# ALBERTA

# OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

# ORDER F2017-54

June 16, 2017

## ALBERTA EMERGENCY MANAGEMENT AGENCY

Case File Number 001496

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

**Summary:** The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Alberta Emergency Management Agency (the Public Body). He requested records containing information relating to the construction of berms during the flooding in High River in 2013 and records regarding an arbitration that had taken place in relation to the flooding.

The Public Body conducted a search for responsive records and provided some records to the Applicant. It applied sections 4, 17, 24(1)(a), (b), and (c), and 27(1)(a) and (b) to sever information from the records. The Applicant requested that the Commissioner review the adequacy of the search and the Public Body's severing decisions.

The Adjudicator determined that section 4(1)(q) applied to two records. However, she found that the attachments to these records were not subject to section 4(1)(q) and she directed the Public Body to include these records in its response to the Applicant, subject to the application of any applicable exceptions.

The Adjudicator confirmed the decision of the Public Body to sever the personally identifying information of individuals who were parties to a settlement agreement.

The Adjudicator found that sections 24(1)(a), (b), and (c) did not apply to the information the Public Body had severed under these provisions. The Adjudicator also determined that sections 27(1)(a), (b), and (c) had not been shown to apply to the records. In making

this determination, and in rejecting the Public Body's claim of solicitor-client privilege, the Adjudicator noted that the Public Body's evidence was inadequate and internally inconsistent and therefore unreliable; moreover, its claim that both sections 27(1)(a) and (b) applied to the same information required it to establish facts underpinning the application of each of these provisions that would necessarily contradict each other. In any event, the Adjudicator determined that the Public Body did not prove that either section 27(1)(a) or (b) applied to the information it had withheld from the Applicant. The Adjudicator also noted that the Public Body appeared to be asserting solicitor-client privilege, in addition to section 24(1), over records created by counsel representing parties opposed in interest to the Public Body. The Adjudicator ordered the Public Body to give the Applicant access to the records it had severed under provisions of sections 24(1) and 27(1) in their entirety.

The Adjudicator ordered the Public Body to conduct a new search for responsive records that would include the records described as the "High River EOC logs" and any responsive records it may have sent to the author of records 182 – 185. She ordered the Public Body to search for any copies of records it may have submitted in arbitration and a copy of the arbitration decision. She indicated that if the Public Body had searched for these records and was unable to locate such responsive records in its custody or control, then the Public Body was required to provide an explanation of the search it conducted to the Applicant. If it had already searched these areas, then the Public Body was required to provide an explanation of the details and results of its search to the Applicant.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2, 4, 6, 10, 17, 24, 27, 65, 68, 69, 70, 71, 72

**Authorities Cited: AB:** Orders 99-022, 2000-013, 2001-016, F2007-025, F2007-029, F2008-021, F2008-023, F2008-028, F2009-024, F2010-007, F2010-015; F2014-25, F2015-29, F2015-31, P2011-D-003

**Cases Cited:** *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403; *Solosky v. The Queen*, [1980] 1 SCR 821; *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 ; *Pritchard v. Ontario (Human Rights Commission)* 2004 SCC 31; *R. v. Campbell*, [1999] 1 S.C.R. 565; *F.H. v. McDougall*, 2008 SCC 53; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53; *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289; *Moseley v. Spray Lakes Sawmills (1980) Ltd.*, 1996 ABCA 141; *Blank v. Canada (Minister of Justice)* [2006] 2 S.C.R. 319; *TransAlta Corporation v Market Surveillance Administrator*, 2014 ABCA 196

## I. BACKGROUND

[para 1] On April 20, 2015, the Applicant made an access request under the FOIP Act to the Alberta Emergency Management Agency (the Public Body) for the following records:

> In the wake of the floods of 2013 and more specifically in the context of [a contractor's] infamous comments regarding the "sacrificing" of your area, I am respectfully requesting ANY and ALL information with regard to the berm, subsequent water movement / changes in levels, sewer back up with associated dates / timelines, capacities, etc. Additionally, any information pertaining to exacerbated sewage concentration (E. coli, etc) in Sunrise / Hamptons and any back flow into other [communities] as a result of this berm and subsequent changes in water levels (head) or other actions / inactions ie. missing sewer caps in Hamptons.
>
> Additionally, this FOIP request also includes any other actions / inactions that could be reasonably deemed pre-emptive or co-emptive.
>
> Also pumping equipment utilized dates/ timelines / place rates of flow. (ie. When was water pumped into the Sunrise / Hamptons area and when was it subsequently pumped out)
>
> This request includes but is not limited to satellite information, LiDAR, aerial photos, notes, emails, diagrams, maps, investigations, EOC documents / notes, notes from [contractors] or other government or NGO's pertaining to this.
>
> Also notes and documents from the Arbitration held last fall, and other judgements / settlements / compensation that may have been paid to other similarly affected residences and their owners.

[para 2] The Public Body responded to the Applicant on August 12, 2015. The Public Body stated:

> After considering all relevant factors, we have made the decision to partially withhold the records that you requested, subject to limited and specific exceptions and/or exclusions to disclosure as follows:
>
> Section 17: The disclosure would be harmful to the personal information of a third party.
> Section 24: The disclosure could reveal advice from Officials.
> Section 27: The disclosure would reveal information that is subject to legal privilege.
>
> Following the completion of our search and retrieval process, we did not locate any responsive records relating to the berm, subsequent water movement, changes in water levels, sewer back-ups, capacities, exacerbated sewage concentrations, etc. We discussed this with AEMA staff and were advised that the responsibility for these records shifted to Alberta Environment and Parks (formerly Environment and Sustainable Resource Development) when the Flood Task Force was disbanded and its accountabilities were moved to various ministries in government.
>
> The bulk of our responsive records relate to the arbitration process, as the arbitration process was linked to the resolution of individual DRP claims. In order to assist you, the following public bodies may have responsive records, and you would need to submit an access request to these public bodies, if you have not done so already.

The Public Body provided contact information for the FOIP Coordinators of the Town of High River, Alberta Justice and Solicitor General, and Alberta Environment and Parks.

[para 3] On August 27, 2015, the Applicant requested review by the Commissioner of the Public Body's response to him. The Commissioner decided to conduct a written inquiry, and delegated the responsibility for conducting it to me.

[para 4] The Public Body severed information under section 27 from 228 pages of records, but elected not to provide these records for my review, with the exception of a

settlement agreement appearing on records 222 – 226, to which it applied section 17 of the FOIP Act.

[para 5] On January 4, 2017, I wrote the Public Body and stated:

> Under section 71(1) of the FOIP Act, a public body -- Alberta Municipal Affairs in this case -- bears the burden of proving, on the balance of probabilities, that there is no right of access in relation to the parts of the record that have been severed under discretionary exceptions. Sections 24 and 27 are examples of discretionary exceptions.
>
> While Alberta Municipal Affairs has provided submissions for the inquiry, I note that it has not tendered evidence regarding the content of the information to which section 27(1)(a) was applied, either in the form of the records themselves, or an affidavit meeting the requirements of *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289.
>
> In addition, in *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 809, the Supreme Court of Canada determined that more evidence to support the application of solicitor-client privilege is required when advice sought from or given by an in-house or government lawyer is at issue. This is because such lawyers may be called upon to give policy advice, which is not legal advice. The Court said:
>
> > 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.
>
> In accordance with the requirements of *ShawCor* and *Pritchard*, in order to meet its burden under section 71, Alberta Municipal Affairs must establish that the information to which it has applied section 27(1)(a) is subject to solicitor-client privilege. In addition, Alberta Municipal Affairs must also provide evidence to support its application of section 24(1) and 27(1)(b) to the records.
>
> Finally, I note that the index indicates in some cases that Alberta Municipal Affairs has applied solicitor-client privilege to records that are described as communications involving third parties adverse in interest (records 186 – 220) to Alberta Municipal Affairs/Alberta Emergency Management Agency. In addition to providing satisfactory evidence, it will be necessary for Alberta Municipal Affairs to provide legal authority to support its position that solicitor-client privilege can attach to communications involving such parties.

The Public Body provided the affidavit of its Director, Information Management, Legislative & Administrative Services in response to my request for evidence regarding its claim of privilege. Attached to this affidavit is a schedule entitled "Schedule 1" which contains descriptions of the records. The Public Body decided to disclose records 175 – 179, over which it had originally claimed litigation privilege, to the Applicant.

[para 6] Once I reviewed the records before me again, I noticed that the Public Body had relied on section 4(1)(q) of the FOIP Act to exclude some records from its response to the Applicant. On May 23, 2017, I added the issue of whether section 4(1)(q) applies to the records to the inquiry and informed the parties that I had done so.

## II. INFORMATION AT ISSUE

[para 7] The information the Public Body has withheld from the Applicant is at issue.

## III. ISSUES

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

**Issue B: Are the records excluded from the application of the FOIP Act by application of section 4(1)(q)?**

**Issue C: Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the information in the records?**

**Issue D: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?**

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

## IV. DISCUSSION OF ISSUES

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

[para 8] Section 10 of the FOIP Act states, in part:

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

[para 9] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records. In Order 2001-016, the Commissioner said:

> In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) [now 10(1)] of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) [now 10(1)].
>
> Previous orders ... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now 10(1)] of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

[para 10] As discussed in the foregoing excerpt, a public body bears the burden of proving that it conducted a reasonable or adequate search for responsive records.

[para 11] In Order F2007-029, former Commissioner Work posed five questions that, if answered by a public body's evidence, assist the adjudicator to assess the quality of the search a public body has conducted. Answering these questions will also assist a public body to ensure that it has conducted a reasonable search. The questions are the following:

> 1. What specific steps were taken by the Public Body to identify and locate records responsive to the Applicant's access request?
> 2. What was the scope of the search conducted – for example: physical sites, program areas, databases, off-site storage areas, etc.?
> 3. What steps were taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.?
> 4. Who did the search?
> 5. Why does the Public Body believe no more responsive records exist than what has been found or produced?

[para 12] The Applicant's primary concern with the Public Body's response to him is that he has not been provided with records regarding the construction of berms in High River during the 2013 flooding and any impact on water levels that may have had in the Hamptons area of High River.

[para 13] The Public Body describes the search it conducted in the following terms:

> As the delegated office to receive and process FOIP requests on behalf of the Public Body, the Municipal Affairs' FOIP Unit prepared a Search and Retrieval Worksheet (Attachment B) detailing the scope of the request and sent it to the FOIP Contact for the Public Body to initiate the search and retrieval of records. All program units within the Public Body, including the Managing Director's Office, Provincial Operations, Disaster Recovery, Public Safety Initiatives, and Flood Recovery Taskforce completed the search for responsive records.
>
> Following completion of the search, some responsive records were provided to the FOIP Unit in paper format; however, as the majority of the responsive records had been created and stored electronically on the Provincial Operations Centre PSDSI database or on shared drives, these electronic records were forwarded to the FOIP Unit on disks and USB drives. These electronic records were searched by staff in the FOIP Unit. FOIP Unit staff were also given access to the Flood Recovery Taskforce SharePoint site to facilitate a search of records held in that repository and as well, a search of Municipal Affair's Action Request Tracking System was also undertaken to identify any responsive records in that repository.
>
> When searching the electronic records, FOIP Unit staff performed keyword searches for each file and any attachments, including "berm", "Hamptons", "Sunrise", "sewer", "sewage", "backflow", "pump", "pumping", and "arbitration".
>
> Following receipt of the records, [the Applicant] contacted the FOIP Unit and questioned whether a full and complete search was completed. In order to ensure that all records had been retrieved, the FOIP Unit completed another follow up search through the electronic documents that had been

> provided by program area staff. Through this process, the FOIP Unit located an additional 214 records that had not been included as responsive to the request during the first retrieval of records.
>
> When the records were originally searched, a number of the files could not be opened and it was assumed that they did not contain any information as a result. Additionally, they did not respond to the keyword searches noted above. However, following a review of the file extensions, it was determined that the files were in fact geographical information system (GIS) files that could not be opened without the appropriate software.
>
> Once the FOIP Unit determined this, the files were sent to a staff member with the appropriate software and the records were printed out in paper format and provided to the Applicant. Additionally, some records generated by the Town of High River were found and a consultation was done with the Town on the disclosure. Following Deputy Minister approval of the disclosure, the records were released to the applicant.
>
> We believe that, to the best of our knowledge, a full and complete search for records has now been completed.

[para 14] The Public Body explains the search it conducted in some areas. However, I note that it does not describe the search it conducted for records that may be contained in legal files. An email appearing on record 2 of the additional records dated September 16, 2013, states:

> To: [Name of a manager]
> Subject: Need some [High River] log pieces
>
> [Name] I need to have you [ask] [a manager] if he can do a log search for the decisions to build the two berms in [High River] that ran through the Hamptons – particularly decisions around the 2nd Avenue Berm.
>
> It is for our legal people.

[para 15] An email to an executive director, dated September 16, 2013, appears on record 1. It states:

> [name of executive director]
>
> Decisions on the need for berms to aid in de-watering operations in High River seem to have been made prior to 0900hrs on 22 June in High River. The first reference to the need for berm construction in High River in PSDSI (not specifically the 2nd avenue berm) is at 0900 hrs in an email from deployed AEMA staff at the High River EOC. The first reference specifically for the need of a berm at 2nd avenue is contained is contained within the ICS 201 Incident Action Plan (IAP) for High River dated 23rd June at 0900 hrs. By 2300hrs 23rd June, the 2nd avenue berm is mentioned in a High River SitRep from the EOC and construction is already underway. PSDSI (documents, Common Operation Picture Reports, POC Event Updates and log entries, mostly pasted emails) reference the 2nd avenue berm, but has no insights into the decision making process that bought it into being. Most likely any references to the creation timeline specifically for the 2nd avenue berm reside within the High River EOC logs in the timeframe of 21 to 23 June.
>
> Attached are all files / emails we have that specifically mention the 2nd avenue berm.

[para 16] A letter to which the Public Body applied section 4(1)(q) (records 182 – 185), refers to facts and information (record 183) that are not contained in, or inferable from, the records the Public Body has produced to the Applicant or provided for my use in the inquiry. It appears that the author of that letter had access to the record to which the two emails on records 1 and 2 refer. In addition, I note that a settlement agreement (records 222 – 226) refers to arbitration proceedings taking place between Her Majesty in Right of Alberta as represented by the Minister of Municipal Affairs and other persons, and to an arbitration decision, but no records containing the arbitration decision itself are described in the Public Body's evidence.

[para 17] Section 6 of the FOIP Act creates a right of access to any record in the custody *or control* of a public body. In addition to being able to make a request for records in the custody of a public body, a requestor may also request records that the public body does not have in its custody, but has the legal ability to obtain.

[para 18] The phrase "custody or control" refers to an enforceable right of an entity to possess a record or to obtain or demand it, if the record is not in its immediate possession. "Custody or control" also imparts the notion that a public body has duties and rights in relation to a record, such as the duty to preserve or maintain records, or the right to destroy them.

[para 19] Previous orders of this office have considered a non-exhaustive list of factors compiled from previous orders of this office and across Canada when answering the question of whether a public body has custody or control of a record. In Order F2008-023, following previous orders of this office, the Adjudicator set out and considered the following factors:

- Was the record created by an officer or employee of the public body?
- What use did the creator intend to make of the record?
- Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?
- Does the public body have a right to possession of the record?
- Does the content of the record relate to the public body's mandate and functions?
- Does the public body have the authority to regulate the record's use?
- To what extent has the record been relied upon by the public body?
- How closely is the record integrated with other records held by the public body?
- Does the public body have the authority to dispose of the record?

[para 20] Not every factor is determinative, or relevant, to the issues of custody or control in a given case. Custody or control may be determined by the presence of only one factor. If it can be said that a public body, has an enforceable right to possess records or obtain or demand them from someone else, or has duties in relation to them, such as

preserving them, it follows that this entity would have control or custody over the records.

[para 21] The records and evidence before me indicate that it is likely that the Public Body has control over responsive records regarding the arbitration, even if these records are not in its immediate possession. I say this because according to the Public Body's submissions, the Public Body's employees acted as the client in the arbitration and it is therefore possible that they had some role in instructing legal counsel in relation to the arbitration. If this is so, then it seems possible that the Public Body has at least some control over the records regarding the arbitration that may be in the custody of lawyers for Alberta Justice and Solicitor General. I will ask the Public Body to request records relating to the arbitration that may be in the possession of Alberta Justice lawyers, and not in its own immediate possession, and to include them in its response to the Applicant (if such records exist) subject to any applicable exceptions to disclosure. If it has already done so, then it need not make the request again. In either case, it should indicate to the Applicant that it searched for records in the possession of Alberta Justice and Solicitor General and what the result of the search was.

[para 22] There is also no evidence before me that the Public Body searched through the records described as the "High River EOC logs" or that it requested responsive records from the author of records 182 – 185. It appears possible from the letter that the author of records 182 – 185 reviewed records other than those that have been identified as records at issue and which are referenced in the emails I have cited above. Moreover, the Public Body has not provided evidence to establish that it searched for these logs or that it requested responsive records from the author of records 182 – 185, or anyone else at Alberta Justice and Solicitor General.

[para 23] I acknowledge that it is possible that the Public Body searched for and located records referenced in the emails, but has applied provisions of section 27(1) to sever the information they contain. Alternatively, the information referred to in record 183 may have been supplied verbally and was never recorded. However, the Public Body's evidence fails to establish either possibility to have been the case. As it stands, in addition to asking the Public Body to request responsive records from Alberta Justice and Solicitor General, I must direct the Public Body to conduct a new search for responsive records in its control that that encompasses records it supplied to Alberta Justice and Solicitor General, and the EOC logs from June 21 – 23, 2013 as it is unclear from its evidence whether it has searched for responsive records in these locations. If it has already conducted such a search, then I require it to provide an explanation of the search it conducted of these areas to the Applicant and to detail the results of the search.

[para 24] For the foregoing reasons, I find that the Public Body has not established that it conducted a reasonable search for responsive records. As a consequence, I find that the Public Body has not established that it met its duty to assist the Applicant.

**Issue B: Are the records excluded from the application of the FOIP Act by application of section 4(1)(q)?**

[para 25] The Public Body decided that records 180 – 187 are exempt from the scope of the FOIP Act by virtue of section 4(1)(q). Records 180 – 181 are comprised of a letter from one member of the Executive Council to another member of the Executive Council. Records 182 – 185 consist of a legal opinion written by a lawyer for Alberta Justice and Solicitor General and addressed to the Public Body, and records 186 – 187 consist of a draft letter to be sent by legal counsel to parties in litigation. The legal opinion and the draft letter are attachments to the correspondence appearing on records 180 – 181.

[para 26] In its submissions of June 9, 2017, the Public Body stated that it continued to rely on section 4(1)(q) with regard to records 180 and 181. It acknowledged that records 182 – 185, and 186 – 187 , which were attached to records 180 – 181, and were created by lawyers of Alberta Justice and opposing counsel, respectively, were not subject to section 4(1)(q).

[para 27] Section 4(1)(q) establishes that certain types of records created by or for Members of the Legislative Assembly or a member of the Executive Council are exempt from the scope of the FOIP Act. It states:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *(q) a record created by or for*
>
> *(i) a member of the Executive Council,*
>
> *(ii) a Member of the Legislative Assembly, or*
>
> *(iii) a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly*
>
> *that has been sent or is to be sent to a member of the Executive Council, a Member of the Legislative Assembly or a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly […]*

[para 28] To fall within the terms of section 4(1)(q), a record must be created by or for a Member of the Legislative Assembly or a member of the Executive Council or the Chair of a Provincial Agency, and be sent to such a person or be intended to be sent to such a person.

[para 29] In Order 2000-013, former Commissioner Clark determined that attachments do not become subject to section 4(1)(q) by virtue of being attached to correspondence that does meet the requirements of section 4(1)(q). He said:

> […] records 41, 42, 43, 44, 45, 51, 57, 58, 59, 61, 62 and 63 do not fulfill section 4(1)(l) [now 4(1)(q)]. These records consist of attachments to other records authored by a Member of the Executive Council. In order for an attachment to fall under section [4(1)(q)], the attachment must individually fulfill the requirements found in this section. The fact that a Member of the Executive Council attaches a covering letter to a record authored by someone else does not mean that the Member of the Executive Council "created" the record or that the record was created on behalf of that Member of the Executive Council. To find otherwise would enable a Member of the Executive Council to shield any record from the Act simply by attaching it to a covering letter.
>
> Consequently, I find that records 41, 42, 43, 44, 45, 51, 57, 58, 59, 61, 62 and 63 do not fulfill section [4(1)(q)] and are not excluded from the application of the Act. Therefore, I have jurisdiction over these records. Furthermore, since no mandatory exceptions apply to the information in records 51, 57, 58 and 59, and the Public Body did not claim any discretionary exceptions in regard to these records, I intend to order the Public Body to disclose these records to the Applicant.

[para 30] In Order F2010-015, the Adjudicator stated:

> In Order 2000-013, the former Commissioner addressed whether an attachment to a record which is authored by a person listed in section 4(1)(q) would fulfill the requirements within section 4(1)(q). The former Commissioner held that in order for an attachment to fulfill the requirements of section 4(1)(q), the attachment must individually fulfill the requirements found within that section. The fact that a Member of the Executive Council attaches a covering letter to a record authored by someone else does not mean that the Member of the Executive Council "created" the record or that the record was created on behalf of the Member of the Executive Council. The former Commissioner held that the Legislature did not intend that any record could be shielded from the Act simply by attaching it to a record that is exempt from the Act under section 4(1)(q). In this inquiry, I find that there is insufficient evidence that the first report (pages 1-17), individually fulfills the requirements of section 4(1)(q). Given the foregoing, I find that the first report (pages 1-17) is not excluded from the application of the Act.

[para 31] Prior orders of this office have held that attachments to correspondence meeting the requirements of section 4(1)(q) do not themselves fall within this provision, unless they also meet the terms of the provision. I agree with the reasoning in these orders. Section 4(1)(q) is clear that a record must be created by or for one of the persons enumerated in the provision, and be sent to, or be intended to be sent, to such a person. If the Legislature had intended attachments to be subject to section 4(1)(q) it could easily have drafted the provision so that it encompassed any records sent by a member of the Executive Council or Member of the Legislative Assembly to one another.

[para 32] I find that records 180 – 181 are subject to section 4(1)(q) and exempt from the scope of the FOIP Act. I agree with the Public Body's most recent submissions that records 182 – 187 do not fall within the terms of section 4(1)(q) and are not exempt.

[para 33] The Public Body states:

> The ministry would request that its application of section 4(1)(q) be reconsidered with respect to pages 182 – 187 and that the records be more appropriately withheld under Section 27(1)(a), (b), & (c) and Section 24(1)(a).

[para 34] I have no authority under the FOIP Act to apply exceptions to disclosure to records on behalf of a public body. Rather, I may order the Public Body to include these records in its response to the Applicant, subject to any exceptions to disclosure that it believes may apply.

[para 35] In Order 2000-013, former Commissioner Clark ordered the disclosure of records on determining that section 4(1)(q) did not apply. However, I do not believe this to be an appropriate order to make. When a provision of section 4 applies, it means that the FOIP Act does not. It would be contradictory to expect a public body to apply a provision of the FOIP Act to records it considers not to be subject to the FOIP Act. In my view, the appropriate order to make on finding that a provision of section 4 does not apply, when a public body has not applied exceptions to the information, is to direct the public body in question to include the records in its response under the FOIP Act and not to preclude the public body from applying any relevant exceptions to disclosure.

[para 36] As I find that records 182 – 187 are not exempt from the FOIP Act, I intend to order the Public Body to include them in its response to the Applicant, although the Public Body will not be precluded from applying any exceptions to disclosure under the FOIP Act that apply to these records when it responds.

**Issue C: Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the information in the records?**

[para 37] The Public Body severed the names of persons who signed a release and settlement agreement with the Crown in Right of Alberta. This agreement appears on records 222 – 226. The Public Body disclosed the remainder of the agreement to the Applicant.

[para 38] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> > *(a) the third party has, in the prescribed manner, consented to or requested the disclosure,*
> >
> > *(b) there are compelling circumstances affecting anyone's health or safety and written notice of the disclosure is given to the third party,*

*(c) an Act of Alberta or Canada authorizes or requires the disclosure,*

*(d) repealed 2003 c21 s5,*

*(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council,*

*(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,*

*(g) the information is about a licence, permit or other similar discretionary benefit relating to*

> *(i) a commercial or professional activity, that has been granted to the third party by a public body, or*
>
> *(ii) real property, including a development permit or building permit, that has been granted to the third party by a public body,*
>
> *and the disclosure is limited to the name of the third party and the nature of the licence, permit or other similar discretionary benefit,*

*(h) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body,*

*(i) the personal information is about an individual who has been dead for 25 years or more, or*

*(j) subject to subsection (3), the disclosure is not contrary to the public interest and reveals only the following personal information about a third party:*

> *(i) enrolment in a school of an educational body or in a program offered by a post-secondary educational body,*
>
> *(ii) repealed 2003 c21 s5,*
>
> *(iii) attendance at or participation in a public event or activity related to a public body, including a graduation ceremony, sporting event, cultural program or club, or field trip, or*
>
> *(iv) receipt of an honour or award granted by or through a public body.*

*[…]*

*(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*

*[…]*

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

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

*(ii) the disclosure of the name itself would reveal personal information about the third party […]*

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

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

*(b) the disclosure is likely to promote public health and safety or the protection of the environment,*

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

*(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*

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

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

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

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

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

[para 39] Section 17 does not say that a public body is never allowed to disclose third party personal information. It is only when the disclosure of personal information

would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 40] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 41] I find that the names of the individual homeowners who are parties to the settlement agreement are their personal information. I find that section 17(2) does not apply to the personal information in the settlement agreement. The settlement agreement does not contain any details of discretionary financial benefits, and so section 17(2)(h) does not apply. However, had there been such details, then section 17(2)(h) may have applied (see Order F2007-025).

[para 42] I find that section 17(4)(g) applies to the names in the settlement agreement, as the names of the individuals who entered the agreement appear in the context of other information about them i.e. that they entered a settlement agreement with the Government of Alberta.

[para 43] As section 17(4)(g) applies to the names, the presumption arises that it would be an unreasonable invasion of personal privacy to disclose them.

[para 44] I am unable to identify any factors under section 17(5) weighing in favor of disclosing the names of the individual homeowners. As a result, the presumption created by section 17(4)(g) is not rebutted.

[para 45] For the foregoing reasons, I will confirm the decision of the Public Body to sever the names of individual homeowners from the settlement agreement on records 222 – 226.

**Issue D: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?**

[para 46] Section 24(1) states, in part:

> *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,*
>
> *(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations […]*

[para 47] In Order F2015-29, 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 [Council], 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 48] 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 49] 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. To establish that section 24(1)(c) applies, a public body must establish that the information it seeks to withhold could reasonably be expected to reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other

negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations if it is disclosed.

[para 50] 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.*

[para 51] 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 52] 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. Sections 24(1) and 27(1) are exceptions under Division 2 of Part 1. When these provisions apply to information, an applicant has no right of access to the information. As a result, under section 71(1), a public body must prove that sections 24(1) and section 27 apply to the information to which it has applied these provisions.

[para 53] 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 54] In *F.H. v. McDougall*, 2008 SCC 53, 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 elected to withhold information from the Applicant under sections 24(1) and 27(1), it must prove that sections 24(1) and 27(1) apply to this information with evidence that is sufficiently clear, convincing, and cogent to meet this purpose.

[para 55] The Public Body applied sections 24(1)(a), (b), and (c) to records to which it assigned page numbers 3 – 6 and 139 – 145[1]. The Public Body describes the information it severed in the following way:

> Section 24(1)(a)(b) & (c) was applied to withhold information that would reveal:
>
> - under section 24(1)(a) – advice, recommendations and analysis developed by or for a public body;
>
> - under 24(1)(b) – consultations or deliberations involving officers or employees of a public body; and
>
> - under 24(1)(c) – positions and plans developed for the purpose of contractual or other negotiations by or behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations.
>
> Without waiving any solicitor client privilege that may also attach to records to which Section 24(1) was applied in addition to s. 27(1) discussed below, the information that was withheld under section 24(1) dealt specifically with how the government would respond to the arbitration proceedings and through a consultation with Justice and Solicitor General pursuant to Section 14(1)(c) of the *FOIP Act* the decision was made that Section 24(1) and Section 27(1) ought to be applied to withhold pages 3 – 6 and 139 – 145 in their entirety for the following reasons.
>
> - Pages 3 – 6: contain a confidential briefing for the Deputy Minister of Executive Council regarding the arbitration. The records included an email to the DM of Executive Council with additional information about proposed approaches and the government's position.

[1] The Public Body did not provide these records for my review. It provided another set of records it describes as "additional records" which are numbered from 1 – 210.

- Pages 139 – 145: emails between Public Body staff, and lawyers working for Justice and Solicitor General.

  While all of the pages in question were also severed under Section 27(1), minor portions of the email streams did not include Justice and Solicitor General staff, however did address the advice that was given by legal counsel with Justice and Solicitor General. The information was provided to assist senior management staff in making a decision on how the Public Body wished to proceed.

[para 56] In its "summary of records" document, the Public Body lists "McLeod Law" as having either given advice or sent an email appearing in records 139 – 145. According to the information available to me from records 186 – 187, I find that McLeod Law represented parties adverse in interest to the Government of Alberta in the arbitration proceedings to which the Public Body refers.

[para 57] The summary of records identifies an employee of the Public Body as the author of records 3 – 6, and that the Deputy Minister of the Executive Council was the recipient of these records. The records are described as "Email (ATT: Briefing Note)", from which I understand the records to consist of an email with an attached briefing note.

[para 58] After I requested that the Public Body provide evidence regarding its assertion of privilege over the records, the Public Body submitted an affidavit, sworn by the Director, Information Management, Legislative & Administrative Services. This affidavit contains a schedule (Schedule 1), which describes records 3 – 6 as "Email from AEMA staff to JSG lawyers and attached Briefing Note". The recipient is no longer described as the Deputy Minister of the Executive Council, but a lawyer or lawyers for the Minister of Justice and Solicitor General.

[para 59] Schedule 1 describes records 139 – 141 as an email between AEMA staff and JSG lawyers, and records 142 – 145 are described in the same way. Schedule 1 does not refer to McLeod Law, although the summary the Public Body provided in its initial submissions describes McLeod Law as an author of the records.

[para 60] In its submissions, the Public Body describes the content of records. I am told that the information contained in records deals specifically with how the government would respond to arbitration proceedings. I am also told that the information was provided to assist senior management staff in making a decision on how the Public Body wished to proceed. Neither of these statements establishes that a provision of section 24(1) applies to the information in records 3 – 6 or 139 – 145.

[para 61] I accept that the records describe information about how the Government of Alberta intended to respond to arbitration proceedings and contain information to assist a decision maker; however, neither quality leads necessarily to the conclusion that the records likely contain advice, policy, recommendations, analyses or policy options developed by or for the Public Body within the terms of section 24(1)(a), consultations or deliberations within the terms of section 24(1)(b), or positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on

behalf of the Government of Alberta or a public body, or considerations relating to those negotiations. Information that does not fall within the terms of section 24(1)(a), (b) or (c) may be used or useful in making a decision. As a result, describing information as intended to assist a decision maker does not bring the information within the terms of section 24(1). Further, information that describes how the Government of Alberta intends to act does not mean that the information falls within the terms of section 24(1); the information may be factual and reflect a decision that has been made, but it may not reveal a position, plan, procedure or criterion within the terms of section 24(1)(c).

[para 62] Finally, I note that if McLeod Law, which represented parties opposed in interest to the Government of Alberta in the arbitration, is the creator of any of the information in the records, and the Summary of Records document prepared by the Public Body suggests that this is reasonably likely to be the case in relation to records 139 – 145, then that information simply cannot fall within the terms of section 24(1)(a),(b), or (c). This is because the information would not be advice developed "by or for the Public Body" within the terms of section 24(1)(a), does not involve the parties set out in section 24(1)(b), and would not reveal information developed by or on behalf of the Government of Alberta or a public body, within the terms of section 24(1)(c).

[para 63] For the foregoing reasons, I find that the Public Body has not established that section 24(1) applies to records 3 – 6, or 139 – 145.

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

[para 64] Section 27(1) of the FOIP Act states, in part:

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

> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer.*

[para 65] The Public Body has applied sections 27(1)(a) and (b) of the FOIP Act to withhold 228 pages of records from the Applicant. It argues that the records are all subject to solicitor-client privilege and are prepared by or for a lawyer in relation to a matter involving the provision of legal services. It also provided informatino that is had applied litigation privilege to some of the records.

[para 66] In *Solosky v. The Queen*, [1980] 1 SCR 821, Dickson J. (as he then was) speaking for the majority, stated the following criteria for establishing the presence of solicitor-client privilege:

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

[para 67] The test for establishing the presence of solicitor-client privilege is not a narrow one. In *Blood Tribe v. Canada (Attorney General),* 2010 ABCA 112 the Alberta Court of Appeal determined that records need not contain legal advice to be subject to solicitor-client privilege. If the information has been communicated so that legal advice could be obtained or given, even though the information is not in itself legal advice, the information meets the requirements of "a communication made for the purpose of giving or seeking legal advice". The Court said:

> The appellant also argues that even if some of the documents contain legal advice and so are privileged, there is no evidence that all of the documents do so. For example, the appellant argues that minutes of meetings, emails and miscellaneous correspondence between Justice Canada lawyers and the Department of Indian and Northern Affairs may not contain any actual advice, or requests for advice, at all. The solicitor-client privilege is not, however, that narrow. As the court stated in *Balabel v. Air India*, [1988] Ch 317, [1988] 2 All E.R. 246 at p. 254 (C.A.):
>
> > Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The

> negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> The miscellaneous documents in question meet the test of documents which do not actually contain legal advice but which are made in confidence as part of the necessary exchange of information between the solicitor and client for the ultimate objective of the provision of legal advice.

[para 68] From the foregoing authorities, I conclude that communications between a solicitor and a client that are part of the necessary exchange of information between them so that legal advice may be provided, but which do not actually contain legal advice, may fall within the scope of solicitor-client privilege.

[para 69] However, 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 SCC 31, 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] 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 70] 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 71] 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.

[para 72] 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 73] 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 a government lawyer 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 involve the giving or seeking of legal advice; 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.

[para 74] In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 the Supreme Court of Canada (SCC) suggested that the Alberta Rules of Court A.R. 124 / 2010, a regulation governing parties making claims of solicitor-client privilege in the context of civil litigation, applies to the Commissioner when conducting an inquiry as to whether a public body has properly applied section 27(1)(a) of the FOIP Act to records in its custody or control that are the subject of an access request (paragraph 70).

[para 75] In *ShawCor*, *supra*, the Alberta Court of Appeal determined that parties claiming privilege over records under the Alberta Rules of Court should support their claims of privilege in the following way:

> This being so, even if we are wrong in concluding that relevant and material records a party objects to produce must, short of disclosing privileged information, be briefly described by that party in accordance with Rule 5.7, the same result would follow given the requirements under Rule 5.8. Why? Identifying "the grounds" for claiming privilege in relation to each record obliges a party to do two things. First, it must state the actual privilege being relied upon with respect to a particular record (e.g. litigation privilege). Second, it must provide a sufficient description about that record to assist other parties in assessing the validity of the claimed privilege. An objection does not exist in a factual vacuum. It is tied to a specific record. Therefore, in explaining the grounds for claiming privilege over a specific record, a party will necessarily need to provide sufficient information about that record that, short of disclosing privileged information, shows why the claimed privilege is applicable to it. Depending on the circumstances, this may require more or less than the "brief description" contemplated under Rule 5.7(1)(b) although we expect that oftentimes the brief description will suffice.

[para 76] From the foregoing, I understand that a party claiming privilege under the Alberta Rules of Court must indicate the privilege being claimed over a record or records and provide a description of the record, short of disclosing privileged communications, adequate to the task of establishing that the record is privileged.

*Who decides under the FOIP Act whether information that a public body has withheld under section 27(1)(a) on the basis of solicitor-client privilege is subject to this privilege?*

[para 77] Section 65 states, in part:

> *65(1) A person who makes a request to the head of a public body for access to a record or for correction of personal information may ask the Commissioner to review any decision, act or failure to act of the head that relates to the request.*
>
> *[…]*
>
> *(5) This section does not apply*
>
> > *(a) to a decision, act or failure to act of the Commissioner when acting as the head of the Office of the Information and Privacy Commissioner,*

> *(b) to a decision by the Speaker of the Legislative Assembly that a record is subject to parliamentary privilege, or*
>
> *(c) if the person who is appointed as the Commissioner is, at the same time, appointed as any other officer of the Legislature, to a decision, act or failure to act of that person when acting as the head of that office.*

Unless section 65(5) applies, an applicant may request review of any decision made by the head of a public body.

[para 78] Section 27 of the FOIP Act authorizes the head of a public body to sever privileged information. It states, in part:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
>
> *[...]*
>
> *(3) Only the Speaker of the Legislative Assembly may determine whether information is subject to parliamentary privilege.*

A decision to sever information under section 27(1) is a decision of the head of a public body in relation to a request within the terms of section 65(1) (cited above) of the FOIP Act.

[para 79] Section 65(5) excludes only three types of access decisions from the ability of a requestor to request review by the Commissioner: (1) when the Commissioner is the head of the public body that made the decision for which review is sought, (2) when the decision under review is the decision of the Speaker to find that parliamentary privilege applies to a record under section 27(3), and (3) when the Commissioner is also the head of another public body and has made a decision regarding access in that capacity. While section 65(5) excludes parliamentary privilege from the purview of the Commissioner, it does not exclude solicitor-client privilege. Other than in section 65, parliamentary privilege is only referred to in section 27 of the FOIP Act. Solicitor-client privilege is referred to in section 27 of the FOIP Act and nowhere else.

[para 80] Section 69 of the FOIP Act requires the Commissioner to conduct an inquiry if a matter has not been settled under section 68, or the Commissioner has not refused to conduct an inquiry under section 70. Section 69(1) states:

> *69(1) Unless section 70 applies, if a matter is not settled under section 68, the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.*

Section 69 of the FOIP Act grants the Commissioner the authority to decide all issues of fact and law in an inquiry. The application of whether solicitor-client privilege applies to public records in a public body's custody or control is a question of both fact and law.

[para 81] Section 72 requires the Commissioner to make an order disposing of the issues at the conclusion of an inquiry.

[para 82] For the reasons that follow, I find that the Legislature intended that it is the Commissioner who is to review a public body's decision to sever information under solicitor-client privilege.

[para 83] Section 65(1) empowers a requestor to seek review by the Commissioner of *any* decision of the head of a public body that relates to a decision relating to the request. Logically, a decision to deny access on the basis of solicitor-client privilege necessarily falls within the category of "any decision".

[para 84] Section 65(5) sets out three kinds of decisions that the Legislature has excluded from the scope of "any decision" within the context of section 65(1). Section 65(5) explicitly excludes decisions of the Speaker regarding the application of parliamentary privilege from the purview of the Commissioner. From the reference to parliamentary privilege in section 65(5), it is clear that the Legislature reviewed section 27 (since this is the only other place where the Legislature refers to parliamentary privilege in the Act) and determined that of the privileges within its scope, only parliamentary privilege would be removed from the Commissioner's purview. Decisions of the head of a public body to apply solicitor-client privilege to records are not excluded under section 65(5), and therefore fall within the category of "any decision" within the terms of section 65(1).

[para 85] Not only does the language of section 65 and the context created by sections 27 and 65(5) support finding that the Commissioner has the authority to conduct an inquiry regarding the head of a public body's decision to apply solicitor-client privilege, but the purpose of the FOIP Act also supports this conclusion.

[para 86] In *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403, Laforest J.[2] described the purpose of freedom of information legislation in the following terms:

> As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them; see David J. Mullan, "Access to Information and Rule-Making", in John D. McCamus, ed., *Freedom of Information: Canadian Perspectives* (1981), at p. 54.

[2] Although Laforest J. was speaking in dissent, the majority agreed with his analysis of freedom of information legislation at paragraph 1.

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:
>
> > Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.

[para 87] The foregoing analysis considers the purpose of the Legislature in enacting freedom of information legislation to be to create a right of access, which in turn assists the Legislature in performing its constitutional function of supervising and holding the executive branch to account. That this is a purpose of the Legislature in enacting the FOIP Act is supported by section 2 of the FOIP Act, which states, in part:

> *2 The purposes of this Act are*
>
> > *(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act,*
> >
> > *(b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure by a public body of that information,*
> >
> > *[…]*
> >
> > *(e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.*

[para 88] The FOIP Act creates a right of access to records in the custody or control of public bodies and the ability to seek an independent review of a decision made by a public body regarding access, such as the Public Body in this case, and imposes duties as to how information is maintained, collected, used, and disclosed. In doing so, it promotes the purpose of increasing transparency of the executive branch of government (public bodies) by enabling citizens and the Legislature to obtain records. On a functional level, the purpose of the FOIP Act is to make public records held by the executive branch of government available to the public on request, subject to any applicable exceptions.

[para 89] If section 65(1) is interpreted in such a way that a requestor cannot request review by the Commissioner of a decision of the head of a public body when the decision relates to the application of solicitor-client privilege, or alternatively, that the Commissioner is bound to accept the decision of the head of the public body that a record is subject to solicitor-client privilege, then the purpose of freedom of information legislation – that of increasing the accountability of the executive branch to the citizenry

and the Legislature – and the legislation's stated objective of providing for independent reviews of decisions regarding access made by public bodies, would be obviated. This would be particularly so in cases where a public body has not supported the claim of privilege with sufficient evidence to meet the terms of section 71, or has provided evidence that contradicts the claim of privilege,

[para 90] In my view, in considering the language of the FOIP Act, the context created by sections 2, 27, 65, 69, 71, and 72 of the FOIP Act, the Legislature intended that the Commissioner make the decision as to whether a public records in the custody or control of the executive branch of government are subject to section 27(1)(a), including in situations when the basis for a public body's application of section 27(1)(a) is solicitor-client privilege.

*Section 27(1)(b)*

[para 91] Cited above, section 27(1)(b) states:

> *27 The head of a public body may refuse to disclose to an applicant*
>
> *(b) information prepared by or for*
>
> *(i) the Minister of Justice and Solicitor General,*
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services […]*

[para 92] In Order F2015-31, the Director of Adjudication discussed the application of sections 27(1)(b) 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*.

[para 93] 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 94] 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 F2010-007). 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 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 on behalf 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 would not meet the terms of either section 27(1)(a) or (c).

[para 95] The meaning of the term "agent" in section 27(1)(b) has also been considered in previous orders. 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". [emphasis in original]
>
> A basic rule of interpretation is that it is presumed that Parliament or a Legislature uses language carefully and consistently, and that within a statute, the same words are taken to have the same meaning and different words have different meanings [*Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R 625 at para. 133, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at pp. 163 to 65]. Given this rule of interpretation, the fact that the word "agent" is used in section 27(1)(c) – as well as 27(1)(b) – shows that the Legislature intended for the term "agent" to mean something different than the broader term "employee". ("Employee" is already defined in section 1(e) of the Act to include a person who performs a service for the public body under a contract or agency relationship, so use of the term "employee" would not have excluded outside legal and non-legal agents).

[para 96] 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 the terms of 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 one cannot see how such an individual could provide advice or services that a lawyer of the Minister of Justice and Solicitor General, or the Minister herself, are also uniquely qualified to provide.

[para 97] 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 98] 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.

[para 99] The term "prepared" in section 27(1)(b) in its ordinary sense means "made or got ready for use."[3] The term "prepared" is not synonymous with "written" or "created", 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 Legislature 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 100] In any event, to fall within section 27(1)(b), information must be prepared by, at the direction of, or in the course of fulfilling routine responsibilities for, a lawyer or

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

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 in relation to a matter.

[para 101] With regard to each record to which the Public Body has applied section 27(1)(a) and (b) it states in its initial submission:

> In reviewing the Public Body's application of s. 27(1) to the responsive records, the Public Body would draw attention to the nature of the Applicant's information request. The Applicant sought:
>
> • Notes and documents from the Arbitration held last fall, and other judgments / settlements / compensation that may have been paid to other similar affected residences / owners.
>
> The responsive records pertaining to the arbitration proceedings included records that, if disclosed to the Applicant, would disclose communications between the Public Body and its legal counsel regarding the seeking and providing of advice and legal services related to the arbitration.
>
> Without waiving any privilege claimed in the records withheld from disclosure pursuant to s. 27(1), the Public Body wishes to inform both the OIPC and the Applicant that the withheld records received a thorough review by the Public Body and its legal counsel from Justice and Solicitor General. After completing this review of the records, it was determined that Sections 27(1)(a),(b) & (c) ought to be applied to withhold the majority of the records as the information in the records:
>
> - are subject to solicitor-client privilege;
> - the records contain information prepared by or for an agent or lawyer of the Minister of Justice and Solicitor General or an agent or lawyer of a public body for the purpose of providing legal services; or
> - the information is in correspondence between an agent or lawyer of the Minister of Justice and Solicitor General or an agent or lawyer of a public body and the Public Body staff in relation to a matter involving the provision of advice or other services by the agent or lawyer.
>
> As the issue of providing privileged records to the OIPC pursuant to s. 56 of FOIP is currently the subject of an appeal to the Supreme Court of Canada and in order to maintain the privilege claimed in those records, the records to which Section 27(1) has been applied have not been provided as part of the responsive records to this Inquiry. The records in question contain legal advice sought from legal counsel and are protected by privilege. Maintaining such privilege is an important part of ensuring that the interests of the government are safeguarded.

*The Public Body's Affidavit Evidence*

[para 102] In response to my request for evidence meeting the terms of *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289 and *Pritchard* (*supra*) the Public Body submitted an affidavit that states:

> I, […] of […], Alberta, have personal knowledge of the following (or, where [applicable], I am informed and do believe that):
>
> I am an authorized representative of the Alberta Emergency Management Agency (the "Public Body").
>
> As part of my duties in relation to this matter, I have reviewed the records over which the Public Body is claiming legal privilege (the "Privileged Records"). The Privileged Records, listed in Schedule 1, are in the custody or under the control of the Public Body.
>
> The Privileged Records consist exclusively of emails (along with briefing materials, and other communications attached to those emails) between various legal counsel for the Government of Alberta and their clients within the Public Body, Municipal Affairs, and the Alberta Flood Recovery Task Force.
>
> I am informed and do verily believe that during the time the Privileged Records were created legal counsel for the Government of Alberta received instructions from and provided legal advice to the Government of Alberta that included operational units from the Public Body, Municipal Affairs and the Alberta Flood Recovery Task Force.
>
> Based on my review of the Privileged Records and consultation with some of the individuals named in the records, I do verily believe that the Privileged Records involve the seeking of or giving of legal advice.
>
> Based on my review of the Privileged Records and consultation with some of the individuals named in the records, I do verily believe that the Privileged Records were intended to be confidential and that the distribution of the Privileged Records was limited to only those who needed the information contained within those records.
>
> I am advised by […], legal counsel to the Public Body, and do verily believe that these records are subject to solicitor-client privilege.
>
> The Public Body objects to produce the records listed in Schedule 1 on the grounds of privilege identified in that Schedule.

[para 103] The Public Body attached a schedule to this affidavit (Schedule 1). Schedule 1 contains brief descriptions of the records. Prior to submitting the affidavit, the Public Body had submitted a "Summary of Records" and an "Index of Records" which also described the content of the records.

[para 104] When Schedule 1 was provided as an attachment to the affidavit, there was no suggestion that the information in the earlier charts was being withdrawn or was to be ignored; indeed, had it been, there would be no indication on it of the subject of the communications, such as might be useful to determine that they concerned a legal matter. It was open to the affiant to acknowledge that Schedule 1 contradicts earlier descriptions of the records, and to explain these contradictions, but she did not do so.

[para 105] I note, too, that the Public Body in its affidavit deals only with the application of section 27(1)(a). However, in its response to my further questions it maintains that it is continuing to apply section 27(1)(b) to each of the records, but is not demonstrating how it applies in its answers because I did not ask it to do so. (I did in fact ask, it to do so. In this regard, as set out in the background above, my letter stated: "In

addition, Alberta Municipal Affairs[4] must also provide evidence to support its application of section 24(1) and 27(1)(b) to the records."

[para 106] As noted above, the Supreme Court of Canada said in *Pritchard* that a party claiming privilege over communications involving government lawyers must provide information regarding the nature of the relationship between the lawyer and the other party to the communication, the subject matter of the communication, and the circumstances in which the communication was made.

[para 107] I considered, and initially attempted to treat, the Public Body's assertions in the affidavit that "the Privileged Records involve the seeking of or giving of legal advice" as evidence that each of the records is either a request for advice or the provision of advice. Similarly, I considered treating the statement that all the withheld emails are "between various legal counsel for the Government of Alberta and their clients within the Public Body, Municipal Affairs, and the Alberta Flood Recovery Task Force" as evidence to this effect for each of the records. However, as I progressed through my review of the other information provided for each record, as set out in the three charts referred to above, this became impossible because in some cases, the other information that was given conflicted with one or another of these assertions. A notable example involves information that was initially described as having flowed from counsel for third parties that were opposed in interest to the Public Body (McLeod Law) to AEMA staff.

[para 108] It would be unreasonable on my part to either apply the assertions in the affidavit as evidence or not, depending on whether other information also provided by the Public Body conflicted with them. For this reason, I decided that I was only able to treat the assertions in the affidavit as arguments about what findings I ought to make about the records, in contrast to being evidence about them.

[para 109] Moreover, I also note that the statement that all the records "*involve* the seeking of or giving of legal advice", while it can be read as asserting that each record consists either of a request for advice or is itself advice, can equally be read as meaning that each record is associated in some way with a request for or the giving of legal advice. The latter is inadequate to establish solicitor-client privilege.

[para 110] As well, I note that the affidavit does not speak to the subject matter of the records (although the other two charts do). While the affiant indicates that "*during the time*" the records were created, legal counsel for the Government of Alberta received instructions from and provided legal advice to the Government of Alberta, she does not assert that the records at issue *relate* in any way to the matter for which instructions were received and provided or that the records contain these instructions. (The initial submissions had stated that "the responsive records pertaining to the arbitration proceedings *included* records that, if disclosed to the Applicant, would disclose communications between the Public Body and its legal counsel regarding the seeking

[4] Alberta Municipal Affairs responded to the access request and made submissions on behalf of the Public Body.

and providing of advice and legal services related to the arbitration. However, this statement does not in terms apply to each of the records being withheld by reference to section 27.)

[para 111] I note also that the index of records and the summary of records that the Public Body provided at earlier times during this inquiry, do in some cases refer to the arbitration as being the subject of discussion in the records at issue. However, even in those cases, as will be discussed in the record by record analysis, below, it is often not clear who created the records, what a record's creator's role was in relation to the matter that was the subject of the record, or the purpose of a record's creator in creating the records, Moreover, the index of records, the summary of records and Schedule 1 sometimes contradict each other as to who the authors of records are, as will be discussed below. As a result, even if I were to draw an inference that the records at issue *relate to* the same matter for which Alberta Justice lawyers were provided instructions and gave advice, I cannot say how the records at issue relate to these instructions in any way, if they do, or whether they consist of the giving or seeking of legal advice in relation to the matter.

[para 112] My next preliminary comment relates to the fact that the Public Body has applied both section 27(1)(a) and (b) to the records. This creates tension in its evidence. Section 27(1)(a) applies to privileged records. To establish that solicitor-client privilege applies to a record, a public body must establish as a fact that a record is a confidential communication between a solicitor and a client, made for the purpose of giving or seeking legal advice. In contrast, to establish that section 27(1)(b) applies, a Public Body must establish as a fact that a record was prepared by or at the direction of a lawyer in relation to a matter involving the provision of legal services.

[para 113] Asserting that section 27(1)(b) applies to a record over which a public body is claiming solicitor-client privilege, has the effect of contradicting the claim of solicitor-client privilege. When a lawyer provides legal advice the lawyer is not "*preparing information in relation to a matter involving the provision of legal services*" within the terms of section 27(1)(b). This point is made in Order F2015-31 where the Director of Adjudication said:

> 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. [emphasis in original]

[para 114] I agree with the Director of Adjudication's reasoning. I would only add that it is equally problematic to apply section 27(1)(b) in circumstances where a public body asserts that a communication involves seeking legal advice, as the Public Body does in this case, given that it asserts that the records "involve the seeking of or giving of legal advice". Section 27(1)(b) applies to information prepared by or on behalf of a lawyer. It is not possible that a communication is a request for legal advice, but at the same time is also communication prepared by or at the direction of a lawyer for use in the provision of legal services. A request for advice by a client may state background facts about the subject regarding which advice is requested, and may even organize materials and provide information in a manner directed by the lawyer. However, while such efforts might be for the purpose that the advice can be given, they would not be being done *by the lawyer or on the lawyer's behalf*. In my view, section 27(1)(b) protects the efforts and preparations of the lawyer or someone working for or on behalf of him or her, and is conceptually distinct from what the client might offer or do as part of the exchange. Therefore, when a public body asserts that both section 27(1)(a) and (b) apply to a communication sent by an employee of a public body to a lawyer, it is effectively contradicting its evidence with regard to the application of both provisions.

[para 115] In the past, when public bodies provided the records at issue to the Commissioner for review to adjudicate claims of solicitor-client privilege, it was possible for public bodies to apply multiple exceptions to privileged records. It did not matter whether doing so contradicted the public body's submissions regarding the application of section 27(1)(a) or (b), as the evidence provided by the content of the record would, in many cases, provide sufficient evidence to establish which exception applied, if an exception did apply, regardless of the public body's assertions. However, in the absence of the records, I must rely on a public body's evidence and arguments. When that evidence is internally contradictory, as is the case when it asserts that both sections 27(1)(a) and (b) apply to the same information, I am limited in my ability to give weight to it, with the result that the public body may not meet its burden under section 71 of the FOIP Act. If a public body fails to meet its burden under section 71, then I must require it to give the Applicant access to the record.

[para 116] Finally, I note that the Public Body does not provide descriptions of each of the emails and attachments over which it is asserting solicitor-client privilege. As the Public Body is claiming privilege over all emails and attachments, *ShawCor* would require it to provide descriptions of each email and attachment over which it is claiming privilege. I note too that attachments do not become privileged because they are exchanged between solicitor and client. An attachment will be found privileged if the attachment meets the test for solicitor-client privilege. This determination may be made

with regard to the context created by the email to which the attachment is attached. This point is made by the Alberta Court of Appeal in *TransAlta Corporation v Market Surveillance Administrator*, 2014 ABCA 196

> TransAlta submits that attachments to e-mails found to be privileged must also be privileged – although this point was not pressed unequivocally during oral argument. In my view, an attachment to a privileged e-mail may be extraneous to the content of that e-mail which means it is still necessary to review the attachment to determine its connection to the e-mail before deciding whether it is also privileged.
>
> In this case, the chambers judge determined that the e-mails found at Tabs 8 and 10 of the Volume of Sealed Records were privileged but that the attachments, found at Tabs 9 and 11, were not. Both attachments were the same. While TransAlta's initial submission was that there was no basis for distinguishing between the e-mail and the attachment for purposes of privilege, it appears it has now agreed to disclose a copy of the attachment in Appendix "A" to the Court Order relating to the records it no longer objects to disclose. Thus, this issue is moot.
>
> The record found at Tab 13 of the Volume of Sealed Records is a draft letter to the MSA seeking clarification with respect to the MSA's legal position regarding certain outage scenarios. The e-mail to which the draft is attached, however, says little more than that the sender is attaching a draft letter for the recipients' consideration. I conclude that the chambers judge must have reviewed the attachment before concluding the e-mail was privileged, and if this was the process she followed, it follows that this attachment is privileged as well.
>
> I come to a different conclusion with respect to the attachments found at Tabs 15 and 17. Like the others in this category, the chambers judge found the e-mails were privileged, but that the attachments were not. I am satisfied there is substance in the e-mails that could attract solicitor-client privilege, as the chambers judge found. <u>The attachment in each case, however, is a copy of a decision by FERC, which is available on-line to the public and does not, therefore, attract privilege.</u>

In this case, I have not been provided with the dates, authors, and subject of many of the emails and attachments over which the Public Body is claiming privilege. Instead of listing each email and attachment, the Public Body appears to provide details about one email only for each item in the chart As discussed in the foregoing case, attachments do not become privileged by virtue of being attached to an email sent to a lawyer. With regard to any emails or attachments for which I have not been provided a description, I am not in a position to find the email or attachment to be privileged.

[para 117] As I am unable to give greater weight to the affidavit than to the materials provided in earlier submissions, I will consider the totality of the information I have been given in the Summary of Records, the Index of Records, and Schedule 1 to determine whether this evidence establishes that the records fall within the terms of sections 27(1)(a), (b), or (c).

*Records 1 - 2*

[para 118] The Public Body's Summary of Records document states that records 1 and 2 were severed under sections 27(1)(a) and (b) and are subject to solicitor-client privilege. The content is described as "email". Under the heading "Advice Given By (Or Email From), the name of a lawyer for Alberta Justice and Solicitor General is entered.

Under the heading "Advice Received By (Or Email To), the names of two employees of the public body are entered. The subject matter is described as "High River – Demand for Arbitration".

[para 119] Schedule 1 of the Affidavit describes these records as "Email between Justice and Solicitor General (JSG) lawyer and Alberta Emergency Management Agency (AEMA) staff September 9, 2013.

[para 120] From all the evidence before me I conclude that

- An Alberta Justice lawyer sent the email[5]
- Two AEMA staff received it
- It is the earliest of the withheld emails
- The subject matter of the email is a demand for arbitration.

As well, I know from other records that were provided during this inquiry that there was at some point a solicitor-client relationship between the Justice lawyer and the staff members.

[para 121] If I could accept the affiant's assertion that all the emails either asked for or provided legal advice, I might be able to conclude that this record involved the provision of legal advice in relation to the demand for arbitration. However, for the reason given above, I cannot accept this blanket assertion as direct evidence of what the records contain. As I cannot do so, I am left only with evidence that the email relates to a demand for arbitration, the identities of the sender and recipients, and that it has the earliest date of any of the withheld records.

[para 122] I am unable to find that records 1 and 2 are subject to solicitor-client privilege. I accept that it is possible that the records are privileged and contain legal advice or "communications 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"[6]; however, the explanation provided by the Public Body could apply equally to an email sent to the public body to inform it only that third parties had requested arbitration. If that is all the records state, then they may not be privileged.

---

[5] The Summary of Records indicates this email was sent by a Justice lawyer to staff members of AEMA. However, the other two charts say that the email was "between" parties. This creates some uncertainty as to whether the flow of information was necessarily as described in the Summary. This is equally true for many of the other emails described in the charts.

As well, it is notable that for most of the individuals named in the charts, I have been given no explanation of the role of particular named individuals as staff members, or the status of particular named individuals as lawyers, though for some of them, I assume for the sake of the present discussion that persons appearing on one or the other of the third and fourth columns of the "Summary of Records" were either Justice Lawyers or Public Body or AEMA staff.

[6] *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 paragraph 26

[para 123] Though I recognize it is possible that the email consists of legal advice, I cannot say this is more likely than not to be the case. Therefore, by operation of section 71, I find that the Public Body's claim of solicitor-client privilege has not been made out. As the Public Body has not asserted any other privilege over records 1 and 2, I find that section 27(1)(a) has not been established as applying to them.

[para 124] The Public Body also continues to maintain that section 27(1)(b) applies to this email. In its letter of January 27, 2017, it stated:

> Our position that section 27(1)(b) also continues to apply to all of the records is unchanged.

As noted above, section 27(1)(b) applies to information prepared or made ready for use by a lawyer in relation to a matter involving the provision of legal services.

[para 125] While I accept that a lawyer of the Minister of Justice and Attorney General wrote the email contained in records 1 and 2, I am unable to find that the email was prepared or made ready for use in relation to a matter involving the provision of legal services, as there is no clear evidence before me as to the content of the email, or the lawyer's purpose in writing the email. I am therefore unable to find that section 27(1)(b) applies to records 1 and 2. Further, for the reasons discussed above regarding the Public Body's affidavit evidence, the assertion that section 27(1)(b) applies contradicts the assertion that the email was legal advice, just as the assertion that the information involves the giving or seeking of legal advice contradicts the Public Body's assertion that section 27(1)(b) applies..

[para 126] As the Public Body has not established that section 27(1)(a) or (b) applies to these records, I must order the Public Body to give the Applicant access to them.

*Records 3 – 6*

[para 127] As noted in my analysis of the Public Body's application of section 24(1), above, the Public Body's summary of records describes these records as an email and an attachment between a named employee of the Public Body and the Deputy Minister of the Executive Council. The subject matter is described as "Hampton Hills Arbitration Request". In its submissions regarding the application of section 24(1)(a), (b), and (c), it describes records 3 – 6 as a briefing note and an email for the Deputy Minister, Executive Council.

[para 128] In the Index of Records, these records are described as "Email and attached briefing note from AEMA staff to JSG lawyers and DM of Executive Council re: Hampton Hills Arbitration Request.

[para 129] In Schedule 1 of the Public Body's affidavit, the records are described as an email from "AEMA staff to JSG lawyers and attached briefing note."

[para 130] The Public Body states:

> While all the pages in question were also severed under Section 27(1), minor portions of the email streams did not include Justice and Solicitor General staff, however did address the advice that was given by legal counsel with Justice and Solicitor General. The information was provided to assist senior management staff in making a decision on how the Public Body wished to proceed.

[para 131] I am unable to reconcile the descriptions of records 3 – 6 that the Public Body has provided. It is unclear who wrote the email or emails, and who wrote the briefing note and for what purpose. Information provided to senior management staff to assist it in making decisions could be a privileged communication if it is written by a lawyer for a public body, and is intended as legal advice, but if it is not written by a lawyer or intended as legal advice then it is likely not. Possibly, if the email was sent to lawyers, it was a request for legal advice, but to reach this conclusion, I would have to speculate as to why a briefing note was attached or what its particular subject matter or purpose might have been. Further, this conclusion would contradict the initial description of who the recipient of the email was. I am therefore unable to answer, on the evidence before me, even the basic question of whether the information in question is a communication between a client and a solicitor.

[para 132] Moreover, I note that on the summary of records, the Public Body indicates that it is relying on litigation privilege to sever information from these records. 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), 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). <u>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</u>. [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 was, at the time of its creation, use in relation to litigation.

[para 133] 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 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), 29 B.C.L.R. 114 (C.A.); *McCaig v. Trentowsky* (1983), 1983 CanLII 3070 (NB CA), 148 D.L.R. (3d) 724 (N.B.C.A.); *Nova, an Alberta Corporation v. Guelph Engineering Co.* (1984), 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.

[para 134] To establish that litigation privilege applies in this case the Public Body would have to assert that the content of the email and the attachment was created for the dominant purpose of litigation, and provide evidence to support this assertion. There is no such evidence before me or any assertion to that effect.

[para 135] In addition, litigation privilege differs from solicitor-client privilege in that it is finite in duration. In *Blank*, Fish J., speaking for the majority, stated:

> Thus, the principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.
>
> As mentioned earlier, however, the privilege may retain its purpose — and, therefore, its effect — where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding "the possibility of defining . . . litigation more broadly than the particular proceeding which gave rise to the claim" (para. 89); see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.).
>
> At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.

[para 136] The settlement agreement in this case effectively put an end to the litigation and any related litigation between the parties to the arbitration that is the subject of the Applicant's access request. As a result, even if I found that records 3 – 6 were created for the dominant purpose of litigation, I would find that the litigation privilege ended when the settlement agreement was executed.[7]

[7] The Applicant was not a party or related party to the arbitration. As a result, applying the Supreme Court of Canada's definition of "related proceedings" in *Blank*, it would appear that any proceedings in which he may be involved with the Government of Alberta, would not be related to the arbitration. Even if I am

[para 137] The Public Body also continues to maintain that section 27(1)(b) applies to this email and briefing note. As noted above, section 27(1)(b) applies to information prepared or made ready for use by a lawyer in relation to a matter involving the provision of legal services.

[para 138] Even if I could accept that the email and briefing note were sent from an AEMA staff member to a lawyer of the Minister of Justice and Attorney General (which is contradicted by the Public Body's initial submissions), I would be unable to find that the email was prepared or made ready for use in relation to a matter involving the provision of legal services, as there is no evidence before me as to the purpose or content of either the email or the briefing note. I am therefore unable to find that section 27(1)(b) applies to records 3-6.

[para 139] Further, the assertion that section 27(1)(b) applies to the email and briefing note contradicts the idea that the email was for the purpose of obtaining advice, or was part of the continuum of communications between client and lawyer respecting the seeking of and giving of advice.

[para 140] The index of records indicates that the Public Body may have also applied section 27(1)(c) to records 3 – 6. (Neither the Summary of Records nor Schedule 1 refer to the Public Body having done so.) Section 27(1)(c) applies to information in correspondence between a lawyer of the Minister of Justice and Solicitor General and another person, in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or the lawyer. As noted above, the summary of records refers to records 3 – 6 as being between an employee of the Public Body and the Deputy Minister of Executive Council. The Index describes the records as a briefing note from AEMA staff to Alberta Justice lawyers and to the Deputy Minister of Executive Council. Schedule 1 describes these records as "Email from AEMA staff to JSG lawyers and attached Briefing Note." The Public Body's arguments in relation to its application of sections 27(1)(a), (b), and (c) to this information describe the information in records 3 – 6 as being developed for the Deputy Minister of Executive Council.

[para 141] Ultimately, I am left in doubt as to who wrote created the records, what the records were about, and to whom they were sent. As I am not in a position to determine that the records were created by or sent to a lawyer in relation to a matter involving the provision of legal services by the lawyer, I am unable to make an independent finding that section 27(1)(c) applies to records 3 – 6.

[para 142] As I am unable to find that sections 27(1)(a), (b), and (c) apply, I must require the Public Body to give the Applicant access to records 3 - 6.

*Records 7 – 9*

---

wrong in concluding that any related litigation has concluded, I note that the Public Body has provided no evidence as to the existence of ongoing or anticipated related litigation.

[para 143] The Summary of Records document describes records 7 – 9 as an email sent from AEMA staff to AEMA staff. The subject matter is described as "the Hamptons Arbitration". The Summary indicates that these records have been withheld on the basis of litigation privilege.

[para 144] In Schedule 1 of the Affidavit, records 7 – 9 are described as "email between AEMA staff relaying legal advice received".

[para 145] As to whether these records are covered by litigation privilege, I have not been told what the "dominant purpose" of creating the email was. If the purpose of the document was, as the Schedule attests, that it relayed legal advice, I cannot conclude that an email relaying legal advice was created for the dominant purpose of litigation, without an explanation as to how the two purposes coincided. For instance, an email that discussed legal advice that had been received simply to keep someone apprised of developments would not necessarily be said to be created for the dominant purpose of the litigation itself. In any event, as the settlement agreement effectively ended the arbitration litigation and any related litigation, (and there is no evidence before me that related litigation is in existence or contemplation) I find that litigation privilege cannot apply to records 7 – 9.

[para 146] Even if I were to overlook the claim of litigation privilege, and ask whether the relaying of legal advice were part of a continuum of communications that reveals a discussion regarding the arbitration between clients and their lawyer, I would have no information, other than a simple assertion, on which to base a judgment that the information that was conveyed is a communication between solicitor and client which entails legal advice and is intended to be confidential by the parties. I have not been told who provided the legal advice that is said to have been relayed in records 7 – 9, or the relationship between that person and the Public Body. (The affiant's general assertion that *all of the emails* were communications between clients and their lawyers would not apply to the legal advice that is said to be being relayed by this email; moreover, I have provided my reasons above as to why I cannot treat that assertion as evidence.)

[para 147] As I am unable to find that the Public Body's claims of litigation privilege and solicitor-client privilege are made out in relation to records 7 – 9, it follows that I find it has not established that section 27(1)(a) applies to the records.

[para 148] The Public Body also continues to maintain that section 27(1)(b) applies to this email. As noted above, section 27(1)(b) applies to information prepared or made ready for use by a lawyer in relation to a matter involving the provision of legal services

[para 149] As this email was sent between staff members of the Public Body, it seems clear that it was not created by or for a lawyer within the terms of section 27(1)(b). As to whether what was relayed (the legal advice received) falls within this provision, I have been given no information as to who created the legal advice (whether a lawyer mentioned in section 27(1)(b)), nor do I have information on which to independently assess whether it was legal advice and thus a legal service within the terms of the

provision. Moreover, as I have discussed above, providing legal advice cannot coherently be described as preparing information in relation to a matter involving the provision of legal services. As a result, I am unable to find independently that section 27(1)(b) applies to records 7 – 9 or to parts of them.

[para 150] As I find that neither section 27(1)(a) nor (b) has been established as applying, I must order the Public Body to give the Applicant access to these records.

*Records 10 – 42*

[para 151] The Public Body's summary of records document describes records 10 – 42 as having been withheld from the Applicant on the basis of solicitor-client privilege and also on the basis of section 27(1)(b). The records are described as either being advice given by, or an email from, two lawyers of Alberta Justice and Solicitor General and the subject matter of the records is the "Hamptons Arbitration – Schedule of Homeowner Returns (Privileged and Confidential)".

[para 152] Schedule 1 of the Public Body's affidavit states that records 10 – 40 consist of an "Email with attachments between AEMA staff and JSG lawyers and an attached Briefing Note".

[para 153] The Public Body's Index of Records describes records 10 – 40 as "Email between AEMA staff and JSG lawyers Re: Hampton's Arbitration – Schedule of Homeowner Returns (Privileged and Confidential) and attached Briefing Note and Executive Summary (Hamptons Arbitration List Files). The Index of Records indicates that records 41 – 42 were disclosed to the Applicant.

[para 154] It is unclear to me from the Public Body's descriptions of the records why it has claimed solicitor-client privilege over them. Its description of the records suggests that the information may be, or may relate to, a list of records or materials submitted by homeowners for the arbitration. The Public Body does not provide sufficient evidence to enable me to make any independent assessment as to whether the documents it lists in some way called for requests for or the provision of legal advice. It is also unclear who wrote the Briefing Note and Executive Summary that was attached, or for what purpose. The topic of the Briefing Note and Executive Summary is described as "Hamptons Arbitration List Files", and it seems possible that the briefing note and summary contain nothing more than a list of documents or a list of home owners or arbitrators.

[para 155] I have already explained why I cannot accept as evidence the affiant's assertion that this email or email chain, as being among the withheld emails, consists of either legal advice (if flowing from counsel to staff) or the seeking of legal advice (if flowing the other way) and that the communications are between solicitor and client.

[para 156] I also note that the "subject matter" entry in the Summary of Records suggests the email may have been marked "privileged and confidential"; however, this

does not make it privileged or confidential. It may be, but it may not be. Equally, a record may not be marked privileged or confidential, and be both.

[para 157] For these reasons, I am unable to find that records 10 – 40 are subject to solicitor-client privilege, or any other privilege. I therefore find that section 27(1)(a) has not been established as applying to records 10 – 40.

[para 158] The Public Body also applied section 27(1)(b) to the information in the records. I have not been given any information regarding the purpose of the persons who created the records to be able to determine whether the records were prepared by or for a lawyer for use in litigation. As a result, I find that section 27(1)(b) has not been demonstrated as applying. Further, as explained above, neither requests for legal advice, nor information consisting of legal advice, fall within the terms of section 27(1)(b), so that the claim that this provision applies undermines the assertion that solicitor-client privilege applies on the basis that the information falls within one of these categories.

[para 159] As neither section 27(1)(a) nor (b) has been demonstrated as applying, I must order the Public Body to give the Applicant access to records 10 – 40.

*Records 43 – 44*

[para 160] The Public Body applied sections 27(1)(a) and (b) to sever information from records 43 and 44.

[para 161] In its Summary of Records document, the Public Body indicates that it is withholding records 43 – 44 on the basis of litigation privilege. The email was created by an employee of the Public Body and sent to two lawyers of Alberta Justice and Solicitor General. The subject matter of the records is described as "Hamptons Arbitration – Mold Experts".

[para 162] The index of records also indicates that records 43 – 44 are an email from AEMA staff to lawyers for Alberta Justice and Solicitor General. The subject matter is described as regarding the "Hampton's Arbitration – mold experts".

[para 163] Schedule 1 of the Affidavit indicates that records 43 – 44 are being withheld on the basis of solicitor-client privilege. In this document, the Public Body offers the following description: "Email from AEMA staff to JSG lawyers July 8, 2014".

[para 164] It is unclear to me from the Public Body's descriptions of this email why it has claimed solicitor-client privilege over it. Its description indicates only that the email had to do with the arbitration, and concerned mold experts in some way. The Public Body does not provide sufficient evidence to enable me to make any independent assessment as to whether this topic would be associated with a request by staff for legal advice.

[para 165] The Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision are made out, that the records do not contain information involving the giving or seeking of legal advice, but

rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 166] Further, I have already explained why I cannot accept as evidence the affiant's assertion that this email, as being among the withheld emails, involves seeking legal advice, or that the communication was between client and solicitor.

[para 167] For these reasons, I am unable to find that records 43-44 are subject to solicitor-client privilege, or any other privilege. I therefore find that section 27(1)(a) has not been established as applying to records 43-44.

[para 168] With regard to section 27(1)(b), I have not been given any information regarding the purpose of the persons who created the email to be able to determine whether the records were prepared by or on behalf of an Alberta Justice lawyer or a lawyer of the Public Body for use in litigation. As a result, I find that section 27(1)(b) has not been demonstrated as applying.

[para 169] As neither section 27(1)(a) nor (b) has been established as applying, I must order the Public Body to give the Applicant access to records 43 – 44.

*Records 45 - 46*

[para 170] The Public Body severed records 45 – 46 under sections 27(1)(a) and (b). The Public Body says it applied solicitor-client privilege to these records.

[para 171] The Summary of Records provided by the Public Body describes the content as an email from a particular lawyer to a particular employee of the Public Body. The subject matter is described as "Question re: DRP assessments". The date of the email is described as August 12, 2014.The Index or Records describes records 45 – 46 in similar terms. Schedule 1 describes records 45 – 46 as "Email between AEMA staff and JSG lawyers August 12, 2014".

[para 172] The Public Body did not explain the discrepancy between its descriptions of records 45 – 46; in the Summary they are described as an email from one lawyer to one employee; in Schedule 1 and the Index of records. the records are described as being between multiple lawyers of Alberta Justice and Solicitor General and "staff" of the Public Body.

[para 173] In any event, I am unable to determine from the Public Body's descriptions of the records that the record contains communications between a solicitor and a client made for the purpose of giving or receiving legal advice. The Public Body does not provide sufficient evidence to enable me to make an independent assessment as to whether the "subject matter" would necessarily be associated with the provision of legal advice, and is therefore whether the email would more likely to be legal advice than not.

[para 174] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 175] Further, I have already explained why I cannot accept as evidence the affiant's assertion that this email, as being among the withheld emails, involves seeking legal advice, or that the communication was between client and solicitor.

[para 176] The Public Body has also argued that section 27(1)(b) applies to records 45 – 46. In order for section 27(1)(b) to apply, the information in the email must be prepared by a lawyer in relation to the provision of legal services. There is no evidence before me that the email was prepared in relation to the provision of legal services as I have not been told the lawyer's purpose in writing it. Moreover, I do not know whether the question in the email was one asked by the lawyer or by the Public Body. As I am unable to determine the purpose of the email in records 45 – 46, I am unable to say that section 27(1)(b) applies to it. Further, as explained above, requests for advice or legal advice do not fall within the terms of section 27(1)(b) as they are not prepared by or for a lawyer.

[para 177] For the foregoing reasons, I find that the Public Body has not established that either section 27(1)(a) or (b) applies to records 45 – 46 and I must require it to give the Applicant access to these records.

*Records 47 - 55*

[para 178] The Public Body applied sections 27(1)(a) and (b) to withhold records 47 – 55 from the Applicant.

[para 179] The Summary of Records document describes the content of the records as emails. The Summary states solicitor-client privilege was applied.Two lawyers of Alberta Justice and Solicitor General are identified as the authors of the emails. Specific employees of the Public Body are identified as recipients. The subject matter is described as "Hamptons Stantec". The Index of Records describes these records in similar terms.

[para 180] Schedule 1 describes records 47 – 55 "Email between AEMA staff, Alberta Flood Recovery Task Force (FRTF) staff and JSG lawyers".

[para 181] The Public Body did not explain the makeup of the Alberta Flood Recovery Task Force and it is unclear whether this Task Force's members are confined to the Government of Alberta. I will assume that they are for the purpose of this analysis.

[para 182] The Public Body did not explain how many emails are included in records 47 – 55 or identify the author or authors of each email, or the recipient or recipients of each email.

[para 183] It is possible that the lawyers provided legal advice to both the Public Body and to staff of the Alberta Flood Recovery Task Force; however, it is also possible the lawyers may have created the emails to discuss policy. Both possibilities could be encompassed by the descriptors the Public Body has used. As explained above, I am unable to accept to the affiant's assertion that all the records "involve the giving of or seeking of legal advice", or were communicated in the context of a solicitor-client relationship. The Public Body does not provide sufficient evidence to enable me to make an independent assessment as to whether the "subject matter" – Hamptons Stantec – would necessarily be associated with the provision of legal advice, and therefore whether the email would is more likely to be legal advice than not.

[para 184] I am also unable to say that section 27(1)(b) applies to records 47 – 55. As explained above, the assertion that section 27(1)(b) applies to the emails contradicts the idea that the emails consisted of legal advice. In any event, no evidence has been provided as to the purpose of the lawyers in writing the emails appearing on records 47 – 55, other than the affiant's broad assertion for all the records, which I cannot accept, that emails sent by lawyers involved legal advice. I am therefore unable to find that it is more likely than not that they prepared the emails in relation to the provision of legal services.

[para 185] As I find that the Public Body has not established that sections 27(1)(a) or (b) apply to records 47 – 55, I must order the Public Body to give the Applicant access to them.

*Records 56 – 61*

[para 186] The Public Body withheld records 56 – 61 from the Applicant on the basis of sections 27(1)(a) and (b). It has claimed solicitor-client privilege over these records.

[para 187] The Summary of Records describes the content records 56 – 61 as "Email "ATT: List of Hamptons Arbitration Participants". It explains that a particular lawyer for Alberta Justice and Solicitor General wrote the email, and sent it to four named individuals. The subject matter is described as "Joist Report". The index of records describes the records as "Email between AEMA staff and JSG lawyers Re: Joist Report". Schedule 1 describes records 56 – 61 as "Email between AEMA staff and JSG lawyers September 10, 2014".

[para 188] The Public Body does not provide sufficient evidence to enable me to make an independent assessment as to whether the "subject matter" – "Joist Report", or the subject of the attachment "List of Hamptons Arbitration Participants"– would necessarily be associated with the provision of legal advice, and therefore whether the email would more likely to be legal advice than not. As discussed above, I am unable to accept the broad assertion in the Public Body's affidavit that every record involves the giving or seeking of legal advice. Further, there are individuals included in the list of recipients whose names do not appear in other lines and whose identity has not been described. If the information were communicated to persons other than a solicitor or client, the communication would not be privileged or privilege would have been waived.

For the foregoing reasons, I find that section 27(1)(a) has not been shown to apply to these records.

[para 189] I am also unable to find that section 27(1)(b) applies to these records. It is unclear who created the records, or for what purpose. As a result, I am unable to say that they are "prepared by or for a lawyer in relation to the provision of legal services". Furthermore, for the reasons described above, the claim that section 27(1)(b) applies is inconsistent with and undermines the claim of solicitor-client privilege.

[para 190] As I find that sections 27(1)(a) and (b) have not been shown to apply to records 56 – 61, I must require the Public Body to give the Applicant access to these records.

*Records 62 – 68*

[para 191] The Public Body applied sections 27(1)(a) and (b) to sever information from records 62 – 68.

[para 192] The Summary of Records document indicates that the Public Body applied section 27(1)(a) to these records on the basis of litigation privilege. The Summary of Records describes the contents of the records as "Email (ATT: Hamptons Arbitration List)" An employee of the Public Body who is not a lawyer is described as the author of records 62 – 68. The recipient is described as AEMA staff. The subject matter is described as "Hamptons Arbitration List".

[para 193] The Index of Records describes records 62 – 68 describes the records as "Email between AEMA staff Re: Hamptons Arbitration List and Executive Summary Hamptons Arbitration Files".

[para 194] Schedule 1 describes records 62 – 68 as "Email between AEMA staff preparing briefing materials ("Status Update Tracking Document") for JSG lawyers Attachment: Status Update Tracking Document September 11, 2014". Schedule 1 also indicates that the Public Body is claiming solicitor-client privilege in all the records it lists.

[para 195] I am unable to find that records 62 – 68 are a communication between solicitor and client, or involved the seeking or giving of legal advice. The descriptions in the Summary of Records and the Index of Records indicate that an employee of the Public Body exchanged the email with other employees of the Public Body. Schedule 1 also indicates that the communications contained in records 62 – 68 were communicated among the Public Body's employees. While it states that the materials contained in records 62 – 68 were created by staff preparing briefing materials, and were "for JSG lawyers" I do not know why this statement is made, or what the purpose of providing the material to the lawyers would be. The Public Body has not explained the relevance of the phrase "Status Update Tracking Document", which Schedule 1 uses twice to describe these records Finally, it appears to be possible that records 62 – 68 are simply a list of

parties involved in the Hamptons Arbitration, which would not, in and of itself, attract solicitor-client privilege.

[para 196] The Summary of Records also states that litigation privilege was applied, but I have been given no evidence or argument as to the dominant purpose for the creation of any of the information in the email or in the attachment.

[para 197] As I am unable to conclude that records 62 – 68 consist of a confidential communication between solicitor and client made for the purpose of giving or seeking legal advice, I am unable to find that records 62 – 68 are subject to solicitor-client privilege. I am also unable to conclude on the basis of the Public Body's various descriptions that records 62 – 68 are subject to litigation privilege.

[para 198] With regard to section 27(1)(b), the Public Body has not provided the basis for the idea that the records were prepared by its employee on behalf of a lawyer of the Minister of Justice and Solicitor General, and its other descriptors of these records do not describe these records as having been prepared by or for a lawyer. Moreover, even accepting that these records were prepared on behalf of a lawyer for the Minister of Justice and Solicitor General, I have not been told that they were prepared for use in relation to a matter involving the provision of legal services. I am unable to conclude that it is more likely than not that these records are subject to section 27(1)(b).

[para 199] On the basis of the Public Body's descriptions of the records, I am unable to say that they are subject to either section 27(1)(a) or (b). I must therefore require the Public Body to give the Applicant access to them.

*Records 69 – 75*

[para 200] The Public Body severed records 69 – 75 on the basis of sections 27(1)(a) and (b).

[para 201] The Summary of Records document indicates that the Public Body is asserting solicitor-client privilege over the records. The Summary describes the contents of the records as Emails. The emails were written by two lawyers with Alberta Justice and Solicitor General. The Summary provides the names of three persons who received the emails. The subject matter is described as "Formal Demand for Arbitration on Behalf of Some Residents of Hampton Hills and Sunrise / Sunshine, High River, Alberta September 11, 2013 [*sic*]".

[para 202] The Index of Records describes records 69 – 75 as follows: "Email between AEMA staff, FRTF staff, and JSG lawyers Re: Formal Demand for Arbitration On Behalf of Some Residents of Hampton Hills and Sunrise / Sunshine, High River, Alberta".

[para 203] Schedule 1 describes records 69 – 75 as: "Email between AEMA staff, FRTF staff, and JSG lawyers September 11, 2014 [*sic*]".

[para 204] As with some of the other records dealt with in the foregoing pages, it could be the case that the lawyers in question were providing advice in this email as to a course of legal action to be followed by the Government of Alberta in relation to the demand for arbitration. However, on the description I have been provided, it is also possible that the records only contain communications to AEMA staff and persons described as "FRTF staff" that a formal demand for arbitration has been received. I have been given insufficient evidence on which to make an independent assessment as to whether legal advice was called for in the circumstances The lawyers may also have simply been forwarding the demand in the email..If so, it is neither a request for, nor the provision of, legal advice.

[para 205] I have already explained why I cannot accept as evidence the affiant's blanket assertion that this email, as being among the withheld emails, involves giving or seeking legal advice, or that the communication was between client and solicitor. As I have no evidence which I can accept that the lawyers were providing advice or similar information in relation to the formal demand in this email, nor of the relationship between the lawyers and the two groups of persons to whom records 69 – 75 were provided (indeed, I cannot say whether "FRTF staff" are Public Body employees), or an explanation of why the email was provided to representatives of these groups, I am unable to say that records 69 – 75 are privileged communications.

[para 206] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 207] I am also unable to find that section 27(1)(b) applies, as there is no evidence as to the purpose of the lawyers who created the emails, and it is unclear what the content of the records is. I am therefore unable to find, on the evidence before me, that the lawyers who sent the emails prepared these emails for their use in providing legal services.

[para 208] Furthermore, for the reasons described above, the claim that section 27(1)(b) applies is inconsistent with and undermines the claim of solicitor-client privilege.

[para 209] As it has not been established that sections 27(1)(a) and (b) apply to records 69 – 75, I must require the Public Body to give the Applicant access to these records.

*Records 76 - 85*

[para 210] The Public Body applied sections 27(1)(a) and (b) to withhold records 76 – 85 from the Applicant.

[para 211] The Summary of Records document indicates that the Public Body is asserting solicitor-client privilege over records 76 – 85. The Summary describes the content of these records as "an email (ATT: Executive Summary)". The email was sent by a lawyer of Alberta Justice and Solicitor General to an employee of the Public Body. The subject matter is described as "Hampton Hills Arbitration".

[para 212] The index of records offers the following description: "Email between AEMA Staff and JSG lawyers Re: Hampton Hills arbitration and Executive Summary Hampton Arbitration Files".

[para 213] Schedule 1 of the Public Body's affidavit describes records 76 – 85 in the following terms: "Email between AEMA staff and JSG lawyers Attachment: Status Update Tracking Document September 12, 2014".

[para 214] From the foregoing, I conclude that the subject line of the email in records 76 – 85 was "Hampton Hills arbitration" or something similar. I also conclude that the email contained an attachment which may have been an Executive Summary or alternatively, a "Status Update Tracking Document". Drawing these conclusions does not enable me to make an independent assessment that the circumstances called for the provision of legal advice by the lawyer, and that records 76 – 85 are subject to solicitor-client privilege. I have already explained why I cannot accept as evidence the affiant's blanket assertion that this email, as being among the withheld emails, involves the provision of legal advice, or that the communication was between solicitor and client.

[para 215] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 216] As I do not know the purpose of the author of the email in writing the email or sending the attachment, I am unable to say that the records were prepared by or for a lawyer in the relation to a matter involving the provision of legal services.

[para 217] For the foregoing reasons, I am unable to support the Public Body's application of sections 27(1)(a) and (b) to records 76 – 85. As a result, I must order the Public Body to give the Applicant access to records 76 – 85.

*Records 86 – 89*

[para 218] The Public Body applied sections 27(1)(a) and (b) to sever records 86 – 89.

[para 219] The Public Body's Summary of Records document indicates that it is asserting solicitor-client privilege over records 86 – 89. The Summary describes the

content of these records as “Email (ATT: Letter from J&SG to MA). The Subject Matter is described as “Flood Arbitration Demand”.

[para 220] The Public Body’s index of records describes records 86 – 89 as “Email between AEMA staff and JSG lawyers, and letter to Municipal Affairs from JSG”.

[para 221] Schedule 1 of the Public Body’s affidavit describes records 86 – 89 in the following terms: “Re: Flood Arbitration Demand and Litigation Hold Letter Flood”. Email between AEMA staff and JSG lawyers, and letter to Municipal Affairs from JSG September 18, 2014.”

[para 222] As with some of the emails already dealt with above, I acknowledge that it is possible that the emails contain advice as to what should sensibly be done by the Public Body in the context of the arbitration, and therefore be subject to solicitor-client privilege However, the information provided is insufficient for me to make an independent assessment that the circumstances called for the provision of legal advice by the lawyer,. I have already explained why I cannot accept as evidence the affiant’s blanket assertion that this email, as being among the withheld emails, involves the provision of legal advice, or that the communication was between solicitor and client. As I am unable to determine the lawyer’s purpose in writing the email and including the attachment, and as I have been given insufficient evidence as to the legal context in which the email and attachment were sent, I am unable to infer it that the records contain solicitor-client communications and I am unable to confirm the Public Body’s claim of privilege over records 86 – 89

[para 223] In addition, the Public Body’s application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 224] Again, as I have not been told the lawyer’s purpose in sending the email and attachment to the Public Body, I am unable to say that she prepared these records for use in a matter involving the provision of legal services. Moreover, it is unclear whether she (or another lawyer) prepared the attachment. As a result, I cannot find that section 27(1)(b) applies.

[para 225] As I find that the Public Body has not established section 27(1)(a) or (b) as applying to records 86 – 89, I must order the Public Body to give the Applicant access to these records.

*Records 90 – 93*

[para 226] The Public Body applied sections 27(1)(a) and (b) to withhold records 90 – 93 from the Applicant.

[para 227] The Public Body's Summary of Records indicates that the Public Body is asserting solicitor-client privilege over records 90 – 93. The content of the record is characterized as an email. The author of the email is a lawyer for Alberta Justice and Solicitor General. The recipient is an employee of the Public Body. The subject matter is described as "Hampton Hills Arbitration – privileged and confidential".

[para 228] The Index of Records offers the following description: Email between AEMA staff and JSG lawyers Re: Hampton Hills Arbitration – privileged and confidential".

[para 229] Schedule 1 describes records 90 – 93 as "Email between AEMA staff and JSG lawyers September 18, 2014".

[para 230] I note that the "subject matter" entry suggest the email may have been marked "privileged and confidential"; however, this does not make it privileged or confidential. It may be, but it may not be. Equally, a record may not be marked privileged or confidential, and be both.

[para 231] As I have no evidence except the affiant's blanket assertions, which I cannot accept as evidence with respect to this email, that the former is the case, and in the absence of evidence enabling me to make an independent assessment as to the purpose of the author of records 90 – 93 in creating and sending them, I am unable to say that these records are subject to solicitor-client privilege.

[para 232] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 233] As I do not know the purpose of the author of records 90 and 93 in creating them, I am unable to say that these records were prepared for use in relation to a matter involving the provision of legal services. I am therefore unable to find that section 27(1)(b) applies to records 90 – 93.

[para 234] As it has not been established that either section 27(1)(a) or (b) applies to records 90 – 93, I must require the Public Body to give the Applicant access to these records.

*Records 94 - 118*

[para 235] The Public Body applied sections 27(1)(a) and (b) to sever records 94 – 118 in their entirety.

[para 236] The Summary of Records document indicates that the Public Body is asserting solicitor-client privilege over records 94 – 118. The Summary describes the

content of the record as "Email (ATT: Executive Summary; List of Arbitration Pool in Mould Project)". The summary also indicates that the author of the email is a lawyer with Alberta Justice and Solicitor General, the recipient is an employee of the Public Body, and the subject matter is described as "Hamptons Updates".

[para 237] The Index of Records describes records 94 – 118 as "Email between AEMA staff and JSG lawyers: Hamptons Updates with Executive Summary Hampton Arbitration Files".

[para 238] Schedule 1 describes records 94 – 118 as "Email between AEMA staff and JSG lawyers: Attachment: Status Update Tracking Document September 19, 2014".

[para 239] I am unable to find that records 94 – 118 contain communications subject to solicitor-client privilege. It appears possible from the description of the records I have been provided that the records contains lists and updates but do not themselves contain legal advice. As I have no evidence except the affiant's blanket assertions that they do, the absence of evidence enabling me to make an independent assessment as to what the purpose of the author or authors of records 94 – 118 was in creating records 94 – 118 and distributing them, I am unable to conclude that this purpose entailed the giving or seeking of legal advice.

[para 240] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 241]
[para 242] I am also unable to find that the records are subject to section 27(1)(b). I do not know the purpose of the author of these records in creating them, and I am unable to infer the purpose from the descriptions provided by the Public Body. As a result, I am unable to say that records 94 – 118 were created by a lawyer for use in a matter involving the provision of legal services.

[para 243] As I find that neither section 27(1)(a) nor (b) has been demonstrated to apply to records 94 - 118, I must require the Public Body to give the Applicant access to these records.

*Records 119 - 121*

[para 244] The Public Body withheld records 119 – 121 from the Applicant on the basis that sections 27(1)(a) and (b) apply..

[para 245] The Public Body's Summary of Records document indicates that the Public Body is asserting solicitor-client privilege over records 119 – 121. The summary describes the content of the records as an email, and indicates that the authors or advice

givers in relation to the email are "McLeod Law" and a lawyer from Alberta Justice and Solicitor General. The subject matter of the records is described as "Request for Further Documents – Privileged and Confidential."

[para 246] The Index describes records 119 – 121 as "Email between AEMA staff, JSG lawyers, and Hampton homeowners' lawyer Re: Request for Further Documents – privileged and confidential".

[para 247] Schedule 1 describes records 119 – 121 as "Email between AEMA staff, and JSG lawyers September 25, 2014".

[para 248] Schedule 1 omits reference to a party adverse in interest to the Public Body to which both the Summary and the Index refer. The Public Body has provided no explanation for the discrepancies between its summary and index documents and Schedule 1. In this case, I prefer the evidence provided by the Summary and the Index as these are consistent as between one another, detailed and specific. If they contained an error, it was open to the affiant to say so in response to my questions about this. The removal of any reference to McLeod Law from the Schedule does not resolve this issue.

[para 249] Based on the evidence I have been provided I find it likely that records 119 – 121 contain a request for documents prepared by McLeod Law, which was then forwarded to the Public Body by a lawyer for Alberta Justice and Solicitor General. I find that these records do not consist of a communication between solicitor and client, made for the purpose of giving or seeking legal advice.

[para 250] Since the Summary and Index of Records provide information that McLeod Law was involved in the communications, and this law firm represented parties opposed in interest to the Public Body, I cannot accept the idea that they were subject to solicitor-client privilege.

[para 251] I also find that section 27(1)(b) does not apply to these records. As the records appear to have been prepared by a lawyer for McLeod Law, it cannot be said that a lawyer for a public body or the Minister of Justice and Solicitor General prepared them. Further, if the correct explanation is that a lawyer for Alberta Justice and Solicitor General may have forwarded a request for records (possibly a request for records prepared by McLeod Law to the Public Body, or vice versa, I am unable to say that the lawyer prepared the forwarding email for use in relation to a matter involving the provision of legal services.

[para 252] I find that sections 27(1)(a) and (b) do not apply to records 119 – 121. As a result, I must order the Public Body to give the Applicant access to these records.

*Records 122 - 123*

[para 253] The Public Body applied sections 27(1)(a) and (b) to sever information from records 122 – 123 in their entirety.

[para 254] The Summary of Records document indicates that the Public Body is asserting solicitor-client privilege over records 122 – 123. It describes the content of the records as "Email". Two lawyers for Alberta Justice and Solicitor General are described as the authors of the email. The subject matter is described as "Hampton Hills arbitration – Privileged and confidential".

[para 255] The Index of Records describes the content of the records as "Email between AEMA staff and JSG lawyers Re: Hampton Hills arbitration – privileged and confidential".

[para 256] Schedule 1 describes records 122 – 123 as "Email between AEMA staff and JSG lawyers October 1, 2014".

[para 257] The descriptions provided by the Public Body are inadequate to support the Public Body's claim of privilege. It appears possible that the email merely passed on information about the arbitration, or requests made by parties in the arbitration. I have no evidence except the affiant's blanket assertions regarding the records' all involving advice or requests for advice, which I cannot accept as applying to all of them, and therefore not to this one. In the absence of evidence enabling me to make an independent assessment as to the purpose of the communication, I cannot find, based on the descriptions alone of records 122 – 123, that they contain communications made for the purpose of giving or seeking legal advice.

[para 258] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 259] As I have no evidence before me as to the purpose of the author or authors of the email in creating it, I am also unable to find that the email was prepared for use in relation to a matter involving the provision of legal services.

[para 260] I find that the Public Body has not established that sections 27(1)(a) and (b) apply to records 122 – 123.

*Records 124 - 125*

[para 261] The Public Body applied sections 27(1)(a) and (b) to records 124 – 125 in their entirety.

[para 262] The Public Body's Summary of Records indicates that the Public Body is asserting solicitor-client privilege over records 124 – 125. The summary describes the content of the record as an email and states that McLeod Law and a lawyer of Alberta Justice and Solicitor General are authors of the email. The subject matter of the email is

described as “Confidential – Solicitor / Client Privilege – Hamptons Arbitration List of Homeowners with Most Extensive Damage”.

[para 263] The Index of Records describes records 124 – 125 as “Email between AEMA staff, JSG lawyer, and Hampton homeowner’s lawyer Re: Confidential – Solicitor / Client Privileged – Hamptons Arbitration List of Homeowners with Most Extensive Damage”.

[para 264] Schedule 1 describes the contents of records 124 – 125 as “Email between AEMA staff and JSG lawyers October 1, 2014”.

[para 265] As with records 119 – 121, there is discrepancy between the descriptions of the records in the summary and index, and the description provided in Schedule 1. I prefer the evidence available to me in the summary and index, as this information is more detailed and specific.

[para 266] I find it likely that records 124 – 125 contain a communication prepared by opposing counsel in the arbitration. I also find it likely that this communication contains a list of the homeowners involved in the arbitration whose properties sustained the most damage, as that is the title of the email.

[para 267] I acknowledge that a lawyer with Alberta Justice could potentially forward correspondence from the other side, and also provide legal advice about it. However, if that is so, then the Public Body would need to submit evidence to this effect in order to prove it. Further, the most specific evidence I have contradicts this, indicating the law firm as one of the correspondents. Even if it the former happened, the communication created by opposing counsel would not itself become subject to solicitor-client privilege by virtue of having been forwarded by an Alberta Justice lawyer.

[para 268] Again, as it appears likely that a portion of the email in records 124 - 125 was created by opposing counsel, I find that section 27(1)(b) does not apply to that portion of the records. Even assuming that some portions of these records were created by a lawyer for Alberta Justice, I am unable to say what the lawyer’s purpose was in creating the record. I am therefore unable to say that the record was prepared by a lawyer for use in the provision of legal services.

[para 269] As I find that sections 27(1)(a) and (b) do not apply to records 124 – 125, I must order the Public Body to give the Applicant access to these records.

*Records 126 – 127*

[para 270] The Public Body applied sections 27(1)(a) and (b) to sever the information in records 126 – 127 in its entirety.

[para 271] The Summary of Records document indicates that the Public Body is asserting solicitor-client privilege over records 126 – 127. The summary describes the

content of the record as an "email" and indicates that it was created by an Alberta Justice lawyer and sent to an employee of the Public Body. The subject matter is described as "Hampton Hills follow up".

[para 272] The description in the Index of Records is similar to that in the Summary of Records. Schedule 1 describes records 126 – 127 as "Email between AEMA staff and JSG lawyers October 2, 2014".

[para 273] I am unable to say, based on the descriptions I have been provided, that the records are privileged. I have not been provided with sufficient evidence to find that the records contain communications between solicitor and client made for the purpose of giving or seeking legal advice. It appears possible that the author of the email intended to provide updates regarding the arbitration. Further, the Public Body has used the phrase "Email between AEMA staff and JSG lawyers", with which it describes records 126 – 127, to also describe records 119 – 121 and 124 – 125, which contain communications involving parties adverse in interest to the Public Body. As a result, I am unable to infer from the Public Body's descriptions that the records are privileged, even if it seems likely that lawyers for Alberta Justice might reasonably provide the Public Body with legal advice in the course of litigation.

[para 274] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 275] I am also unable to find that section 27(1)(b) applies to records 126 – 127. I have been provided insufficient information about the purpose of the author of the records in creating records 126 – 127 and about the substance of the records to be able to determine that they were prepared by a lawyer for use in the provision of legal services.

[para 276] I have already explained why I cannot accept as evidence the affiant's blanket assertion that this email, as being among the withheld emails, involves giving or seeking legal advice, or that the communication was between client and solicitor.

[para 277] As I find that the Public Body has not established that section 27(1)(a) or (b) applies to records 126 – 127, I must order the Public Body to give the Applicant access to records 126 – 127.

*Records 128 - 138*

[para 278] The Public Body applied sections 27(1)(a) and (b) to sever records 128 – 138 in their entirety.

[para 279] The Summary of Records indicates that the Public Body is asserting solicitor-client privilege over records 128 – 138. The summary describes the content of

the records as "Email (Att: Executive Summary). The author of the email is indicated to be an Alberta Justice lawyer and the recipients as employees of the Public Body. The subject matter of records 128 – 138 is described as "Hamptons Arbitration List October 2, 2014 Update".

[para 280] The Index of Records describes records 128 – 138 as "Email between AEMA staff and JSG lawyers Re: Hamptons Arbitration List October 2, 2014 Update and Executive Summary Hampton Arbitration Files".

[para 281] Schedule 1 describes records 128 – 138 as "Email between AEMA staff and JSG lawyers Attachment: Status Update Tracking Document October 2, 2014".

[para 282] I am unable to conclude that records 128 – 138 are solicitor-client privileged communications. Records 128 – 138 are described as an update and could merely describe developments regarding the status of the arbitration, which would not necessarily constitute legal advice. I have no evidence except the affiant's blanket assertions regarding the records' all involving advice or requests for advice, which I cannot accept as applying to all of them, and therefore not to this one. In the absence of evidence enabling me to make an independent assessment as to the purpose of the communication, I cannot conclude they contain communications made for the purpose of giving or seeking legal advice.[para 282] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 283] I am also unable to say that records 128 – 138 are subject to section 27(1)(b), , and I have been given no information as to the purpose of the author of records 128 – 138 in creating the records. It may be that the author prepared them in order to use them in a matter involving the provision of legal services, but it appears possible that the information was exchanged in order to provide a status update.

[para 284] As I find that the Public Body has not established that sections 27(1)(a) and (b) apply to records 128 – 138, I must require the Public Body to give the Applicant access to these records.

*Records 139 - 145*

[para 285] The Public Body applied sections 24(1)(a), (b), and (c), and 27(1)(a) and (b) to sever records 139 – 145 in their entirety. I have already found, above, that the Public Body has not established that section 24(1) applies to records 139 – 145. I turn now to the question of whether it has established that sections 27(1)(a) and (b) apply to them.

[para 286] The Summary of Records indicates that the Public Body is asserting solicitor-client privilege over records 139 – 145. The content of the record is described as

"email" and the email (or emails) is apparently authored by McLeod Law, and two lawyers of Alberta Justice. An employee of the Public Body is listed as the recipient of the email. The subject matter of the email is described as "Urgent: Confidential – Solicitor / Client Privilege – Hamptons Arbitration".

[para 287] The Index of Records describes records 139 – 141 as "Email between AEMA staff and JSG lawyers Re: Urgent: Confidential – Solicitor / Client Privilege Hampton's Arbitration". Records 142 – 145 are described as "Email between AEMA staff and JSG lawyers Re: Hampton Hills – PRIVILEGED AND CONFIDENTIAL".

[para 288] Schedule 1 describes records 139 – 141 as "Email between AEMA staff and JSG lawyers October 2, 2014". It describes records 142 – 145 in identical terms.

[para 289] There is discrepancy between the Summary of Records and the Index of Records and Schedule 1. The Summary indicates that one of the authors of records 139 – 145 is opposing counsel in the arbitration. The Index and Schedule 1 omit reference to opposing counsel as an author of the records or a portion of them.

[para 290] Clearly, if the records, or a portion of them, were created by opposing counsel, those records, or that portion of them, are not subject to solicitor-client privilege. The Summary of Records suggests that at least a portion of records 139 – 145 was written by opposing counsel. The Public Body's descriptor "Email between AEMA staff and JSG lawyers" is of no assistance in determining the extent to which information in the records was written by AEMA staff or JSG and which was written by opposing counsel. Moreover, the Public Body has used the same descriptor for records 119 – 121 and 124 – 125, which also contain emails created by opposing counsel.

[para 291] I am unable to accept that records 139 – 145 are subject to solicitor-client privilege. Not only is the Public Body's evidence as to the context in which the records were created, too vague, but it is not clear from its evidence that the parties to the communication were solicitor and client. As a result, I am unable to find that section 27(1)(a) applies to records 139 – 145.

[para 292] I am also unable to find that section 27(1)(b) applies to records 139 – 145. As I have not provided sufficient context regarding these records, or an explanation of the role of opposing counsel in creating at least some of the records, I cannot find that section 27(1)(b) applies to them, as I have no way of knowing whether they were created by a lawyer for use in the provision of legal services. Rather, it appears that a portion of them at least – those created by opposing counsel – were not.

[para 293] As I am unable to find that sections 27(1)(a) and (b) apply to records 139 – 145, I must order the Public Body to give the Applicant access to them.

*Records 146 – 149*

[para 294] The Public Body applied sections 27(1)(a) and (b) to sever records 146 – 149 in their entirety.

[para 295] The Summary of Records document indicates that the Public Body is asserting solicitor-client privilege over records 146 – 149. The summary describes the content of the record as "email". A lawyer for Alberta Justice is described as the author of the email and an employee of the Public Body is described as the recipient. The subject matter is described as "Hampton Hills – privileged and confidential".

[para 296] The index of records describes the records as: Email between AEMA staff and JSG lawyers Re: Hampton Hills PRIVILEGED AND CONFIDENTIAL". The index differs from the summary in that it refers to a plurality of staff members and lawyers sending and receiving the email, while the Summary only refers to one of each.

[para 297] Schedule I describes the records as "Email between AEMA staff and JSG lawyers October 2, 2014".

[para 298] It is unclear to me why the Public Body refers to the email as being between one lawyer and one employee in the Summary, and between more than one lawyer and more than one employee in the Index and in Schedule 1. Regardless, the Public Body's evidence is insufficient to establish that the records are privileged.

[para 299] It may be that the Public Body's description of the records as "Privileged and Confidential" is a reference to the subject line of the email or to a caution appearing in the body of the email. Accepting that the record was intended to be confidential, it has not been established what the purpose of the author or authors of the email was in writing it. As a result, it is unclear whether the communication is one made for the purpose of giving or seeking of legal advice. Moreover, the Public Body has used the phrase "Email between AEMA staff to JSG lawyers" in Schedule 1 to describe emails that its Summary of Records document indicates were prepared by opposing counsel (records 119 – 121 and 124 – 125). I am therefore unable to place weight on the Public Body's descriptions of the records in Schedule 1.

[para 300] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

para 301] I am also unable to conclude that section 27(1)(b) applies to records 146 – 149. As I do not know the purpose of the author of the email, or even who wrote the email or how many people wrote the email, I am unable to say whether it was prepared for use by a lawyer in the provision of legal services.

[para 302] As well, I have already explained why I cannot accept as evidence the affiant's blanket assertion that this email, as being among the withheld emails, involves

giving or seeking legal advice, or that the communication was between client and solicitor.

[para 303] As I find that the Public Body has not established that sections 27(1)(a) or (b) apply to the information in the records, I must require the Public Body to give the Applicant access to these records.

*Record 150*

[para 304] The Public Body severed record 150 in its entirety under sections 27(1)(a) and (b).

[para 305] The Summary of Records document indicates that the Public Body is asserting solicitor-client privilege over record 150. It describes the content of the record as Email, and indicates that it was written by (or advice given by) an Alberta Justice lawyer and sent to an employee of the Public Body. The subject matter is described as "Hamptons Arbitration BN – Privileged and Confidential".

[para 306] The index of records describes record 150 as "*from* AEMA staff to JSG lawyer Re: Hamptons Arbitration BN – PRIVILEGED AND CONFIDENTIAL" [my emphasis].

[para 307] Schedule 1 describes record 150 as "Email from AEMA staff to JSG lawyer.

[para 308] The Public Body's descriptions of record 150 are contradictory in that the summary names an Alberta Justice lawyer as authoring the email, whereas the index and Schedule I both indicate that an AEMA staff member wrote the email.

[para 309] While I recognize that solicitor-client privilege may attach to communications written by a client, when they are made for the purpose of obtaining legal advice, I do not know whether record 150 was written by a client or a lawyer, or what the creator of the email's purpose was in writing it. As I do not know who wrote it, in what capacity or in what circumstances, I cannot find it to be subject to solicitor-client privilege.

[para 310] It may be the case that "BN", which appears in the summary and index, stands for "briefing note". However, if this is so, then it remains unclear that a briefing note sent by an employee of the Public Body to an Alberta Justice lawyer would be a privileged communication. Rather, it seems at least equally likely that it the briefing note might contain the employee's analysis and advice developed for the Public Body.

[para 311] I also cannot find record 150 to be subject to section 27(1)(b). As discussed above, section 27(1)(b) applies to information prepared by a lawyer of a public body or the Minister of Justice and Solicitor General for use in the provision of legal services; the evidence of the Public Body suggests that record 150 may have been written

by an employee of the Public Body who is not a lawyer, and there is no evidence before me that the record was created on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 312] As I find that the Public Body has not established that section 27(1)(a) or (b) applies to record 150, I must require it to give the Applicant access to this record.

*Records 151 – 160*

[para 313] The Public Body severed records 151 – 160 in their entirety on the basis of sections 27(1)(a) and (b).

[para 314] The Summary of Records document indicates that the Public Body is asserting litigation privilege over records 151 – 160. The content of the record is described as "Email (ATT: Executive Summary)" and the author of the email is described as an Alberta Justice lawyer. An employee of the Public Body is described as the recipient. The subject matter is described as "Hamptons Arbitration List October 1, 2014 Update".

[para 315] The index of records describes records 151 – 160 as: "Email *from* AEMA *to* JSG lawyer Attachment: Re: Hamptons Arbitration List October 1, 2014 Update and Executive Summary Hamptons Arbitration List" [my emphasis].

[para 316] Schedule 1 describes records 151 – 160 as "Email *from* AEMA staff *to* JSG lawyer Status Update Tracking Document October 3, 2014" [my emphasis]. Schedule 1 indicates that solicitor-client is being asserted over all the records it lists.

[para 317] There is no evidence before me that records 151 – 160 were prepared for the dominant purpose of use in litigation. As a result, I cannot find that litigation privilege applies. Further, as discussed above, litigation privilege ends when the proceeding for which records were created (and any related litigation) ends. As noted above, I find that the execution of the settlement agreement effectively ended the arbitration and any related proceedings. There is no evidence before me that litigation in related to the arbitration is ongoing or in contemplation. I cannot find that litigation privilege applies to records 151 – 160 for that reason as well.

[para 318] I also cannot find that solicitor-client privilege applies to records 151 – 160 as it is unclear as to who authored these records and what the author's purpose was in creating them. It appears possible that the author of records 151 – 160 intended to provide an update on the arbitration, but there is no evidence that the author was communicating the giving or seeking of legal advice in doing so.

[para 319] As it is unclear whether the author of records 151 – 160 is a lawyer or someone acting on a lawyer's behalf, I am unable to say that records 151 – 160 were created by or for a lawyer in relation to a matter involving the provision of legal services.

[para 320] As I find that the Public Body has not established that records 151 – 160 are subject to section 27(1)(a) or (b), I must require the Public Body to give the Applicant access to these records.

*Records 161 - 162*

[para 321] The Public Body applied sections 27(1)(a) and (b) to sever records 161 – 162 in their entirety.

[para 322] The Public Body's Summary of Records document indicates that it is asserting solicitor-client privilege over records 161 – 162. The author of the email is described as an Alberta Justice lawyer and the recipient is described as an employee of the Public Body. The subject matter of the records is described as "Hampton Hills AR 76029".

[para 323] The Public Body's index of records describes the email as "Email between AEMA staff and JSG lawyer Re: Hamptons files".

[para 324] Schedule 1 describes records 161 – 162 as "email between AEMA staff and JSG Lawyer October 2, 2014".

[para 325] Assuming that "AR" stands for "action request" in the description contained in the summary, it appears that an employee or employees of the Public Body and a lawyer or lawyers of Alberta Justice exchanged a communication regarding an action request from the Minister responsible for the Public Body.

[para 326] I am not able to say that records 161 – 162 are privileged. It appears possible that an employee or employees of the Public Body may have asked Alberta Justice for specific information to assist it in briefing the Minister. Clearly, any such information provided could be privileged, although it would not necessarily be so. In the absence of an explanation as to the roles and identities of the parties to the email, and their purpose in creating the email, I am unable to say that records 161 – 162 are subject to solicitor-client privilege.

[para 327] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 328] I am also unable to say that section 27(1)(b) applies. Not only do I not know whether a lawyer or a non-lawyer wrote the email, but it appears possible that the email was written in order to obtain information regarding an action request. I am therefore unable to say that the records were prepared by or for a lawyer, or that they were to be used in the provision of legal services.

[para 329] Further, I have already explained why I cannot accept as evidence the affiant's blanket assertion that this email, as being among the withheld emails, involves giving or seeking legal advice, or that the communication was between client and solicitor.

[para 330] As I find that the Public Body has not established that section 27(1)(a) or (b) applies, I must require it to give the Applicant access to these records.

*Records 163 – 172*

[para 331] The Public Body applied sections 27(1)(a) and (b) to sever records 163 – 172 in their entirety.

[para 332] The Public Body's Summary of Records document indicates that it is asserting litigation privilege over the records. The contents are described as "Email (ATT: Executive Summary). Two lawyers of Alberta Justice are described as the authors of the email, while an employee of the Public Body is described as the recipient. The subject matter is described as "Hamptons Arbitration List October 2, 2014 Update".

[para 333] The index of records describes records 163 – 172 as "Email from AEMA staff to JSG lawyers Re: Hamptons Arbitration List October 2, 2014 Update and Executive Summary Hamptons Arbitration List".

[para 334] Schedule 1 describes records 163 – 172 as "Email from AEMA staff to JSG lawyer Attachment Status Update Tracking Document October 3, 2014." As noted above, Schedule 1 indicates that the Public Body is asserting solicitor-client privilege over all documents it lists.

[para 335] There is no evidence before me that records 163 –172 were prepared for the dominant purpose of use in litigation. As a result, I cannot find that litigation privilege applies for this reason. Further, as discussed above, litigation privilege ends when the proceeding for which records were created (and any related litigation) ends. As noted above, I find that the execution of the settlement agreement effectively ended the arbitration and any related proceedings and there is no evidence before me to support finding that related litigation is ongoing or in contemplation. I find that litigation privilege does not apply to records 163 – 172 for that reason as well.

[para 336] I am also unable to find that solicitor-client privilege applies to records 163 – 172 as it appears possible that an employee or employees of the Public Body created records 163 – 172 and sent them to an Alberta Justice lawyer or lawyers in order to provide updates and a means to track the proceedings. I have not been provided evidence to support finding that records 163 – 172 contain communications made for the purpose of giving or seeking legal advice. (I have already explained why I cannot accept as evidence the affiant's blanket assertion that these records, as being among the withheld emails, involves giving or seeking legal advice, or that the communication were between client and solicitor.)

[para 337] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 338] I am also unable to find that section 27(1)(b) applies to records 163 – 172 as the Public Body's evidence does not establish that these records were prepared by or for a lawyer in relation to a matter involving the provision of legal services.

[para 339] As I find that the Public Body has failed to establish that records 163 – 172 are subject to section 27(1)(a) or (b), I must require it to give the Applicant access to these records.

*Records 173 – 174*

[para 340] The Public Body applied sections 27(1)(a) and (b) to sever records 173 – 174 in their entirety.

[para 341] The Public Body's Summary of Records document indicates that it is asserting solicitor-client privilege over these records. The content of the record is described as an email. The summary indicates that a lawyer for Alberta Justice sent the email and an employee of the Public Body received the email. The subject matter is described as "Hampton Hills – Privileged and Confidential".

[para 342] The Index of Records describes records 173 – 174 as "Email from JSG lawyer to AEMA staff Re: Hampton Hills – Privileged and Confidential."

[para 343] Schedule 1 describes records 173 – 174 as "Email from JSG lawyer to AEMA staff October 3, 2014".

[para 344] While the descriptions of the records the Public Body has provided are consistent; I am unable to determine whether records 173 – 174 are privileged. I am told that the record is an email written by a lawyer to an employee of the Public Body and that the subject of the email is the Hampton Hills arbitration; however, it does not follow from this that the email is subject to solicitor-client privilege. In order to find the email to be privileged, I would need to have evidence as to the purpose of the lawyer in writing the email so that I could determine whether it was intended to communicate regarding the giving or seeking of legal advice. There is no evidence before me as to the lawyer's purpose in writing the email.

[para 345] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal

advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 346] I am also unable to support the Public Body's application of section 27(1)(b) to records 173 – 174. As there is no evidence as to the lawyer's purpose in writing the email, I cannot say that it was prepared in relation to a matter involving the provision of legal services.

[para 347] I have already explained why I cannot accept as evidence the affiant's blanket assertion that this email, as being among the withheld emails, involves giving or seeking legal advice, or that the communication was between client and solicitor.

[para 348] As I find that the Public Body has not established that either section 27(1)(a) or (b) applies to records 173 – 174, I must require the Public Body to give the Applicant access to these records.

*Records 175 – 179*

[para 349] The Public Body applied sections 27(1) and (b) to sever information from records 175 – 179.

[para 350] The Public Body's Summary of Records document indicates that it is asserting litigation privilege over records 175 – 179. The content of records 175 – 177 is described as "Email (ATT: Messages, Key Messages). The subject matter is described as: "Hamptons Issue". The subject matter of records 178 – 179 is described as: "Hampton Hills messages". An employee of Municipal Affairs and an employee of AEMA are described as the sender and recipient of the email respectively.

[para 351] The Index of Records describes records 175 – 177 as: "Email from MA [Municipal Affairs] staff to AEMA staff Re: Hamptons Issue and messages and Advice to Minister. The index describes records 178 – 179 as "Email from AEMA staff to MA staff Re: "Hampton Hills and messages".

[para 352] Schedule 1 describes records 175 – 179 in two ways. At lines 28 – 29 it describes these records as communications between staff of the Ministry of Municipal Affairs and AEMA staff. The Public Body notes that it has decided not to withhold these records from the Applicant.

[para 353] However, at line 41, the Schedule provides an alternate description of records 175 – 179. It describes these records as: "Email between AEMA staff providing advice and letter received from JSG lawyer to AEMA staff September 27, 2014". Schedule 1 indicates that these records are being withheld from the Applicant under section 27(1)(a).

[para 354] It is unclear to me whether the reference in line 41 is intended as an alternate description of records 175 – 179 or whether it addresses different records.

Assuming that it describes different records, I find that the description in Schedule 1 does not support finding that records 175 – 179 are privileged. It is not clear from the description who provided advice to AEMA staff or whether the letter from the lawyer of Alberta Justice was a privileged communication. I have not been told the purpose of the Alberta Justice lawyer in writing the letter, or anything about its content, and so am unable to find it to be privileged.

[para 355] As I am unable to find that the records referred to in line 41 of Schedule 1 are subject to section 27(1)(a), I must require the Public Body to disclose these records.

*Records 180 - 181*

[para 356] The Public Body applied sections 27(1)(a) and (b) to sever records 180 – 181 in their entirety.

[para 357] The Public Body's Summary of Records document indicates that the Public Body is asserting solicitor-client privilege over records 180 – 181. The summary describes the content of these records as "Email" and indicates that the author of the document is an Alberta Justice lawyer and the recipients are two employees of the Public Body. The subject matter is described as "Hampton Hills – Update".

[para 358] The index of records describes the records as "Email between AEMA staff and JSG lawyers Re: Hampton Hills – Update".

[para 359] Schedule 1 describes records 180 – 181 as "Email between AEMA staff and JSG lawyers October 8, 2014".

[para 360] While the Summary of Records indicates that only one lawyer wrote the email contained in records 180 – 181, the Index and Schedule 1 indicate that more than one lawyer was involved in the communication. As a result, there is tension between the descriptions.

[para 361] In any event, I am unable to find that records 180 – 181 are privileged. From what I have been told, it appears that the email in records 180 – 181 may have been intended only as an update regarding the arbitration. There is no evidence before me to suggest that the email in these records was exchanged by lawyers of Alberta Justice and employees of the Public Body for a purpose other than providing an update, such as giving or seeking legal advice. As it appears possible, and even likely, that the email was intended to provide an update only, I am unable to say that records 180 – 181 are privileged.

[para 362] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 363] I am also unable to say whether records 180 – 181 are subject to section 27(1)(b). As it is unclear from the Public Body's description who created the email, it is uncertain whether it was created by or for a lawyer within the terms of section 27(1)(b). As the only purpose I can attribute to the creator of the email is to provide an update, it is also unclear whether records 180 – 181 were prepared for use in the provision of legal services.

[para 364] I have already explained why I cannot accept as evidence the affiant's blanket assertion that this email, as being among the withheld emails, involves giving or seeking legal advice, or that the communication was between client and solicitor.

[para 365] As I find that the Public Body has not established that section 27(1)(a) or (b) applies to records 180 – 181, I must require the Public Body to give the Applicant access to these records.

*Record 182*

[para 366] The Public Body applied sections 27(1)(a) and (b) to sever record 182 in its entirety.

[para 367] The Public Body's Summary of Records document indicates that it is asserting solicitor-client privilege over record 182. The Summary indicates that the content of the record is "email" and that an Alberta Justice lawyer sent the email and that two employees of the Public Body received it. The subject matter of the record is described as "Hamptons".

[para 368] The index of records describes record 182 as: "Email from JSG lawyer to AEMA staff Re: Hamptons".

[para 369] Schedule 1 describes record 182 as: "Email from JSG lawyer to AEMA staff October 9, 2014".

[para 370] I am unable to find that record 182 is privileged. I have already explained why I cannot accept as evidence the affiant's blanket assertion that this email, as being among the withheld emails, involves giving or seeking legal advice, or that the communication was between client and solicitor.I have not been provided with any other evidence as to the purpose of the lawyer in sending the email. I know only that the subject of the email is "Hamptons". Whether the lawyer intended to give legal advice, or to facilitate giving legal advice, by sending the email, cannot be determined on this basis. The email as described could equally contain non-privileged information on the topic of "Hamptons".

[para 371] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal

advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 372] I am also unable to find that record 182 is subject to section 27(1)(b). As there is no evidence as to the purpose of the lawyer in creating and sending the email, I am unable to find that the email was prepared in relation to the provision of legal services.

[para 373] As I find that the Public Body has not established that section 27(1)(a) or (b) applies to record 182, I must require the Public Body to disclose it to the Applicant.

*Record 183*

[para 374] The Public Body applied sections 27(1)(a) and (b) to withhold record 183 in its entirety from the Applicant.

[para 375] The Public Body's Summary of Records document indicates that it is asserting solicitor-client privilege over record 183. The content of the record is described as "email" and the summary also indicates that the email was sent by an Alberta Justice lawyer to an employee of the Public Body. The subject matter is described as "Hampton Hills Update".

[para 376] The Index of Records describes record 183 as "Email from JSG lawyer to AEMA staff Re: Hampton Hills update".

[para 377] Schedule 1 describes record 183 as "Email from JSG lawyer to AEMA staff October 9, 2014".

[para 378] I am unable to find that record 183 is privileged. I have already explained why I cannot accept as evidence the affiant's blanket assertion that this email, as being among the withheld emails, involves giving or seeking legal advice, or that the communication was between client and solicitor. , I have not been provided with evidence as to the purpose of the lawyer in sending the email, other than that it was to provide an update. Whether the lawyer intended to give legal advice in providing the update, or to facilitate giving legal advice, by sending the email, cannot be determined on this basis. The email as described could equally contain non-privileged information.

[para 379] In addition, the Public Body's application of section 27(1)(b) to this record would suggest, if the facts grounding the application of this provision were made out, that the record does not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 380] I am also unable to find that record 183 is subject to section 27(1)(b). As there is no evidence as to the purpose of the lawyer in creating and sending the email,

other than to provide an update, and I am therefore unable to find that the email was prepared in relation to the provision of legal services.

[para 381] As the Public Body has not established that record 183 is subject to either section 27(1)(a) or (b), I must require it to give the Applicant access to these records.

*Records 184 - 185*

[para 382] The Public Body applied sections 27(1)(a) and (b) to withhold records 184 – 185 from the Applicant in their entirety.

[para 383] The Public Body's Summary of Records document indicates that the Public Body is asserting solicitor-client privilege over these records. The summary describes the content of the record as "email" and indicates that it was sent by an Alberta Justice lawyer and received by an employee of the Public Body. The subject matter is descried as "Hamptons Notifications".

[para 384] The Index of Records describes records 184 – 185 as: "Email from AEMA staff to JSG lawyers Re: Hamptons Notifications".

[para 385] Schedule 1 describes records 184 – 185 as: "Email from JSG lawyer to AEMA staff October 9, 2014 October 9, 2014 [*sic*]".

[para 386] The Public Body's descriptions of records 184 – 185 are inconsistent as to whether these records were sent by a lawyer or by its employees. The summary and index are consistent in that they indicate that the records are about "Hamptons Notifications".

[para 387] As the Public Body has not provided consistent or convincing evidence as to the authorship of the emails in records 184 – 185, and no evidence as to the purpose of the author of records 184 – 185 in creating them, I find that the Public Body has not established that these records are privileged.

[para 388] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 389] I am also unable to find that section 27(1)(b) applies to records 184 – 185. Section 27(1)(b) applies to records prepared by or for a lawyer of a public body or the Minister of Justice and Solicitor General in relation to the provision of legal services. In the absence of convincing and consistent evidence as to the identity of the author of the records, the author's role within the Government and the arbitration, and the author's purpose in creating records 184 -185, I cannot find that section 27(1)(b) applies.

[para 390] I have already explained why I cannot accept as evidence the affiant's blanket assertion that this email, as being among the withheld emails, involves giving or seeking legal advice, or that the communication was between client and solicitor.

[para 391] As I find that the Public Body has not established that section 27(1)(a) or (b) applies to records 184 – 185, I must require the Public Body to give the Applicant access to records 184 – 185.

*Records 186 – 189*

[para 392] The Summary of Records document indicates that the Public Body is asserting solicitor-client privilege over records 186 – 189. It describes the content of these records as Email, and indicates that it is an email from "McLeod Law" and an Alberta Justice lawyer. The recipient is indicated to be an employee of the Public Body.

[para 393] The Index of Records describes records 186 – 189 as: "Email between AEMA staff, JSG lawyers, and *Hamptons homeowners' lawyer*. Re: Hampton Hills Arbitration – privileged and confidential [my emphasis]".

[para 394] Schedule 1 describes records 186 – 189 as: "Email from JSG lawyer to AEMA staff October 17, 2014".

[para 395] As noted above, I wrote the Public Body to ask it questions regarding references to opposing counsel in the Summary and Index. I asked it to provide legal authority for its apparent position that communications involving opposing legal counsel are subject to solicitor-client privilege. Rather than address this concern, it submitted Schedule 1, which omits reference to opposing counsel as an author of records.

[para 396] I prefer the evidence of the Summary and the Index, which are detailed and consistent in their description of at least a portion of records 186 – 189 as a communication between opposing counsel and the Government of Alberta. In any event, it appears that Schedule 1 may describe the same content, only with reference to opposing counsel omitted.

[para 397] I am unable to find that records 186 – 189 are subject to solicitor-client privilege, given the likelihood that at least a portion of the records were created by opposing counsel, based on the fact the Index describes the records as being between AEMA staff, Alberta Justice lawyers and the Hamptons homeowners' lawyer. It may be the case that an Alberta Justice lawyer provided legal advice in relation to opposing counsel's correspondence; however, if that is so, there is no evidence before me to support such a finding. Ultimately, I am left with evidence indicating that records were created and communicated by opposing counsel, without explanation of this evidence.

[para 398] If it is the case that some of the information in records 186 - 189 was created by opposing counsel, while other information was created by an Alberta Justice lawyer and contains legal advice, I have been provided with descriptions of the

documents contained in records 186 – 189 that are inadequate for the task of determining that some documents are privileged while others are not.

[para 399] For the same reason that I am unable to say section 27(1)(a) applies, I cannot find that section 27(1)(b) applies to records 186 – 189. This is because of the likelihood that opposing counsel created at least a portion of the records. Assuming that an Alberta Justice lawyer also wrote an email contained in records 186 – 189, there is no evidence before me that the lawyer prepared the email for use in relation to a matter involving the provision of legal services. However, in this case, the conflict in the evidence as to the identity of the authors of the records makes it impossible to find reasonably that a lawyer of the Public Body did create records 186 – 189 or a portion of them.

[para 400] As I find that the Public Body's evidence argues against finding that section 27(1)(a) or (b) applies to records 186 – 189, I must require the Public Body to give the Applicant access to these records.

*Records 190 - 199*

[para 401] The Public Body applied sections 27(1)(a) and (b) to withhold records 190 – 199 from the Applicant in their entirety.

[para 402] The Public Body's Summary of Records document indicates that it is asserting litigation privilege over records 190 – 199. The content of records 190 – 199 is described as "Email (ATT: Executive Summary). No author or recipient is ascribed to records 190 – 199. The subject matter is described as "Hampton Arbitration – List October 1, 2014 update".

[para 403] The index of records describes records 190 – 199 as: "Email between AEMA staff Re: Hamptons Arbitration List October 1, 2014 update".

[para 404] Schedule 1 describes records 190 – 199 as: "Email between AEMA staff preparing briefing materials "(Status Update Tracking Document") for JSG lawyers October 20, 2014".

[para 405] Schedule 1 describes records 193 – 194 as: "Email from AEMA staff to JSG lawyer October 18, 2014".

[para 406] Schedule 1 describes records 195 – 198 as: "Email between AEMA staff, Municipal Affairs staff, and JSG lawyers October 25, 2014".

[para 407] As noted above, Schedule 1 indicates that the Public Body is asserting solicitor-client privilege over all the records it lists. I will therefore address whether solicitor-client privilege applies to records 190 – 199, in addition to addressing the Public Body's claim of litigation privilege over these records.

[para 408] There is no evidence before me that records 190 – 199 consist of a confidential communication between a solicitor and a client made for the purpose of giving or seeking legal advice. The summary and the index indicate that records 190 – 199 were exchanged only among the Public Body's staff. Moreover, the records are described as for the purpose of "preparing briefing materials" which is not the same thing as "seeking legal advice". Ultimately, I cannot say that records 190 – 199 are subject to solicitor-client privilege, and it appears likely from the Public Body's description of these records that they are not subject to solicitor-client privilege.

[para 409] I also find that litigation privilege has not been demonstrated as applying to records 190 – 199. As discussed above, litigation privilege applies to records prepared for the dominant purpose of use in litigation. In this case, there is no evidence that records 190 – 199 were created for use in litigation, although there is an indication that they were prepared for the purpose of updating and preparing briefing materials. I am unable to determine from what I have been told that records 190 – 199 were prepared for the dominant purpose of use in litigation. I therefore find that the Public Body's claim of litigation privilege has not been made out.

[para 410] I find that section 27(1)(b) does not apply to records 190 – 199. I am told that records 190 – 199 were created by employees of the Public Body preparing briefing materials. Based on this description, I find that records 190 – 199 do not consist of information prepared by a lawyer of the Public Body or the Minister of Justice and Solicitor General for use in relation to a matter involving the provision of legal services.

[para 411] As I find that neither section 27(1)(a) nor (b) applies to records 190 – 199, I must require the Public Body to disclose these records to the Applicant.

*Records 200 - 201*

[para 412] The Public Body applied sections 27(1)(a) and (b) to withhold records 200 – 201 from the Applicant in their entirety.

[para 413] The Public Body's Summary of Records document indicates that it is asserting solicitor-client privilege over records 200 – 201. It describes the content of records 200 – 201 as "Email". The authors of the records are described as opposing counsel and two lawyers of Alberta Justice. The recipient of the email is described as an employee of the Public Body. The subject matter of the records is described as: "Draft Settlement Agreement and Release (Hampton Hills)".

[para 414] The Index of Records describes records 200 – 201 as: "Email between JSG lawyers and Hamptons homeowner's lawyer Re: Draft Settlement Agreement and Release (Hamptons Hills)".

[para 415] Schedule 1 describes records 200 – 201 as: "Email from JSG lawyers to AEMA staff October 22, 2014".

[para 416] Schedule 1 alternately describes records 199 – 201 as: "Email from JSG lawyer to AEMA staff November 19, 2014."

[para 417] Each of the Public Body's descriptions of records 200 – 201 conflicts materially with the other. The summary characterizes the information as involving opposing counsel, two lawyers of Alberta Justice, and an employee of the Public Body. The index describes the email as a communication between Alberta Justice and opposing counsel regarding a draft settlement and release, while Schedule 1 asserts that the records are an email from Alberta Justice lawyers to the Public Body's staff. The descriptions of the dates of the records are also at odds with each other.

[para 418] I am at a loss to explain why the Public Body has elected to provide conflicting descriptions of records 200 – 201 or why it assets solicitor-client privilege over them. I accept it is possible that a lawyer for Alberta Justice forwarded a settlement communication between Alberta Justice lawyers and opposing counsel to an employee of the Public Body. If so, then Schedule 1 would not be entirely misleading. However, if this is the case, the communication between opposing counsel and lawyers for Alberta Justice would not become subject to solicitor-client privilege by virtue of being forwarded by an Alberta Justice lawyer. In any event, I have not been provided with sufficient evidence to find that this was the case.

[para 419] On the evidence before me, which indicates that at least a portion of the records is a settlement communication between opposing counsel and lawyers for Alberta Justice, I find that the Public Body has not made out its claim of solicitor-client privilege.

[para 420] I also find that section 27(1)(b) does not apply to records 200 – 201. Not only would records prepared by opposing counsel not meet the terms of section 27(1)(b), and the Public Body's evidence raises this possibility, but there is no evidence before me that a lawyer of Alberta Justice prepared these records for use in a matter involving the provision of legal services.

[para 421] As I find that sections 27(1)(a) and (b) do not apply to records 200 – 201, I must require the Public Body to give the Applicant access to these records.

*Records 202 - 215*

[para 422] The Public Body withheld records 202 – 215 from the Applicant in their entirety under sections 27(1)(a) and (b).

[para 423] The Public Body's Summary of Records document indicates that it is asserting solicitor-client privilege over records 202 – 215. The Summary of Records indicates that the content of the record is "Email (ATT: Draft Settlement Agreement)" and that opposing counsel and an Alberta Justice lawyer created the email and sent it to an employee of the Public Body. The subject matter is described as "Draft Settlement Agreement and Release".

[para 424] The Index of Records describes records 202 – 215 as: "Email between AEMA staff, JSG lawyers, and Hamptons [homeowners'] lawyers Re: Draft settlement Agreement and Release".

[para 425] Schedule 1 describes records 202 – 215 as "Email from AEMA staff to JSG lawyers and attachment October 22, 2014".

[para 426] Schedule 1 describes records 202 – 203 as: "Email from JSG lawyer to JAG Lawyers and AEMA staff December 11, 2014".

[para 427] As with records 200 – 201, the Public Body's evidence appears contradictory with regard to the parties involved in the communications over which the Public Body has claimed solicitor-client privilege. As noted above, I asked the Public Body for authority to support its claim of solicitor-client privilege over records created by or involving opposing counsel. It appears to have considered that this issue would be resolved by omitting reference to opposing counsel in its sworn evidence.

[para 428] However, as both the Summary and Index indicate that opposing counsel was involved in the communications that are being withheld on the basis of solicitor-client privilege, and as Schedule 1 does not preclude this possibility, given that the attachment to which it refers could be a communication with opposing counsel, I am unable to find that records 202 – 215 are subject to solicitor-client privilege.

[para 429] I also find that section 27(1)(b) does not apply to records 202 – 215. As discussed above, records prepared by opposing counsel do not fall within the terms of section 27(1)(b).

[para 430] As I find that sections 27(1)(a) and (b) do not apply to records 202 – 215, I must require the Public Body to give the Applicant access to these records.

*Records 216 - 220*

[para 431] The Public Body applied sections 27(1)(a) and (b) to withhold records 216 – 220 from the Applicant in their entirety.

[para 432] The Public Body's Summary of Records indicates that it is asserting solicitor-client privilege over records 216 – 220. The contents of these records are described as: "Email (ATT: Letter from McLeod Law to JSG, Letter from JSG to McLeod Law). The subject matter of the record is described as "Hampton Hills".

[para 433] The Index of Records describes records 216 – 220 as: "Email between JSG lawyers and Hampton's [homeowners'] lawyer Re: Hampton Hills and Letter to Alberta Justice and Response".

[para 434] Schedule 1 describes records 216 – 220 as: "Email from JSG lawyer to AEMA staff and attachment October 24, 2014".

[para 435] Based on these conflicting descriptions, it is possible that a lawyer from Alberta Justice may have forwarded communications exchanged between Alberta Justice and opposing counsel to an employee of the Public Body. If that is so, then records 216 – 220 are not subject to solicitor-client privilege, given that this privilege does not extend to communications with opposing counsel. Sending communications from opposing counsel to another party does not have the effect of transforming the communication with opposing counsel into a solicitor-client privileged communication, even if it is a lawyer for Alberta Justice that sends the communication. As discussed in *TransAlta Corporation, supra*, an attachment that is not privileged does not become privileged by virtue of attaching it to a communication from a lawyer.

[para 436] If it were the case that the Alberta Justice lawyer provided legal advice in the email that forwarded the communications involving opposing counsel to the Public Body, then that would likely be a solicitor-client privileged communication. However, there is no evidence before me (other than the general assertions of the affiant which I must reject) that would enable me to find that a lawyer for Alberta Justice provided legal advice in the course of forwarding the communication.

[para 437] For the foregoing reasons, I find that records 216 – 220 are not subject to solicitor-client privilege.

[para 438] I also find that records 216 – 220 are not subject to section 27(1)(b) as the evidence indicates that they may not have been prepared by a lawyer of the Public Body or the Minister of Justice and Solicitor General in relation to matter involving the provision of legal services, but by opposing counsel. Moreover, there is no evidence before me that the email to which the communication involving opposing counsel was attached was prepared for use in relation to a matter involving the provision of legal services.

[para 439] As I find neither section 27(1)(a) nor (b) applies to records 216 – 220, I must require the Public Body to give the Applicant access to these records.

*Record 221*

[para 440] The Public Body applied sections 27(1)(a) and (b) to withhold record 221 from the Applicant in its entirety.

[para 441] The Public Body's Summary of Records document indicates that the Public Body is asserting solicitor-client privilege over record 221. It describes the content of this record as "Email (ATT: Release and Settlement Agreement)". The sender is described as an Alberta Justice lawyer and the recipient is described as an employee of the Public Body. The subject matter is described as "Hampton Hills Arbitration". The settlement agreement appears on records 222 – 226 and was disclosed to the Applicant, with the names of individual homeowners severed under section 17(1).

[para 442] The index of records describes record 221 as: "Email from JSG lawyer to AEMA staff Re: Hampton Hills Arbitration".

[para 443] Schedule 1 describes record 221 as: "Email from JSG lawyer to AEMA staff [November 21, 2014]".

[para 444] I am unable to say that record 221 is a solicitor-client communication. There is no evidence which I can accept indicating that record 221 contains legal advice or was intended to facilitate the giving or seeking of legal advice.

[para 445] I am also unable to say that record 221 is subject to section 27(1)(b) as there is no compelling evidence before me that record 221 was prepared by a lawyer of Alberta Justice for use in a matter involving the provision of legal services by the lawyer.

[para 446] As I find that sections 27(1)(a) and (b) have not been demonstrated as applying, I must require the Public Body to give the Applicant access to record 221.

*Records 227 - 228*

[para 447] The Public Body severed records 227 – 228 under sections 27(1)(a) and (b) in their entirety.

[para 448] The Summary of Records indicates that the Public Body is asserting solicitor-client privilege over records 227 – 228. The content of the record is described as "Email". The email was apparently sent by a lawyer of Alberta Justice to two employees of the Public Body. The subject matter is described as: "Hampton Hills Arbitration Communications – privileged and confidential".

[para 449] The index of records describes records 227 – 228 as: "Email from JSG lawyer to AEMA staff Re: Hampton Hills arbitration communications – privileged and confidential".

[para 450] Schedule 1 describes records 227 – 228 as: "Email from AEMA staff to JSG lawyers December 5, 2014".

[para 451] The descriptions of the records contradict each other. The summary and the index indicate that records 227 – 228 were sent by an Alberta Justice lawyer to the Public Body. Schedule 1 describes the records as having been sent by the Public Body to Alberta Justice.

[para 452] The subject matter appears to be "arbitration communications". I do not know what the Public Body means by this phrase. Possibly it refers to settlement communications between the Public Body and the homeowners involved in the arbitration, or possibly it is referring to a communication strategy by which the Public body will disclose details of the arbitration to the public. However, in either case, I cannot reach the conclusion that the communication is made for the purpose of giving or

seeking legal advice, assuming that I were able to determine who sent or received the email. Relaying communications or discussing a communications strategy does not necessarily entail the giving or seeking of legal advice. It may in some cases, or it may not. However, to meet the burden imposed by section 71(1) of the FOIP Act, a public body must establish on the balance of probabilities that information is more likely than not subject to section 27(1)(a). That burden has not been met by the Public Body's conflicting descriptions of the records.

[para 453] In addition, the Public Body's application of section 27(1)(b) to these records would suggest, if the facts grounding the application of this provision were made out, that the records do not contain information involving the giving or seeking of legal advice, but rather, information prepared by or on behalf of a lawyer in relation to a matter involving the provision of legal services.

[para 454] I am unable to find that section 27(1)(b) applies to the records as I am unable to say that a lawyer of the Public Body or the Minister of Justice and Solicitor-General created these records. I am also unable to find that they were prepared by or on behalf of such a person for use in relation to a matter involving the provision of legal services.

para 455] I have already explained why I cannot accept as evidence the affiant's blanket assertion that this email, as being among the withheld emails, involves giving or seeking legal advice, or that the communication was between client and solicitor.

[para 456] As I find that records 227 – 228 have not been shown to be subject to either section 27(1)(a) or (b), I must require the Public Body to give the Applicant access to these records.

*Conclusion*

[para 457] I am unable to support the Public Body's application of exceptions to disclosure to the records to which it has applied exceptions. I appreciate the time the Director, Information Management, Legislative & Administrative Services has 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 addition, contradictions in the evidence render it unreliable. 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 some of 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.

[para 458] If I, as the Commissioner's delegate, were to accept the assessment of the employees who described the records 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 the evidence of the Public Body is conflicting, 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.

## V. ORDER

[para 459] I make this order under section 72 of the Act.

[para 460] I order the Public Body to conduct a new search for responsive records that includes the records described as the "High River EOC logs" and any responsive records it may have sent to the author of records 182 – 185. I also order it to search for any records it may have submitted in arbitration and a copy of the arbitration decision. I also order the Public Body to request any responsive records that may be in the possession of Alberta Justice lawyers and not in its own immediate possession. Once the Public Body has searched these areas, if it is unable to locate any responsive records in its custody or control, then I order it to provide an explanation of the search it conducted to the Applicant. If it has already searched these areas, then I require the Public Body to provide an explanation of the details and results of its search to the Applicant.

[para 461] I confirm the Public Body's decision that records 180 – 181 are not subject to the Act through application of section 4(1)(q).

[para 462] As I find that records 182 – 187 are not exempt from the application of the FOIP Act, I order the Public Body to include the records in its response to the Applicant under the FOIP Act. The Public Body is not precluded from applying exceptions to disclosure if it determines that such apply.

[para 463] I confirm the Public Body's application of section 17(1) to the names of parties to the settlement agreement.

[para 464] I order the Public Body to give the Applicant access to all records to which it applied provisions of sections 24 and/or 27 in their entirety.

[para 465] I order the Public Body to notify me within 50 days of receiving this order, that it has complied with it.

_____

Teresa Cunningham
Adjudicator