relation to matters involving the provision of advice or other services by the secretary's lawyer.

[para 218] I expressed the following concerns regarding the Public Body's evidence:

> The Public Body applied sections 27(1)(a), (b), and (c) to withhold the emails on this page. The information is described as: "Email dated February 21, 2013 from secretary of a lawyer of the CPS to another lawyer of the CPS regarding legal advice and instructions." From the description, it is unclear whether the information in the email reveals legal advice or instructions.
>
> The information is then described as having been prepared "for a lawyer of the CPS in relation to a matter involving the provision of legal services and is information in correspondence between a lawyer of the CPS and the secretary of another lawyer of the CPS in relation to matters involving the provision of advice or other services by the secretary's lawyer."
>
> Previous orders of this office (F2008-028, F2009-024) have interpreted prepared "by or for" as meaning "by or on behalf of" or "by or at the direction of" a lawyer. In the description the Public Body provided for the inquiry, "for" appears to be interpreted as meaning "sent to", which is not an interpretation that has been followed by this office. The reference to the "secretary's lawyer" adds confusion sing [sic], although I assume that this was intended to mean "the lawyer to whom the secretary reports". However, in the absence of evidence as to the purpose and context of the communication between the lawyer and the secretary that would support finding that the communication was made for the purpose of obtaining legal advice, I am unable to find that it was.
>
> In the absence of the records, or more detailed and specific affidavit evidence regarding the contents of the records and the purpose for which they were created, I am unable to find that solicitor-client privilege attaches to the information severed from these pages or that the information has been properly withheld under the exceptions the Public Body has applied.

[para 219] The Public Body clarified that the email had been sent on behalf of a CPS lawyer by his secretary to another CPS lawyer to provide information regarding the subject matter of "what part of the ongoing advice has been concerning". The Public Body characterizes this email as part of the continuum of communication, the purpose of which is providing and obtaining legal advice and instructions.

[para 220] I am unable to characterize this email as falling within the "continuum of communication", as I am unable to make any independent determination as to whether the ongoing discussion which is referenced involved the seeking or giving of legal advice. Indeed in this case, the affidavit does not positively assert that the lawyers involved in the email exchange were involved in the seeking or provision of legal advice, nor does it assert that any legal advice (in contrast to the subject matter of what is said to be advice), was referenced in the communication.

[para 221] I am unable to say that the contents of record 72 are privileged within the terms of section 27(1)(a). Moreover, as I have been given insufficient information as to the role of the persons who participated in the email exchange, or their purpose, beyond simply exchanging information, I am unable to state independently that sections 27(1)(b) and (c) apply.

Records 73 – 75

[para 222] The FOIP Manager's affidavit explains that records 73 – 75 are duplicates of records 18 – 20. My reasoning in relation to records 18 – 20 applies also to records 73 – 75.

Conclusion

[para 223] I am unable to support the Public Body's application of exceptions to disclosure to the majority of the records to which it has applied exceptions. I appreciate the time and care the FOIP Manager put into providing evidence for the inquiry; however, ultimately I find that the evidence she supplied is ambiguous, in the sense that it could potentially describe information that is subject to an exception to disclosure, or alternately, to information that is not subject to the exceptions. In the end, I am unable to say that the information that has been withheld is likely to be subject to exceptions to disclosure, although I do not discount the possibility that the information may be. As discussed above, the Public Body's burden is to prove that the information is more likely than not subject to an exception to disclosure. On the evidence before me, this burden has not been met in the majority of cases.

[para 224] It may be the case that the Public Body anticipated that I would assume that all the completely redacted records related to the same information that is in the second redaction on record 2 even though it did not state this to be the case. However, even if the Public Body had clearly established that the completely redacted records addressed this same subject matter, insufficient evidence regarding the context in which

the information was discussed and the roles of those discussing the information was provided in order to enable me to find reasonably and independently that the information was subject to the exceptions it applied.

[para 225] If I, as the Commissioner's delegate, were to accept the assessment of the FOIP Manager who provided the affidavit about the question of whether the records are subject to privilege, or fall within the terms of section 24(1)(a) or (b), or section 27(1)(a), (b), or (c), rather than making the assessment myself based on evidence, particularly in this case where some of the information at issue does not on its face appear to fall within these provisions, I would be abdicating my statutory duty to ensure the criteria for the application of these provisions are met and would be in essence allowing a party to decide the ultimate issue for the inquiry. Section 2(e) of the FOIP Act establishes that one of the purposes of the FOIP Act is "to provide for independent reviews of decisions made by public bodies under this Act". If I were to accept, without more evidence, what in most cases amounts to the Public Body's bare assertions that its decisions to sever information under sections 24 and 27 the Act were made appropriately, as determinative of the issues for inquiry, I would be undermining this purpose of the Legislature in enacting the FOIP Act, and denying the Applicant his right to an independent review.

IV. ORDER

[para 226] I make this order under section 72 of the Act.

[para 227] I order the Public Body to disclose the records to the Applicant in their entirety, with the exception of the second redaction on records 2, 15 and 21, all redactions on records 5 – 6 and 37 – 39, the second, third, fourth, fifth, and sixth redactions on records 18 – 20, and 73 – 75, and the five redactions on records 69 – 71 that are duplicates of the redactions on records 5 – 6, as discussed in this order, and also with the exception of the notes appearing on records 34 and 35 that the Public Body has indicated are nonresponsive to the Applicant's access request.

[para 228] I order the Public Body to notify me within fifty days of receiving this order, that it has complied with it.

_____

Teresa Cunningham
Adjudicator