ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2017-57

July 7, 2017

EDMONTON POLICE SERVICE

Case File Number F5536

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Summary: On June 16, 2010, the Criminal Trial Lawyers' Association, (the Applicant), made a request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Edmonton Police Service, (the Public Body), for access to information about an investigation conducted in relation to a member of the Public Body (Officer A).

The Public Body responded to the Applicant's access request on August 23, 2010. The Public Body granted access to 35 records from a disciplinary decision held under the *Police Act*, with exhibits, but redacted information from these records under section 17(1). The Public Body severed information from 1236 records under section 17, other than portions of a disciplinary decision. The Public Body also withheld information from the Applicant under sections 24(1) and 27 of the FOIP Act.

The Adjudicator issued a notice to produce to the Public Body for some of the records to which it had applied section 27(1)(a). Rather than produce the records, the Public Body sought judicial review of the Adjudicator's decision to demand the records. The Public Body also challenged the Adjudicator's jurisdiction to make a decision regarding records over which it claimed solicitor-client privilege. The Adjudicator completed the parts of the inquiry for which she had the evidence of the records and issued Order F2013-13.

Following the decision of the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016] 2 SCR 555, the Public Body

proposed that the Adjudicator complete the outstanding issues in the inquiry and the Adjudicator rescinded the notice to produce.

The Adjudicator determined that the records over which the Public Body claimed solicitor-client privilege were either not privileged, or had not been demonstrated to be privileged. In arriving at this decision, the Adjudicator also found that she had jurisdiction to decide the issue of whether the records were privileged, or not, and determined that making this decision was not an infringement of the Public Body's constitutional rights.

The Adjudicator determined that some of the records were subject to either section 27(1)(b) or (c), but found that the Public Body had exercised its discretion to sever information under these provisions by relying on irrelevant considerations and failing to consider relevant ones. The Adjudicator noted that some of the records to which the Public Body applied sections 27(1)(b), and (c) were subject to section 20(1)(g) (prosecutorial discretion). She determined that the Public Body was not precluded from applying this provision and considering whether it had properly exercised its discretion to withhold information from the Applicant under this provision.

The Adjudicator also ordered the Public Body to make a new decision regarding the application of section 17(1), as the basis for its decision that section 17(1) applied was unclear on the evidence.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 4, 5, 17, 20, 24, 27, 56, 65, 68, 69, 70, 71, 72; *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000 c. A-3 ss. 11, 16; Designation of Constitutional Decision Makers Regulation AR 69/2006 Schedule 1; *Witness Security Act*, SA 2010, c W-12.5 s. 18; *Climate Change and Emissions Management Act*, S.A. 2003 c. C-16.7 s. 59(4); *Oil Sands Conservation Act*, R.S.A. c. O-7 s. 20(4); *Police Act*, R.S.A. 2000, c. P-17 ss. 2, 45, 47; *Financial Administration Act*, R.S.A. 2000, c. F-12 s.2; *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5; *Alberta Bill of Rights*, RSA 2000 c. A-14 **CA:** *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11

Authorities Cited: AB: Orders F2008-028, F2009-024, F2010-019, F2013-13; F2014-25, F2015-22, F2015-31, F2015-41, F2016-31, **ON:** PO-3372, MO-1663-F

Cases Cited: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016] 2 SCR 555; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504; *Insurance Corporation of B.C. v. Heerspink*, [1982] 2 S.C.R. 145; *Ontario v. Criminal Lawyers' Association of Ontario*, [2013] 3 SCR 3; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] 2 SCR 306; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 SCR 66; *R. v. Skakun* 2014 B.C.C.A. 223 ; *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403; *Kalick v. the King* [1920] S.C.R. 175; *R. v. Wijesinha*, [1995] 3 SCR 422; *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 SCR 152; *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R.

860; *Blank v. Canada (Minister of Justice)*, [2005] 1 FCR 403; *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319; *F.H. v. McDougall* [2008] 3 S.C.R. 41; *Canada v. Solosky* [1980] 1 S.C.R. 821; *R. v. Campbell*, [1999] 1 SCR 565; *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337; *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372; *Sable Offshore Energy Inc. v. Ameron International Corp*., [2013] 2 SCR 623; *Chisholm v. Lindsay* 2015 ABCA 179; *Mahe v. Boulianne* 2010 ABCA 74; *McGovern-Burke v Martineau*, 2016 ABQB 514; *Chisholm v. Lindsay*, [2013] A.J. No. 1121; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23

I. BACKGROUND

[para 1] On June 16, 2010, the Criminal Trial Lawyers' Association, (the Applicant), made a request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Edmonton Police Service, (the Public Body), for access to information about an investigation conducted in relation to a member of the Public Body (Officer A). The request states:

> This is a FOIPP Act application for copies of all records relating to the incident on Whyte Avenue … which led to [Officer A] being charged criminally and under the *Police Act* and the investigation thereof. That will include all internal memos and emails and meeting minutes about the matter…
>
> As can be seen from the enclosed CBC article … and the numerous comments found at [a website address] there is a high degree of public interest in relation to how [Officer A] was handled initially and how his *Police Act* prosecution was handled. Allegations have been made that he received special treatment because of his status and there is substance to them.

[para 2] The Public Body responded to the Applicant's access request on August 23, 2010. The Public Body granted access to 35 pages of records from a disciplinary decision held under the *Police Act*, with exhibits, but redacted some information from these records under sections 17(1). The Public Body severed information from 1236 records under section 17. The Public Body also withheld information from the Applicant under sections 24(1) and 27 of the FOIP Act.

[para 3] The Applicant requested review by the Commissioner of the Public Body's response to its access request. The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 4] The Public Body elected not to provide for my review most of the records it had withheld from the Applicant under section 27(1)(a), but provided affidavit evidence instead. As I was unable to conclude that the records were subject to privilege, or any of the other provisions of section 27(1), on the evidence it had provided, I asked the Public Body questions regarding its claim of privilege. Alberta Justice requested the opportunity to make submissions on the issue of privilege. As Alberta Justice had knowledge of the circumstances in which some of the records over which solicitor-client privilege was claimed were created (records 743 – 752, 753 – 755, 967, 968, 977 – 986,

1052 and 1078.), I agreed that it could provide submissions on the issue of privilege with regard to those records.

[para 5] After reviewing the Public Body's answers to my questions and Alberta Justice's submissions, I issued a notice to produce to the Public Body. I ordered it to produce records 1307, 1308, 1312, 1313, 1315, 1339, and 1340.

[para 6] Rather than produce the records, the Public Body sought judicial review of my notice to produce.

[para 7] I decided to issue a decision regarding all the records that I was able to view, including some records over which solicitor-client privilege had been asserted. I found that the Public Body's claim of privilege over the records I had been provided 1228, 1295 – 1301, 1314, 1344 – 1345, 1346 – 1349, or 1356 – 1359) was not supported, but that sections 17, 27(1)(b) and / or (c), which the Public Body also applied to these records could potentially apply or did apply. I ordered the Public Body to make new decisions as to whether section 17 applied to the information it had severed from the records, including those over which it asserted solicitor-client privilege. If it should make a new decision that section 17 did not apply to the records over which it had asserted solicitor-client privilege and applied sections 27(1)(b) and (c), it was to reconsider its exercise of discretion to withhold information under sections 27(1)(b) or (c), as it was unclear on what basis it had decided to withhold it, other than that it fell within the terms of one of these provisions. However, I decided not to make a decision regarding any records that I had not been provided.

[para 8] The Public Body amended its judicial review application. It sought an order in the nature of *quo warranto*[1] stating that the Commissioner does not have the legal authority to request or review records over which solicitor-client privilege has been claimed or the legal authority to rule on a claim of solicitor-client privilege. It also sought a declaration that the FOIP Act should not be interpreted to permit the Commissioner to make a determination whether or not records are subject to solicitor-client privilege, and a declaration that the provisions relied upon by the Commissioner to rule on a claim of solicitor-client privilege are unconstitutional and of no force or effect.

[para 9] Subsequently, in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016] 2 SCR 555, the Supreme Court of Canada upheld a decision of the Alberta Court of Appeal to quash a notice to produce issued by an adjudicator of this office which had demanded that the University of Calgary provide records to support its claim of privilege in an inquiry. The Court held that solicitor-client privilege is not a privilege of the law of evidence, and, as a consequence, section 56 of the FOIP Act, which empowers the Commissioner to demand records "despite any other enactment or any privilege of the law of evidence", contains no authority for the

[1] H.W.R. Wade, in *Administrative Law* 5th Edition, states: "The remedy [*quo warranto*] as now defined applies to usurpation of "any substantive office of a public nature and permanent character which is, held under the Crown or which has been created by any statutory provision or royal charter"". (H.W.R. Wade, *Administrative Law* 5th Edition, (Oxford; Oxford University Press, 1982)) p. 521.

Commissioner to demand records when a public body asserts solicitor-client privilege over those records.

[para 10] On December 19, 2016, the Public Body proposed that I decide all outstanding issues in the inquiry.

[para 11] I rescinded the notice to produce, and invited the parties to the inquiry to make any additional submissions they chose to make.

[para 12] Alberta Justice submitted that it agreed with the Public Body's claim of privilege in relation to records 743 – 752, 753 – 755, 967, 968, 977 – 986, 1052, and 1078. No other parties provided further submissions.

II. RECORDS AT ISSUE

[para 13] Records 743 – 755, 967 – 968, 974 – 986, 1052, 1078, 1307, 1308, 1312, 1313, 1315, and 1339 – 1340 are at issue.

III. ISSUES

Issue A: Did the Public Body properly apply section 27(1) to the information in records 743 – 755, 967 – 968, 974 – 986, 1052, 1078, 1307, 1308, 1312, 1313, 1315, 1339, and 1340?

Issue B: Does section 17(1) of the FOIP Act require the Public Body to sever information from records 743 – 752, 967 – 968, 977 – 983, 1052, 1078, 1307, 1308, 1312, 1313, 1315, 1339, and 1340?

IV. DISCUSSION OF ISSUES

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

[para 14] As the Public Body has challenged the authority of the Commissioner to decide whether records are subject to solicitor-client privilege, I have decided to address this issue by answering the following question:

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 15] 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 16] 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 17] 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 18] 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 solicitor-client privilege to records in a public body's custody or control is a question of both fact and law.

[para 19] Section 72 requires the Commissioner to make an Order disposing of the issues at the conclusion of an inquiry.

[para 20] For the reasons that follow, I find that the Legislature intended that the Commissioner review a public body's decision to sever information on the basis of solicitor-client privilege.

[para 21] 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 22] 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 23] 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 24] 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:

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

> 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.
>
> 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 25] 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 26] 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 to be 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 members of the Legislature to obtain records in the custody of the executive branch. On a functional level, the purpose of the FOIP Act is

to make public records held by the government available to the public on request, subject to any applicable exceptions.

[para 27] 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 28] In my view, in considering the language of the FOIP Act, and 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 public records in the custody of the administrative 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.

Are the Public Body's rights under the Charter of Rights and Freedoms infringed if the Commissioner makes a decision regarding its claim of solicitor-client privilege?

[para 29] The Office of the Information and Privacy Commissioner has taken the position in previous orders[3] that the Commissioner lacks jurisdiction under the FOIP Act to decide constitutional issues. This position relies on section 11 of the *Administrative Proceedings and Jurisdiction Act*, which states:

> *11 Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so.*

Section 16 of the *Administrative Proceedings and Jurisdiction Act*, referred to in section 11, contains authority for the Lieutenant Governor in Council to make regulations. The Constitutional Decision Makers Regulation A.R. 69/2006 is a regulation passed under section 16. This Regulation does not list the Information and Privacy Commissioner among the decision makers authorized to decide constitutional issues.

[para 30] The constitutional jurisdiction provisions of the *Administrative Proceedings and Jurisdiction Act* were introduced in response to *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504. In that case, the Supreme Court of Canada determined that administrative tribunals with jurisdiction to decide issues of law presumptively have

[3] See Orders F2010-019 and F2015-41.

jurisdiction to decide issues relating to the constitutionality of the statutory provisions under which they operate. The Court said:

> In my view, the Nova Scotia Court of Appeal erred in concluding that the Appeals Tribunal did not have jurisdiction to consider the constitutionality of the challenged provisions of the Act and the FRP Regulations. I am of the view that the rules concerning the jurisdiction of administrative tribunals to apply the *Charter* established by this Court in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570, *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, 1991 CanLII 57 (SCC), [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, 1991 CanLII 12 (SCC), [1991] 2 S.C.R. 22, ought to be reappraised and restated as a clear set of guidelines. Administrative tribunals which have jurisdiction — whether explicit or implied — to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. [my emphasis] This presumption may only be rebutted by showing that the legislature clearly intended to exclude *Charter* issues from the tribunal's authority over questions of law. To the extent that the majority reasons in *Cooper v. Canada (Human Rights Commission)*, 1996 CanLII 152 (SCC), [1996] 3 S.C.R. 854, are inconsistent with this approach, I am of the view that they should no longer be relied upon.

The foregoing case holds that tribunals authorized to decide issues of law *presumptively* have the authority to decide constitutional issues. The presumption can be rebutted if it can be demonstrated that the Legislature clearly intended that the tribunal not decide such issues.

[para 31] Section 69(1) of the *Freedom of Information and Protection of Privacy Act* states:

> 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. [my emphasis]

[para 32] The omission of the Information and Privacy Commissioner from the list of decision makers who may decide constitutional issues from Schedule 1 of the Designation of Constitutional Decision Makers Regulation AR 69/2006 has been interpreted as a clear indication that the Legislature did not intend the Information and Privacy Commissioner to have the authority to decide constitutional issues. However, this interpretation does not take into consideration the Commissioner's authority to decide *all* issues of law arising in an inquiry under section 69(1) and the status of the FOIP Act as quasi-constitutional legislation.

[para 33] Applying the analysis in *Martin* and *Laseur*, (*supra*), the Commissioner has been given the authority to decide all questions of law. As a matter of interpretation, section 69(1) of the FOIP Act gives the Commissioner the power to decide constitutional issues when they arise in an inquiry. This is because the issues regarding the constitutionality of a provision or action are questions of law.

[para 34] Section 5 of the FOIP Act is a paramountcy provision, which sets out rules for resolving conflict between the FOIP Act and other statutes. It states:

> *5 If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless*
>
> *(a) another Act, or*
>
> *(b) a regulation under this Act*
>
> *expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act. [my emphasis]*.

Only in the situation where a provision in conflict with the FOIP Act expressly states that it applies notwithstanding the FOIP Act, will the other provision prevail.

[para 35] Section 11 of the *Administrative Proceedings and Jurisdiction Act* is inconsistent with section 69 of the FOIP Act, as it would limit the issues of law that the Commissioner may decide in an inquiry if it is intended to apply to the Commissioner. The FOIP Act is clear that the Commissioner may decide *all* issues of law. It does not state that the Commissioner may decide "some issues of law", or "all issues of law except constitutional issues".

[para 36] In my view, the phrase "notwithstanding any other enactment", where it appears in section 11 of the *Administrative Proceedings and Jurisdiction Act*, is insufficient in and of itself to override the application of the FOIP Act. Section 5 of the FOIP Act requires conflicting legislative provisions to be express that they apply despite "*this Act*" i.e. "*the Freedom of Information and Protection of Privacy Act*". Review of Alberta's legislation indicates that provisions that are intended to apply notwithstanding the FOIP Act specifically state that they apply "notwithstanding" or "despite the *Freedom of Information and Protection of Privacy Act*".[4]

[para 37] I note too that section 2(1) of the *Financial Administration Act*, R.S.A. 2000, c. F-12 states:

> *2(1) This Act and the regulations operate notwithstanding any other Act except the Alberta Bill of Rights, the Freedom of Information and Protection of Privacy Act and the Alberta Human Rights Act, whether enacted before or after the commencement of this Act, unless the contrary is expressly declared in this Act or the regulations or in any other Act.*

Section 2(1) of the *Financial Administration Act* establishes that this statute is paramount over all other statutes save the *Alberta Bill of Rights* R.S.A. 2000, c. A-14, the *Alberta Human Rights Act* R.S.A. 2000, c. A-25.5, and the FOIP Act. All provisions in the *Financial Administration Act* are not to be read as applying "notwithstanding" these three paramount statutes unless the provision states expressly that it is intended to do so.

[4] See for example, the *Witness Security Act*, SA 2010, c W-12.5 s. 18, the *Climate Change and Emissions Management Act*, S.A. 2003 c. C-16.7 s. 59(4), and the *Oil Sands Conservation Act* , R.S.A. c. O-7 s. 20(4)

[para 38] Human rights legislation and bills of rights, like the FOIP Act, are considered to be "quasi-constitutional" in application. In *Insurance Corporation of B.C. v. Heerspink*, [1982] 2 S.C.R. 145, Lamer J. (as he then was) explained how "fundamental" or "quasi-constitutional" legislation is to be interpreted in the event of conflict:

> When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises.
>
> As a result, the legal proposition *generalia specialibus non derogant* cannot be applied to such a code. Indeed the *Human Rights Code*, when in conflict with "particular and specific legislation", is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.
>
> Furthermore, as it is a public and fundamental law, no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection.
>
> Therefore, whilst agreeing with my brother Ritchie that "the two statutory enactments under review can stand together as there is no direct conflict between them", I should add that were there such a conflict, the Code would govern. I find nowhere in the laws of British Columbia that s. 5 of the Statutory Conditions set forth in s. 208 of the *Insurance Act*, R.S.B.C. 1960, c. 197, as amended, is to be given any special treatment under the *Human Rights Code.*

[para 39] Although the foregoing excerpt is from a concurring opinion, Lamer J.'s analysis now reflects the law. In *Sullivan and Driedger on the Construction of Statutes*, Ruth Sullivan notes:

> In a series of judgments handed down in the 1980s, the Supreme Court of Canada established a new rule for resolving conflict, based on the character of the legislation. Under this rule, legislation enacted for the protection of human rights, as well as other "fundamental" or "quasi-constitutional" legislation, prevails over ordinary legislation to the extent necessary to avoid conflict. This rule applies regardless of which legislation was enacted first and which is considered more specific.[5]

[para 40] In *The Interpretation of Legislation* in Canada, Côté notes on page 372 that certain statutes or "fundamental laws" are predominant over other statutes and render inconsistent statutes inoperative to the extent of the inconsistency. Although Côté provides the example of human rights legislation, the FOIP Act is also a fundamental statute, given that the courts have also assigned "quasi-constitutional" status to freedom of information and protection of privacy legislation. (See *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] 2 SCR 306, at paragraph 40; *Canada (Information Commissioner) v. Canada (Commissioner of the*

[5] Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes* 4th Edition, (Markham; Butterworths Canada Ltd. 2002) p. 271

Royal Canadian Mounted Police), [2003] 1 SCR 66 at paragraph 26); *R. v. Skakun* 2014 B.C.C.A. 223 at paragraph 1.)

[para 41] Section 2(1) of the *Financial Administration Act* supports finding that the FOIP Act is quasi-constitutional in application, given that it includes the FOIP Act with human rights legislation as legislation that is paramount over it. The express language employed by Alberta's statutes when excluding provisions from the application of the FOIP Act, is also indicative of the FOIP Act's quasi-constitutional application.

[para 42] As discussed above, legislation that is not quasi-constitutional in effect, such as the *Administrative Proceedings and Jurisdiction Act*, must express specific intent to override quasi-constitutional legislation in clear, certain terms before conflict will be resolved in its favor. Given that the FOIP Act *is* quasi-constitutional in effect, and given that section 5 of the FOIP Act requires that another statute expressly refer to the FOIP Act if its provisions are to take precedence over conflicting provisions in the FOIP Act, I conclude that section 69(1) of the FOIP Act prevails over section 11 of the *Administrative Proceedings and Jurisdiction Act*, by application of section 5, with the result that the Commissioner may decide constitutional issues should any arise in an inquiry, as doing so is consistent with the Commissioner's authority to decide "all issues of fact and law".

[para 43] Finally, I note that the FOIP Act requires the Commissioner to decide issues that may be constitutional in nature when the Commissioner decides whether she has jurisdiction over a record. For example, information in Court files is exempted under section 4(1)(a), personal or constituency records of a member of the Executive Council are excluded under section 4(1)(o), certain records created by or for the Speaker of the Legislative Assembly or the office of a Member of the Legislative Assembly under section 4(1)(p) and certain records created by Members of the Legislative Assembly under section 4(1)(q). In other words, the Commissioner must determine whether records are in the control of the Legislative branch of government, or the executive branch of government. Moreover, the FOIP Act requires the Commissioner to decide whether records are under provincial or federal jurisdiction (see Orders F2009-027, F2009-047).

[para 44] In *Ontario v. Criminal Lawyers' Association of Ontario*, [2013] 3 SCR 3 Karakatsanis J., speaking for the majority, set out the separate functions of the legislative, executive, and judicial branches of government. She said:

> This Court has long recognized that our constitutional framework prescribes different roles for the executive, legislative and judicial branches (see *Fraser v. Public Service Staff Relations Board*, 1985] 2 S.C.R. 455, at pp. 469-70). The content of these various constitutional roles has been shaped by the history and evolution of our constitutional order (see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 49-52).
>
> Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy

> choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.
>
> All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding that "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other" (p. 389).
>
> Accordingly, the limits of the court's inherent jurisdiction must be responsive to the proper function of the separate branches of government, lest it upset the balance of roles, responsibilities and capacities that has evolved in our system of governance over the course of centuries.
>
> Indeed, even where courts have the jurisdiction to address matters that fall within the constitutional role of the other branches of government, they must give sufficient weight to the constitutional responsibilities of the legislative and executive branches, as in certain cases the other branch will be "better placed to make such decisions within a range of constitutional options" (*Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, at para. 37).

[para 45] The provisions of section 4 I have referenced may be viewed as ensuring that the Commissioner, in the course of reviewing the decisions of the executive branch regarding information and records, does not interfere with or usurp the constitutional responsibilities of the legislative and judicial branches of government. In other words, the Act requires the Commissioner to decide whether she has jurisdiction over a record or not, and this decision may be a constitutional one. Moreover, there is no mechanism under the FOIP Act for decisions in relation to section 4 to be reviewed, save by the Commissioner. As a result, I find that the provisions of section 4 evince clear intent on the part of the Legislature that the Commissioner should make constitutional decisions. As set out in *Martin* and *Laseur, supra*, when the power to decide questions of law is given to a decision maker, the Legislature is presumed to have also given the decision maker the power to decide constitutional issues, unless the Legislature is sufficiently clear that the decision maker does not have this power. In my view, the Legislature has not expressed intent that the Commissioner should not decide constitutional issues when these arise; rather, the terms it has used and the powers it has given the Commissioner support finding that the Commissioner may make constitutional decisions if necessary in an inquiry.

[para 46] For the foregoing reasons, I find that I may address the constitutional aspects of the argument that the Commissioner lacks authority to decide whether a public body has properly withheld information from an applicant on the basis of solicitor-client privilege.

If section 65 authorizes the Commissioner to review a public body's decisions to apply solicitor-client privilege to records, does it violate the Public Body's constitutional rights?

[para 47] Section 1(p) of the FOIP Act defines the term "public body" exhaustively. Under this definition, a public body refers to any of the following:

> *(i) a department, branch or office of the Government of Alberta,*
>
> *(ii) an agency, board, commission, corporation, office or other body designated as a public body in the regulations,*
>
> *(iii) the Executive Council Office,*
>
> *(iv) the office of a member of the Executive Council,*
>
> *(v) the Legislative Assembly Office,*
>
> *(vi) the office of the Auditor General, the Ombudsman, the Chief Electoral Officer, the Ethics Commissioner, the Information and Privacy Commissioner, the Child and Youth Advocate or the Public Interest Commissioner, or*
>
> *(vii) a local public body […]*

[para 48] A municipal police service, such as the Public Body in this case, is a "local government body" under section 1(i) of the FOIP Act. Section 1(j), which defines "local public body" includes local government bodies in the definition.

[para 49] In reviewing the definition of "public body" I note that public bodies are representatives of the "administrative state" or "executive branch of government" as public bodies owe their existences and powers to delegations of power by the Alberta Legislature.

[para 50] In the course of performing its policing duties, the Public Body may be viewed as representing the coercive powers of the state. When acting as a "public body" under the FOIP Act, it makes statutory decisions in response to access requests, and implements government legislation and policy supporting access to information. In both roles the Public Body is, like the Commissioner, a representative of the administrative or executive branch of government carrying out statutory functions the Legislature has assigned to it.

[para 51] A public body has duties and obligations in relation to records over which it has custody or control under the FOIP Act. When the Commissioner reviews decisions of public bodies under section 69 of the FOIP Act to ensure that they are fulfilling their public duties appropriately, the Commissioner's role is one emanation of the "state" – an officer of the Legislature – overseeing another – in this case, a police service – rather

than the state interacting with citizens. The particular kinds of vulnerabilities the privilege "as a fundamental civil and constitutional right" is meant to address – those of citizens engaged in interactions with the state – have no parallel in the context of the Commissioner reviewing a decision of a public body to determine if it may or may not refuse access in reliance on solicitor-client privilege. A public body is not transformed into an individual with *Charter* rights by virtue of its participation in an inquiry before the Commissioner. Rather, the FOIP Act applies to a public body because of its status as a representative of the administrative or executive branch of government. A public body does not have *Charter* rights when the Commissioner makes decisions regarding the application of solicitor-client privilege, nor is there a "presumption" against the Commissioner making a decision about a public body's application of section 27(1)(a) when solicitor-client privilege is claimed.

[para 52] In addition, while the FOIP Act permits an applicant to make an access request, none of the duties and obligations under the FOIP Act apply to a citizen and the Commissioner has no authority to order citizens to disclose records.

[para 53] As noted above, the Supreme Court of Canada has held that the constitutional framework of Canada's democracy has the legislative branch making policy choices, adopting laws and holding the purse strings of government, the executive branch implementing and administering those policy choices and laws, and the judiciary maintaining the rule of law, by interpreting and applying the laws enacted by the Legislature through the independent and impartial adjudication of references and disputes.

[para 54] My role as the Commissioner's delegate is to implement and administer the FOIP Act. My role is not to amend or narrow the provisions of the FOIP Act by restricting or subverting their meaning so that I may apply policies that I, or the parties before me, consider preferable to those enacted by the Legislature. To do so would be to usurp the constitutional function of the Legislature. Unless sections 27, 65, 71 and 72 are unconstitutional, interpreting them as not providing me with the authority to decide questions of solicitor-client privilege despite their clear meaning within the context of the FOIP Act would be to overstep my jurisdiction as a representative of the executive branch of government, and could result in the Legislature being unable to fulfill its oversight role effectively, or at all, in relation to public records in the government's control when it claims solicitor-client privilege. As discussed above, I find sections 27, 65, 71 and 72 are not unconstitutional as these provisions do not apply to citizens in the sense of infringing their *Charter* rights,[6] while the government entities (public bodies) that are subject to the FOIP Act and are subject to these provisions do not have *Charter* rights.

[6] Section 65 applies to a citizen in the sense that it enables a requestor or complainant to seek review by the Commissioner.

Who bears the burden of proof in this inquiry?

[para 55] Section 71(1) of the FOIP Act sets out the burden of proof in an inquiry. It states, in part:

> *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.*

[para 56] Section 71(1) imposes the burden of proof in an inquiry on the public body to prove that an applicant has no right of access.

[para 57] The standard of proof imposed on a public body under section 71(1) of the FOIP Act 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 to the information it seeks to withhold from an applicant.

[para 58] In *F.H. v. McDougall* [2008] 3 S.C.R. 41, the Supreme Court of Canada described the qualities of evidence necessary to satisfy the balance of probabilities. The Court stated:

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

[para 59] 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 it has withheld from an applicant. As the Public Body decided to apply sections 27(1)(a) to withhold information from the Applicant, it has the burden of proof under section 71(1) to prove that section 27(1)(a) applies to this information with evidence that is sufficiently clear, convincing, and cogent to meet this purpose.

[para 60] The Public Body decided not to provide the records to which it applied solicitor-client privilege for my review, but elected to provide affidavit evidence from an investigative manager and a solicitor in support of its claim that solicitor-client privilege applies to these records.

[para 61] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky* [1980] 1 S.C.R. 821. Speaking for the Court, Dickson J. (as he then was) said:

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

[para 62] If a public body can establish through evidence the three preconditions to a finding of solicitor-client privilege, with regard to each document it has withheld under this privilege, then the public body will have established that the records are subject to solicitor-client privilege.

Records 743 – 752, 977 - 983

[para 63] The investigative manager states in his affidavit:

> I have reviewed pages 743 to 752 and 974 to 983 [*sic*] of the Responsive Records and do believe that these Records contain references to a legal opinion provided by the Office of the Chief Crown Prosecutor to the Professional Standards Branch of the EPS (the "Legal Opinion") .
>
> I have also reviewed pages 753 to 755 and 984 to 986 of the Responsive Records and do believe that these Records are in the nature of case law provided by the Office of the Chief Crown Prosecutor to the Professional Standards Branch as part of the Legal Opinion.
>
> This type of legal opinion was required by the EPS in order that the Professional Standards Branch conduct an investigation into complaints brought against an EPS member. This type of legal opinion involves the Office of the Chief Crown Prosecutor providing the EPS with a legal opinion about a legal issue, including advice regarding a recommended course of action based on legal considerations.
>
> This type of legal opinion is provided to the EPS by the Office of the Chief Crown Prosecutor with an expectation that it will remain confidential.
>
> This type of legal opinion is provided by the Office of the Chief Crown Prosecutor, and received by the EPS, on the explicit condition that it is subject to Crown work product privilege and that it is not to be disclosed without the permission of the Chief Crown Prosecutor. I am informed by my review of the Responsive Records that this condition is noted on the face of page 743 of the Responsive Records.

[para 64] The solicitor states:

> It is my belief that the legal advice was sought from a professional legal advisor acting in his capacity or her capacity as such. The Office of the Chief Crown Prosecutor was acting in the capacity of a legal advisor to the EPS in connection with the Professional Standards Branch investigation. In seeking and obtaining the Legal Opinion, the EPS is the recipient of confidential legal advice.
>
> …
>
> In addition to expectations of confidentiality relating to solicitor-client privilege, the Legal Opinion is further provided by the Office of the Chief Crown Prosecutor, and received by the EPS, on the explicit condition that it is subject to Crown work product privilege and that it is not to be disclosed without the permission of the Chief Crown Prosecutor. I am informed by my

> review of the Responsive Records that this condition is noted on the face of pages 743 and 974 of the responsive records.

Elsewhere in her affidavit, the solicitor describes records 753 – 755 and 984 – 986 as case law referenced in the Crown prosecutor's "opinion".

[para 65] The Public Body argues:

> The fact that a Crown prosecutor works "in-house" in government legal service does not affect the creation or character of the privilege. While the Minister of Justice, who is *ex officio* the Attorney General of the province of Alberta, has a special responsibility to ensure the administration of public affairs and in that respect he or she is not subject to the same client direction as private clients, solicitor-client privilege may apply nonetheless. There is no conflict that may arise between the Minister and the EPS as "client." The Attorney General and the EPS would presumably be united in asserting that privilege applies to Crown opinions such as the Crown opinion referenced in the Responsive Records.

[para 66] The phrases "Crown work product privilege", "work product privilege", and "litigation privilege" overlap, and, when describing a lawyer's or Crown counsel's work product, describe the same privilege. However, work product privilege and litigation privilege are *not* synonymous with solicitor-client privilege.

[para 67] In *Blank v. Canada (Minister of Justice)*, [2005] 1 F.C.R. 403, the Federal Court of Appeal determined that the working papers of Crown counsel were subject to litigation privilege and not solicitor-client privilege. The majority also determined that litigation privilege ends with the litigation. The majority determined that the records should be disclosed to the requestor as the privilege had ended. In determining that litigation privilege, rather than solicitor-client privilege, applied, the majority stated the following:

> It is important to understand the limited reach of this decision. One must keep in mind the testimony of Attorney General Scott to the Standing Committee on the Legislative Assembly as to the rationale for the "second branch" (*Big Canoe* (C.A.), at paragraph 9):
>
> > Hon. Mr. Scott: As I said the other day, this is just to expand the coverage designed to ensure protection for solicitor-client material to crown counsel, who according to how you view the law, may or may not have a client and therefore may or may not have, technically, the benefit of solicitor-client privilege. I would have not thought the issue was contentious.
> > . . .
> > The key words, and the words that clarify, are "crown counsel" because the case is made that crown counsel may not, in a highly theoretical sense, have a client. Because crown counsel has a kind of independent role that a normal lawyer does not have, a crown counsel may be thought, in a technical sense, not to have a client. The policeman is not the crown counsel's client, but as a matter of clarification it was recognized that opinions given by crown counsel should be producible or not in the same way as opinions given by any other crown lawyer [*sic*].
>
> This passage makes it clear that the reference in section 19 to Crown counsel is a reference to Crown attorneys in criminal prosecutions, and not a reference to all counsel in the employ of the government. (In these reasons, I use "Crown counsel" and "Crown attorney" interchangeably.) Crown attorneys occupy a unique position in the legal system in the sense that they are agents

> for the Attorney General who act in the public interest. Neither the Crown attorney, acting in that capacity, nor the Attorney General has a client in the traditional sense. *R. v. W.R.D.*, [1994] 5 W.W.R. 305 (Man. C.A.), at paragraphs 10-13; affd by [1995] 1 S.C.R. 758. On the other hand, it is clear that lawyers who are employed by the government in a capacity other than prosecutors have a solicitor-client relationship with those they advise […]

[para 68] In *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, a majority of the Supreme Court of Canada dismissed the government's appeal of the foregoing decision and confirmed that litigation privilege and solicitor-client privilege are distinct privileges, stating:

> With the exception of *Hodgkinson v. Simms* (1988), , 33 B.C.L.R. (2d) 129, a decision of the British Columbia Court of Appeal, the decisions of appellate courts in this country have consistently found that litigation privilege is based on a different rationale than solicitor-client privilege: *Liquor Control Board of Ontario v. Lifford Wine Agencies Ltd.* (2005), 76 O.R. (3d) 401; *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 ("*Big Canoe*"); *College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1; *Gower v. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716; *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.* (2000), 188 N.S.R. (2d) 173; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321.
>
> American and English authorities are to the same effect: see *In re L. (A Minor)*, [1997] A.C. 16 (H.L.); *Three Rivers District Council v. Governor and Company of the Bank of England (No. 6)*, [2004] Q.B. 916, [2004] EWCA Civ 218, and *Hickman v. Taylor*, 329 U.S. 495 (1947). In the United States communications with third parties and other materials prepared in anticipation of litigation are covered by the similar "attorney work product" doctrine. This "distinct rationale" theory is also supported by the majority of academics: Sharpe; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at pp. 745-46; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at pp. 197-98; J.-C. Royer, *La preuve civile* (3rd ed. 2003), at pp. 868-71; G. D. Watson and F. Au, "Solicitor-Client Privilege and Litigation Privilege in Civil Litigation" (1998), 77 *Can. Bar Rev.* 315. For the opposing view, see J. D. Wilson, "Privilege in Experts' Working Papers" (1997), 76 *Can. Bar Rev.* 346, and "Privilege: Watson & Au (1998) 77 Can. Bar Rev. 346: REJOINDER: 'It's Elementary My Dear Watson'" (1998), 77 *Can. Bar Rev.* 549.
>
> Though conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in their operation. But treating litigation privilege and legal advice privilege as two branches of the same tree tends to obscure the true nature of both.
>
> Unlike the solicitor-client privilege, the litigation privilege arises and operates *even in the absence of a solicitor-client relationship*, and it applies indiscriminately to all litigants, whether or not they are represented by counsel: see *Alberta (Treasury Branches) v. Ghermezian* (1999), 242 A.R. 326. A self-represented litigant is no less in need of, and therefore entitled to, a "zone" or "chamber" of privacy. Another important distinction leads to the same conclusion. Confidentiality, the *sine qua non* of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.
>
> In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.

[para 69] The Court considered that litigation privilege and solicitor-client privilege have different conceptual bases. However, while litigation privilege and solicitor-client privilege are conceptually different, it does not follow that a record could not be subject to both privileges at once if a solicitor's working papers revealed communications between solicitor and client.

[para 70] As will be discussed below, it is not clearly the case that a Crown prosecutor has a client, or that a Crown prosecutor's working papers could reveal solicitor-client confidences. In saying this, I accept that there may be situations in which a police officer or police service and a solicitor who is a Crown prosecutor may form such a relationship. As the Supreme Court of Canada stated in *R. v. Campbell*, [1999] 1 SCR 565:

> The RCMP must be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings. Here, the officer's consultation with the Department of Justice lawyer fell squarely within this functional definition, and the fact that the lawyer worked for an "in-house" government legal service did not affect the creation or character of the privilege. 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] In *Campbell*, a member of the police service sought legal advice as a client as to the legality of an undercover criminal investigation he was conducting and then acted on the advice. In that case, the Court found that the member sought legal advice as a client from an employee of the justice department in the employee's capacity as a lawyer. In arriving at this conclusion, the Court stated:

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

[para 72] *Campbell* establishes that communications between a police officer, or a police service, and a government lawyer *may* be subject to solicitor-client privilege but are not necessarily so; whether the privilege attaches to communications between the two depends on the nature of the relationship, the subject of the advice and the circumstances in which it was sought and rendered. If the "functional needs of the administration of justice" require that a party seeking legal advice obtain it from a lawyer from a justice department, then the relationship may be privileged.

[para 73] In *Kalick v. The King*, [1920] S.C.R. 175, Brodeur J. offered the following definition of "administration of justice" in his concurring reasons:

> I am of opinion that the "administration of justice" mentioned in section 157 of the Criminal Code should not be restricted to what takes place after an information had been laid; but it includes the taking of necessary steps to have a person who has committed an offence brought

> before the proper tribunal, and punished for his offence. It is a very wide term covering the detection, prosecution and punishment of offenders.

[para 74] In *R. v. Wijesinha*, [1995] 3 SCR 422 and *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 SCR 152, the Supreme Court of Canada cited the foregoing definition and noted that it has been accepted in the case law. The "administration of justice" in the criminal context, then, refers to the investigation, prosecution, and punishment of criminal offences.

[para 75] In Order MO-1663-F, an Adjudicator with the Office of the Ontario Information and Privacy Commissioner rejected the argument that *Campbell* stands for the proposition that a Crown prosecutors' office acts as "in-house counsel" for municipal police services in all cases.

> The Court [in *Campbell*] found that the consultation by an officer of the Royal Canadian Mounted Police (the RCMP) with a Department of Justice lawyer over the legality of a proposed "reverse sting" operation by the RCMP fell squarely within the functional definition. The Court emphasized that it is not everything done by a government (or other) lawyer that attracts solicitor-client privilege, providing some examples of different responsibilities that may be undertaken by government lawyers in the course of their work. The Court stated that
>
> > [w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.
>
> *R. v. Campbell* has been applied in orders of this office, such as in PO-1779, PO-1931 and MO-1241. In each of these orders, a solicitor-client privilege was found on the basis that the police (a municipal police service or the Ontario Provincial Police) sought legal advice from Crown counsel. All communications within the framework of this relationship were found to qualify for solicitor-client privilege under either section 12 of the Act, or section 19 of the provincial Act. In addition, in Order PO-1779, in relation to the OPP, Assistant Commissioner Tom Mitchinson analysed the relationship between the OPP and the Crown as follows:
>
> > However, there is one further aspect to consider before concluding that solicitor-client communications privilege is established. In Order P-613, section 19 was not applied on the basis that there is no solicitor-client relationship between Crown counsel and the OPP. However, in my view, this interpretation is no longer supportable as a result of the recent Supreme Court of Canada decision in *R. v. Campbell*, [1999] 1 S.C.R. 565. In that case, the Court concluded that a solicitor-client relationship did exist between counsel with the federal Department of Justice and the R.C.M.P. The decision sees the R.C.M.P. as a "client department" of the Department of Justice and, therefore, it is difficult to see how the same conclusion could not apply vis à vis the Ministry of the Attorney General and the OPP. In my view, a solicitor-client relationship exists between the OPP and Crown counsel.
>
> This analysis has been followed in subsequent orders applying the solicitor client privilege under the provincial Act to communications between the OPP and Crown counsel.
>
> The circumstances described in Order PO-1779 do not apply to the relationship between a municipal police force and Crown counsel. Even the Police in this case do not assert that they can be viewed as a "client department" of Crown counsel. Therefore, whether a solicitor-client relationship can be established in a particular instance depends on the application of the functional definition set out in *Descôteaux v. Mierzwinski* and approved in *R. v. Campbell*,

> above. In MO-1241, former Adjudicator Holly Big Canoe specifically found that the Police sought legal advice from the assistant crown attorney. Other than MO-1241, I am not aware of any orders of this office which have applied *R. v. Campbell* to communications between a municipal police force and Crown counsel.
>
> In the appeal before me, I find there is an insufficient basis to conclude that the communications on pages 122 and 123 were in relation to the seeking or giving of legal advice. It would not be surprising for the Police and the Crown to be in communication during any given prosecution, as they were here. However, there is nothing in the specific communications at issue, in the surrounding circumstances, or in the submissions before me, to establish that these communications occurred as part of the seeking of legal advice by the Police from the Crown. I find, accordingly, that the Police have not established that these communications occurred within the framework of a solicitor-client relationship.

[para 76] In the foregoing order, the Adjudicator determined that whether a solicitor-client relationship can be established in a particular instance depends on the application of the functional definition set out in *Descôteaux et al. v. Mierzwinski,* [1982] 1 SCR 860, subsequently approved and applied in *Campbell*. I agree with the Adjudicator's reasoning in this order. In *Campbell*, a police officer required a legal opinion in the course of conducting an undercover criminal investigation; the Supreme Court of Canada accepted that it was a functional requirement of the administration of justice that the officer obtain legal advice in the circumstances.

[para 77] In Order PO-3372, a 2014 order of an Adjudicator of the Office of the Information and Privacy Commissioner of Ontario, the Adjudicator rejected a claim that information exchanged between the Ottawa Police Service and the Attorney General's office regarding an individual's request for a name change, was subject to solicitor-client privilege, finding that the parties did not enter a solicitor-client relationship. The Adjudicator followed the reasoning in Order MO-1663-F, stating:

> In the appeal before her, Senior Adjudicator Liang found it not surprising for the municipal police and the Crown to be in communication in the course of a prosecution. However, she found nothing in the specific communications at issue, in the surrounding circumstances, or in the submissions before her to establish that these communications occurred as part of the seeking of legal advice by the police from the Crown.
>
> I agree with Senior Adjudicator Liang's analysis and adopt it for the purposes of this appeal. I have reviewed page 56 and have considered the nature of the relationship between the Attorney General and the police, and the circumstances of the communications reflected in page 56. In this case, the Ottawa Police were assisting the Attorney General in carrying out its mandate the *CNA*. They were gathering information in respect of, and evaluating the appellant's request for a confidential change of name, and then communicating that information and evaluation to ministry counsel. Having reviewed the communications at issue and the parties' representations, and taking into account the surrounding circumstances, I am not persuaded that these communications were made for the purpose of or in the course of obtaining or giving professional legal advice as between ministry counsel and the Ottawa Police. I am also not persuaded that the communications reflect legal advice given or sought as among any other parties or were made within that context. Consequently, the ministry's arguments based on a "continuum of communications" must also fail.

> Further, I am not satisfied that this memo to file was prepared for Crown counsel "for use in giving legal advice". Rather, it simply reflects the communications made for the purpose of gathering information about and evaluating the appellant's change of name request.

[para 78] In Order F2016-31, a recent decision of this office, the Adjudicator adopted the reasoning of Ontario Orders PO-3372 and MO-1663-F. She rejected the argument in that case that communications between a Crown prosecutor and a municipal police service were solicitor-client communications in the absence of evidence that there was a functional need for the two entities to enter a solicitor-client relationship.

[para 79] In *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337, the British Columbia Court of Appeal rejected the argument that when a Crown prosecutor reviews information to determine whether a prosecution should be conducted, the decision is subject to solicitor-client privilege. The Court said at paragraphs 101 – 105:

> In examining relevant information and documents and deciding whether or not to approve a prosecution, Crown counsel is neither a client of another lawyer, nor a solicitor advising more senior officers in the Criminal Justice Branch. He or she is an officer of the Crown, independently exercising prosecutorial discretion. While he or she may well consult with and obtain information from others, he or she does not take legal advice from them.
>
> The fact that the Assistant Deputy Attorney General is able to review a subordinate's decision and override it does not convert the earlier decision into legal advice. The Commissioner was correct in finding that charging decisions made by Crown counsel are not covered by solicitor-client privilege, because they are not made within any solicitor-client relationship.
>
> In holding that solicitor-client privilege is inapplicable to the functions of Crown counsel in the charge approval process, we have carefully considered the rationale for solicitor-client privilege. In *R. v. Campbell*, at para. 49, Binnie J. recalled Lamer C.J.C.'s comment in *R. v. Gruenke*, [1991] 3 S.C.R. 263 at 289:
>
> > The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication ….
>
> For the substantive conditions precedent to the right of the "lawyer's client to confidentiality" he recalled the Supreme Court's adoption in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 873 of Wigmore's formulation:
>
> > Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications related to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the adviser, except the protection be waived.
>
> Solicitor-client privilege is designed primarily as a means to ensure that clients are not reluctant to obtain legal advice, or reticent in discussing their situations with their solicitors. It is a means to foster the proper taking and giving of legal advice. <u>These considerations are not germane to the situation of Crown counsel in charge approval decisions</u>. [my emphasis]

[para 80] In "The Accidental Consistency: Extracting a Coherent Principle from the Jurisprudence Surrounding Solicitor Client Privilege between the Police and the Crown"[7], Marc S. Gorbet posits the following:

> The requirements for solicitor client privilege are straightforward and easily understood through the Wigmore articulation: "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived." The key to understanding this definition and how it relates to the role of the Crown is distinguishing the varying roles of the Crown. A Crown who is prosecuting a matter is first and foremost an officer of the court and could not be considered a professional legal advisor. As noted by The Royal Commission on the Donald Marshall, Jr., Prosecution: "the Crown prosecutor occupies what has sometimes been characterized as a quasi-judicial office, a unique position in our Anglo-Canadian legal tradition." In instances where the issue of solicitor client privilege arises between the police and a Crown who is acting as a prosecutor, the Crown cannot be considered a solicitor of the police for the purpose of obtaining privilege. As will be seen, several cases have espoused this idea.
>
> On the other hand, where the Crown is not prosecuting the matter before the court and has merely provided advice to the police, there is nothing in the requirements for solicitor client privilege that would appear to exclude this relationship. The Crown is being consulted by the police in the Crown's capacity as a legal advisor. Providing that the communications offered meet the requirement of being an opinion, this situation is a solicitor client relationship. The Integrated Proceeds of Crime Sections of the Royal Canadian Mounted Police (RCMP) throughout Canada have Department of Justice lawyers working as in-house counsel. Providing that they only advise on matters, and are not prosecuting, these Department of Justice lawyers are within the definition of solicitor. In no way is this example in conflict with the traditional rule. By delineating the precise role of the Crown as either a prosecutor or an advisor, the traditional rule of solicitor client privilege can remain coherent in the police/Crown context.

The foregoing article contains a review of case law in which courts found, or did not find, that a Crown prosecutor and a police officer / service entered a solicitor-client relationship. The author arrives at the conclusion that when Crown counsel acts as a Crown prosecutor, he or she *cannot* enter a solicitor-client privileged relationship with a party, including the police, regarding the prosecution, for the reason that the Crown does not act as a solicitor in a prosecution, and because taking on a client in relation to a prosecution would conflict with the function and duties of Crown counsel. However, when the police seek legal advice in the course of a criminal investigation, and the matter is not being prosecuted, it is possible for Crown counsel to act as a solicitor, and the police and the Crown in such a case could enter a solicitor-client relationship. This analysis, is, in my view, consistent with what the Supreme Court of Canada held in *Campbell* (*supra*) and with the case law I have reviewed.

[para 81] In reviewing the Public Body's claim of privilege over the records provided to it by the Assistant Chief Crown Prosecutor, I will apply the principles in *Campbell* and consider the nature of the relationship between the Crown prosecutors and the Public Body, the subject matter of the records and the circumstances in which the records were provided to the Public Body.

[7] (2004) 41 Alta. L. Rev. 825 - 852

In what circumstances were the records provided to the Public Body?

[para 82] From my review of the Public Body's evidence and submissions I conclude that the Crown provided its decision regarding charges and prosecution following its review of the investigation materials the Public Body had gathered and submitted to it. I draw support for this finding from the affidavit of the Public Body's solicitor, which states:

> The Legal Opinion was sought by the EPS in accordance with section 45(2) of the Police Act, R.S.A. 2000, c. P-17. This type of legal opinion involves the Office of the Chief Crown Prosecutor providing the EPS with a legal opinion about a legal issue, including advice regarding a recommended course of action based on legal considerations.

[para 83] Section 45 of the *Police Act*, to which the Public Body's solicitor refers, states, in part:

> *45(1) Where a complaint is a complaint as to the actions of a police officer other than the chief of police, subject to sections 43 and 43.1, the chief shall cause the complaint to be investigated.*
>
> *(2) If, after causing the complaint to be investigated, the chief of police is of the opinion that the actions of a police officer may constitute*
>
> > *(a) an offence under an Act of the Parliament of Canada or the Legislature of Alberta, the chief shall refer the matter to the Minister of Justice and Solicitor General, [my emphasis] or*
> >
> > *(b) a contravention of the regulations governing the discipline or the performance of duty of police officers, the chief shall cause the matter to be proceeded with under subsection (3).*

[para 84] In my view, section 45 provides no support for the position of the Public Body that it entered a solicitor-client relationship with the Crown prosecutors. Section 45(2) requires the Chief to refer, which means "to send" or "to direct" a matter to the Minister of Justice and Solicitor General once the Chief has formed the opinion that an offence has been committed by a police officer. At the point that the Chief forms the opinion that the actions of a police officer may be an offence, he has already had the matter investigated and he must then direct the matter to the Minister of Justice and Solicitor General.

[para 85] Section 47(2) of the *Police Act* provides further context for section 45(2). It states:

> *47(2) Notwithstanding that the actions of a police officer have been referred to the Minister of Justice and Solicitor General under section 45(2)(a) or 46(3)(a), if the person who referred the matter to the Minister of Justice and Solicitor General is of the opinion that those actions also constitute a contravention of*

> *the regulations governing the discipline or the performance of duty of police officers, the matter as it relates to that contravention shall be proceeded with under section 45(3) or 46(4), as the case may be, unless the Minister of Justice and Solicitor General otherwise directs.*

[para 86] Section 47(2) of the *Police Act* clarifies that it is the "actions" of a police officer that are the "matter" that is referred to the Minister of Justice and Solicitor General. In my view, the context created by section 47(2) renders the Public Body's interpretation of section 45(2) – that it refers to the giving and seeking of legal advice by the Public Body – implausible. Instead, the better reading of section 45(2) is that it requires the Chief to refer a matter of an officer's misconduct to the Minister of Justice and Solicitor General *for a decision regarding charges and prosecution* once an investigation has been completed and there is evidence that a police officer may have committed an offence. Once a Crown prosecutor decides that charges should be laid, it provides its decision to the police service so that the charges may be laid.

[para 87] I also draw support for this reading from the fact that section 47(2) appears intended to authorize parallel proceedings, i.e. criminal and disciplinary proceedings, unless the Minister of Justice and Solicitor General directs otherwise. There would be no reason for section 47(2) to apply *notwithstanding* section 45(2), if section 45(2) contemplated that the Public Body would obtain legal advice from the Minister of Justice and Solicitor General once it completed an investigation.

[para 88] Finally, I note that section 2 of the *Police Act* states:

> 2(1) The Minister is charged with the administration of this Act.
>
> (2) Notwithstanding anything in this Act, all police services and peace officers shall act under the direction of the Minister of Justice and Solicitor General in respect of matters concerning the administration of justice.

Section 2 of the *Police Act* supports concluding that when a matter concerning the administration of justice arises, such as a prosecution or potential prosecution, police services take direction from the Minister of Justice and Solicitor General or her agents. The presence of section 2 in the *Police Act* also argues against the idea that a police service may provide instruction to a Crown prosecutor as a client.

[para 89] From the evidence before me, I find that the Public Body submitted the results of its investigation to the Minister of Justice and Solicitor General under section 45(2), and that the Minister of Justice and Solicitor General, through the Crown prosecutors, made the decision to prosecute an offence.

What is the subject matter of the records?

[para 90] As noted above, the subject matter of the records is a Crown prosecutor's opinion as to whether to conduct a prosecution and on what charges, following review of

the evidence submitted to the Minister of Justice and Solicitor General by the Public Body under section 45(2) of the *Police Act*.

What was the nature of the relationship between the Crown prosecutors and the Public Body?

[para 91] The Public Body included records 974, 975, and 976 among the records it provided for my review. Record 974 contains the July 9, 2007 letter of an assistant chief Crown prosecutor to a staff sergeant with the Professional Standards Branch. Records 975 and 976, consist of an opinion prepared by Crown counsel and addressed to the assistant chief Crown prosecutor. Records 975 and 976 indicate that these records were withheld under sections 17, 27(1)(b) and 27(1)(c), but not section 27(1)(a). Record 974 indicates that it was also severed under section 27(1)(a), in addition to these provisions. However, the Public Body's submissions indicate that it now considers all these records to be subject to solicitor-client privilege, despite not initially severing information from records 975 and 976 on the basis of the privilege.

[para 92] From the portions of the records that I have been provided, and from the descriptions provided by Public Body's Investigative Manager and Solicitor, I conclude that the assistant chief Crown prosecutor wrote the Public Body and attached an opinion prepared by another Crown prosecutor regarding prosecution, in the capacity of Crown prosecutor, and not as the Public Body's solicitor. I make this finding, in part, on the basis that both the Investigative Manager and the Public Body refer in their affidavits to the information in the records as subject to Crown work product privilege. That the records are described as the subject of "Crown work product privilege" and marked as such, indicates that the Crown prosecutors considered the records to be their work product in relation to a prosecution or potential prosecution.

[para 93] I also conclude that the records record an opinion or decision of a Crown prosecutor that a matter should be prosecuted, and the charges that should be brought in relation to a prosecution.

[para 94] The decision to prosecute is a decision made in the exercise of prosecutorial discretion. In *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372 the Supreme Court of Canada described prosecutorial discretion and the necessity for such decisions exercising prosecutorial discretion to be made independently in constitutional terms:

> The gravity of the power to bring, manage and terminate prosecutions which lies at the heart of the Attorney General's role has given rise to an expectation that he or she will be in this respect fully independent from the political pressures of the government. In the U.K., this concern has resulted in the long tradition that the Attorney General not sit as a member of Cabinet. See Edwards, *supra*, at pp. 174-76. Unlike the U.K., Cabinet membership prevails in this country. However, the concern remains the same, and is amplified by the fact that the Attorney General is not only a member of Cabinet but also Minister of Justice, and in that role holds a position with partisan political aspects. Membership in Cabinet makes the principle of independence in prosecutorial functions perhaps even more important in this country than in the U.K.

> It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions. Support for this view can be found in: Law Reform Commission of Canada, *supra*, at pp. 9-11. See also Binnie J. in *R. v. Regan*, [2002] 1 S.C.R. 297, at paras. 157-58 (dissenting on another point).

[para 95] When making prosecutorial decisions, the Attorney General[8], and her agents, the Crown prosecutors, must act independently of partisan concerns. Forming a solicitor-client relationship with a police service in the course of bringing a prosecution – with the effect that the Crown would be acting on the instructions of its client, the police service, in electing to prosecute – would be antithetical to the constitutional requirement of independence to which the Court in *Krieger* refers. In my view, the proper functioning of the administration of justice, to which *Campbell* refers, requires finding that the Crown prosecutor did *not* enter a solicitor-client relationship with the Public Body in making the decision to prosecute. In *Campbell*, the police officer and a government lawyer entered a solicitor-client relationship in the course of the investigation conducted by the police in which the police officer had no other means of accessing legal advice; in the case before me, I note that the Public Body had *completed* the investigation and referred the results of the investigation to the Minister of Justice and Solicitor General under section 45(2) of the *Police Act* for prosecution. As a result, the functional needs of the administration of justice in *Campbell* and the case before me are different.

[para 96] Moreover, in *Davies, supra*, the British Columbia Court of Appeal held that solicitor-client privilege is inapplicable to the functions of Crown counsel in the charge approval process. The Court of Appeal held that solicitor-client privilege is designed primarily as a means to ensure that clients are not reluctant to obtain legal advice, or reticent in discussing their situations with their solicitors and is a means to foster the proper taking and giving of legal advice. The Court held that such considerations are "not germane to the situation of Crown counsel in charge approval decisions". In my view, this case is persuasive authority that the charging decisions of Crown counsel are not subject to solicitor-client privilege.

[para 97] As I find that the Public Body and the Crown prosecutors did not enter a solicitor-client relationship, it follows that I find that the correspondence of the Crown prosecutors present in the records is not subject to solicitor-client privilege.

Case law

[para 98] As noted above, records 753 to 755 and 984 to 986 are described as case law attached to the Crown prosecutors' correspondence. The Public Body argues that disclosing the case law would allow inferences to be drawn as to the subject matter of the Crown prosecutors' correspondence and that these records are also subject to solicitor-client privilege.

[8] In Alberta, the Minister of Justice and Solicitor General is also the Attorney General.

[para 99] As I find above that the Crown prosecutor's correspondence is not subject to solicitor-client privilege, I also find that the case law accompanying it is not subject to solicitor-client privilege.

[para 100] I note, too, that in *TransAlta Corporation v Market Surveillance Administrator*, 2014 ABCA 196 the Alberta Court of Appeal rejected a claim of privilege over a case attached to an email. In finding that the email was privileged, but the attached case was not, the Court said:

> 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. 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.

The Court in that case rejected the position that a publicly available decision could attract privilege and ordered the disclosure of the attachment. The Public Body does not argue that the cases in question are not publicly available. Its reasons for withholding this information from the Applicant are that the cases would reveal the reasoning of the Crown prosecutors in deciding whether to prosecute. From the evidence available to me, I conclude that the case law that constitutes records 753 – 755 and 984 – 986 is likely publicly available. Applying the reasoning in *TransAlta Corporation*, I find that records 753 – 755 and 984 – 986 are not privileged.

[para 101] For the reasons above, I find that records 753 to 755 and 984 to 986 are not subject to solicitor-client privilege.

Litigation Privilege

[para 102] As I have found that records 743 – 755 and 977 – 986 are not subject to solicitor-client privilege I must consider whether they are subject to litigation privilege. As noted above, the Public Body asserts that the records are subject to Crown work product privilege, which is more commonly referred to as "litigation privilege". Section 27(1)(a) authorizes a public body to withhold records from an applicant that are subject to any type of legal privilege: litigation privilege is an example of a legal privilege. If litigation privilege attaches to the records, then section 27(1)(a) may still apply to them, even if they are not subject to solicitor-client privilege.

[para 103] 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 documents 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). This litigation privilege is completely separate from privilege from communications to or from a lawyer to get or receive legal advice. One does not need both situations to withhold papers: either one suffices. [Emphasis added in original]

> At p. 61 of *Opron,* the Court again noted that a litigant claiming privilege need not overcome the "double hurdle" of litigation privilege and "legal advice" or solicitor-client privilege. The solicitor-client privilege and the litigation privilege are distinct, and should not be confused. The former attaches to all confidential communications made between lawyer (or lawyer's agent) and client, where the client is seeking the lawyer's advice. Litigation privilege is broader in scope, in that it attaches even to communications with, or documents prepared by, third parties. Litigation privilege is limited, though, to situations where the dominant purpose for the communications or creation of the document was, at the time of its creation, use in relation to litigation.

[para 104] As noted above, records 744 – 755 and 977– 986 contain the reasoning of a Crown prosecutor as to whether a prosecution should be conducted and the charges that should be laid. These records may be characterized as having been prepared for use in relation to a prosecution. Records 743 (if it is a duplicate of record 974) and 974 contain a letter to the Public Body. It appears that this letter was provided to the Public Body so that the Public Body would take the steps necessary to commence the prosecution – i.e. to lay the charges. If that is so, then records 743 – 752 and 974 – 983 were, at that time, subject to litigation privilege as they constitute third party communications made for the dominant purpose of advancing litigation. Alternatively, the records were created for the dominant purpose of use in litigation. As a result, the records were, at the time they were created, subject to litigation privilege.

[para 105] However, the Supreme Court of Canada held in *Blank* that litigation privilege ends when the litigation (and any related litigation) for which a third party communication was made or a record prepared, ends. In *Davies*, the British Columbia Court of Appeal also held that litigation privilege ceases to apply to a Crown counsel's work product once a final decision has been made not to undertake or continue a prosecution of the matter (paragraph 108).

[para 106] In its letter of August 29, 2012 Alberta Justice conceded that Crown work product privilege (which I refer to as litigation privilege) had ended in relation to the records at issue.

[para 107] As the prosecution and the time for bringing any related litigation have ended, I agree with Alberta Justice that litigation privilege does not apply to records 743 – 755 and 974 – 986.

[para 108] As no other privilege has been argued as applying, I find that section 27(1)(a) does not apply to records 743 – 755 and 974 – 986.

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

[para 109] Sections 27(1)(b) and (c) authorize the head of a public body to withhold certain types of information that are not privileged. These provisions state:

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

[para 110] In Order F2015-31, the Director of Adjudication discussed the application of sections 27(1)(b) and (c), stating:

> I note with respect to each of these provisions that they apply to information that is either prepared by, or is in correspondence involving, one of the listed people, that is *in relation to a matter involving the provision of legal services, or of advice or other services*.
>
> The Public Body says it also applied sections 27(1)(b) and 27(1)(c) "to the records at issue" (although in the index it supplied in its initial submission it indicated it did not apply section 27(1)(b) to sixteen of the records). More particularly, it says in its initial submission (at para 25) that:
>
> > The records withheld under subsection 27(1)(b) were prepared by lawyers of the Minister of Justice and Solicitor General in relation to matters involving the provision of legal services.
>
> In its January 6, 2015 submission (at para 14), it adds to this explanation by saying that this provision was applied because the records "were prepared 'by or for' a lawyer of the Minister of Justice and Attorney General, in connection with the provision of a legal service, *i.e. the advice given by the Crown to the CPS as to the suitability of the Applicant as a witness in legal proceedings*".

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

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

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

[para 111] The term "legal services" is undefined in the FOIP Act. In Order F2008-028, the Adjudicator reviewed past orders of this office interpreting this phrase and said:

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

In the foregoing order, the Adjudicator followed previous orders and determined that the term "legal services" includes any law-related service performed by a person licensed to practice law. He also determined that a public body must provide evidence that information in the particular record is in relation to legal services in order to succeed.

[para 112] 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 113] 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 114] In Order F2008-028, the Adjudicator considered that the Legislature's use of the term "prepared" in section 27(1)(b) meant that section 27(1)(b) applies to substantive information about the legal services being provided only, and did not apply to information such as dates. The term "prepared" in section 27(1)(b) in its ordinary sense means "made or got ready for use." The term "prepared" is not synonymous with "writing" or "creating", and "writing an email" is not the same thing as "preparing an email." Had the Legislature worded section 27(1)(b) so that it encompassed any information "written by an agent or lawyer of a public body in relation to a matter involving the provision of legal services" it could have easily done so . However, the Legislation chose the word "prepared" to describe a 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 Crown prosecutor's work product, although it is not necessarily restricted in its application to such information.

[para 115] In any event, to fall within section 27(1)(b), information must be prepared by, or on behalf of, a lawyer or agent, or the Minister of Justice and Solicitor General, in relation to a matter involving the provision of legal services. At a minimum, to establish that this provision applies, a public body must provide clear evidence that the information was prepared by or for one of the persons enumerated in the provision, and

that the purpose for preparing the information was for use in the provision of legal services.

[para 116] Section 27(1)(c) contemplates information in correspondence between a public body's lawyer or agent, and any other person; however, the correspondence must be in relation to a matter which involves the provision of advice or services by the lawyer. At a minimum, a public body seeking to rely on this provision must establish that the lawyer (or agent) involved in the correspondence in question is providing advice or services that relate to the matter that is the subject of information in the correspondence. As a result, a public body must provide convincing evidence regarding the matter, the subject of the correspondence, and the role of the lawyer or agent, in order to meet its burden.

[para 117] In Order F2015-22 I interpreted the word "matter" in section 27(1)(c) in the following way:

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

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

[para 118] Section 27(1)(c) applies, then, to information in correspondence between a lawyer or agent and someone else, in relation to a legal matter, for which the lawyer or agent is providing advice or other services. A prosecution is arguably a legal service, within the terms of section 27(1)(c), as it is a service performed by the Minister of Justice and Solicitor General and her agents, the Crown prosecutors, for the benefit of the public.

[para 119] Records 744 – 752 and 975 – 983 consist of a memorandum prepared by a Crown prosecutor for an assistant chief Crown prosecutor. From what I have been provided of the records, I find that it is more likely than not that these records were prepared by an agent of the Minister of Justice and Solicitor General (the Attorney General) in relation to a matter involving the provision of legal services i.e. a prosecution. I conclude that section 27(1)(b) applies to these records.

[para 120] As noted above, records 743 and 974, which I am told are duplicate records, contain a letter from a Crown prosecutor to the Public Body communicating a decision in relation to conducting a prosecution and laying charges. I find that this letter falls within the scope of section 27(1)(c), as the letter is correspondence between an agent of the Minister of Justice and Solicitor General (a Crown prosecutor) and a staff sergeant of the Professional Standards Branch. The letter relates to a matter (a prosecution) for which the Minister of Justice and Attorney General was providing legal services i.e. conducting a prosecution.

[para 121] Records 753 – 755 and 984 – 986 have been described to me as case law, which was attached to a Crown prosecutor's charging decision and sent with it to a staff sergeant of the Public Body. As discussed above, the word "prepared" usually means "made or got ready for use".

[para 122] Section 27(1)(b)(ii) requires that information be prepared by an agent or lawyer of the Minister of Justice and Solicitor General in relation to a matter involving the provision of legal services before this provision can be said to apply to it. As discussed above, the term "prepare" typically means "to make or get ready for use". In my view, "preparing" information involves something more than obtaining preexisting information and using it. *Preparing information* involves creating or altering the information in some way, (such as annotating it) so that it may be used for a particular purpose.

[para 123] The evidence before me establishes that a Crown prosecutor attached a case to a decision regarding bringing charges and conducting a prosecution. I do not know whether the Crown prosecutor also prepared the information in these records that it could be used in a prosecution. As a consequence, I am unable to say that the case law was "prepared by or for a Crown prosecutor" within the terms of section 27(1)(b).

[para 124] To fall within the terms of section 27(1)(c), the case law must be "in correspondence between [an agent or lawyer] and any other person in relation to a matter involving the provision of advice or other services [by the agent or lawyer]".

[para 125] The question becomes what is meant by information that is "in relation to a matter involving the provision of advice or other services by the [agent or lawyer]". Although it does not say so, it appears that the Public Body takes the position that information is "in relation to a matter involving the provision of advice or services by [a lawyer]" even if the information does not, strictly speaking, address a matter or is not about the matter, but has been used in the matter. The question is whether this position is supportable.

[para 126] In my view, the FOIP Act may be seen to distinguish between information that is "in relation to" a matter, and information that is "used" in a matter. For example, section 20(1)(g) of the FOIP Act states:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> > *(g) reveal any information relating to or used in the exercise of prosecutorial discretion […]*

The foregoing provision indicates that the Legislature does not consider the term "relating to" to encompass the term "used". While the term "relating to" is not identical to the term "in relation to", which appears in section 27(1)(c), it is clear from section

20(1)(g) that when the Legislature intends to enable a public body to except information that it has used, it uses the term "used".

[para 127] The Public Body did not apply section 20(1)(g) to records 753 – 755 and 984 – 986, (or otherwise indicate that it was excepting these records from disclosure to protect the Crown's exercise of prosecutorial discretion). However, it appears that this provision would apply, as it encompasses information *used* in the exercise of prosecutorial discretion. Instead, the Public Body applied section 27(1)(c). The question is whether section 27(1)(c) encompasses the same kinds of information.

[para 128] In my view, section 27(1)(c) is not intended to duplicate section 20(1)(g). Rather, it enables government lawyers to communicate with parties in legal matters matter (and other parties in the matter to communicate with them) in order to move these matters forward without concern that the communications (which may contain concessions or admissions against interest) will be made known to other parties or the public. However, this purpose can be met without expanding this provision to include attachments to correspondence that was merely used in relation to a matter, but was not created to address the matter. Again, it seems likely that if the Legislature intended section 27(1)(c) to encompass information *used* by a lawyer or a by a party writing to a lawyer, that it would have used the language of section 20(1)(g). I find that the case law contained in records 753 – 755 and 984 – 986 was *used* in making a charging decision; however, I find that the case law is not in relation to the matter that was the subject of the Crown prosecutor's correspondence as the content of the case law would not be concerning the matter or about it in any way.

[para 129] The primary concern of the Public Body with regard to the case law appears to be that the content of the case law would reveal the content of records 744 – 752 and 975 – 983. In a sense, it argues that the case law is in relation to the prosecution that was being considered in records 744 – 752 and 975 – 983 as the case law would reveal the reasoning of the Crown prosecutor in relation to the prosecution.

[para 130] In Order F2008-016, the Adjudicator was faced with a situation where a Public Body withheld information under one provision, but its arguments indicated to her that it had really withheld information in accordance with another provision. She said:

> Although sections 27(1)(b) and 27(1)(c) were not explicitly referred to on the responsive documents or in the EPS' submissions, I find that the substance of the EPS submissions allows me to find that it took into consideration all appropriate elements of sections 27(1)(b) and 27(1)(c) when severing the records, even though the EPS ultimately decided to sever under a provision of the Act that was not correct. Since the principle the EPS used to withhold these records (the confidential seeking of advice or consultations with lawyers employed at the Ministry of Justice) fits within section 27(1)(c), I see no reason to deprive the EPS of its ability to apply section 27(1)(c) at this point.

[para 131] Given that 744 – 752 and 975 – 983 contain a Crown prosecutor's charging decision, I accept that these records likely contain information that may reveal information (case law) used in the exercise of prosecutorial discretion. Given that it appears that the Public Body's concerns regarding records 753 – 755 and 984 – 986 stem

from the concern that a Crown prosecutor's reasoning would be revealed by disclosure, I accept that it may have taken into consideration elements supporting the application of section 20(1)(g), even though it ultimately applied the wrong provisions of the FOIP Act to the case law. As in order F2008-016, I have decided that the Public Body should not be precluded from applying section 20(1)(g) at this point.

[para 132] For the reasons above, I find records 753 – 755 and 984 – 986 are subject to section 20(1)(g).

Records 967 – 968

[para 133] The Public Body withheld records 967 – 968 under sections 17 and 27(1)(a). The Public Body describes records 967 – 968 in the following terms:

> Pages 967 to 968 of the Responsive Records consist of a string of emails sent from and to [a Staff Sergeant] (then a S/Sgt. in the Professional Standards Branch) on June 28, 2007, and June 29, 2007. My review of pages 967 to 968 indicates that [the Staff Sergeant] emailed an EPS member with respect to a call received from the Crown Prosecutor seeking clarification and further information regarding matters being considered by the Crown Prosecutor in relation to the preparation of the Legal Opinion. The EPS member in question responded to the question from the Crown Prosecutor, and [the Staff Sergeant] forwarded the email response from the EPS member to the Crown Prosecutor in relation to the preparation of the Legal Opinion. The information contained in pages 967 to 968 records facts in relation to which the legal advice was given, and provide factual background for the advice.
>
> Pages 967 to 968 are part of the continuum of legal advice sought by the EPS and provided by the Crown Prosecutor in relation to the preparation and provision of the Legal Opinion. Information in these pages was passed between the EPS and the Crown Prosecutor in order to keep both solicitor and client informed so that confidential advice may be sought and given. Revealing the information contained in pages 967 to 968 would reveal the nature of the legal advice sought by the EPS. These records reference substantive legal advice sought by the EPS and provided by the Crown Prosecutor. These records consist of or reference a communication between a solicitor (the Crown Prosecutor) and a client (the EPS), they entail or support the giving and seeking of legal advice, and they are intended to be confidential by the parties.

[para 134] I have already found that the Crown prosecutors did not enter a solicitor-client relationship with the Public Body. It follows from this finding that the emails on records 967 – 968, which I am told contain communications between a staff sergeant and an EPS member for the purpose of answering a factual question posed by a Crown prosecutor.

[para 135] While records 967 – 968 were likely subject to litigation privilege at the time they were made, Alberta Justice and Solicitor General has conceded that any litigation privilege attaching to the records has ended.

[para 136] For these reasons, I find that Section 27(1)(a) does not apply to records 967 – 968.

[para 137] I have also considered the possibility that section 20(1)(g) may apply to records 967 – 968, given that it is possible that a question posed by the Crown prosecutor

could reveal considerations relating to the exercise of prosecutorial discretion. However, it is not clear to me whether the emails in question reveal the Crown prosecutor's questions and it is not entirely clear what was provided to the Crown prosecutor. This is because the information is characterized as a response to a question from a Crown prosecutor, but is also characterized as referencing "substantive legal advice sought by the EPS and provided by the Crown Prosecutor". The latter description suggests that the records contain questions posed by the Public Body to the Crown prosecutor, which would not necessarily reveal considerations relating to the exercise of discretion. Had the Public Body provided the records for my review, I would have the benefit of the evidence the emails provide, and would be able to determine which of the conflicting descriptions of the records I have been provided is accurate. However, as I am unable to do so on what I have been provided, I am unable to say that section 20(1)(g) applies to these records.

Record 1052

[para 138] The Public Body withheld information from record 1052 under sections 17 and 27(1)(a), (b), and (c). The Public Body's solicitor describes record 1052 as containing the following information:

> Page 1052 of the Responsive Records consists of an email from [the Staff Sergeant] to the Crown Prosecutor in response to the Crown Prosecutor's questions seeking clarification and further information regarding matters being considered by the Crown Prosecutor in relation to the preparation of the Legal Opinion. These pages reference substantive legal advice sought by the EPS and provided by the Crown Prosecutor. The information contained in page 1052 records facts in relation to which the legal advice was given, and provide factual background for the advice.
>
> Page 1052 is part of the continuum of legal advice sought by the EPS and provided by the Crown Prosecutor. Information in these pages was passed between the EPS and the Crown Prosecutor in order to keep both solicitor and client informed so that confidential advice may be sought and given. Revealing the information contained in page 1052 would reveal the nature of the legal advice sought by the EPS. These records [*sic*] consist of a communication between a solicitor (the Crown Prosecutor) and a client (the EPS), they entail or support the giving and seeking of legal advice, and they are intended to be confidential by the parties.

[para 139] I have already found that the Crown prosecutors and the Public Body did not enter a solicitor-client relationship. It follows that I find that record 1052 is not subject to solicitor-client privilege. Alberta Justice and Solicitor General has also conceded that any litigation privilege attaching to the records has ended. I therefore find that section 27(1)(a) does not apply to record 1052.

[para 140] Section 27(1)(b)(ii), as discussed above, applies to information prepared by or on behalf of a lawyer or agent of the Minister of Justice and Solicitor General. In this case, there is no evidence before me that the email created by the staff sergeant was created by or for a Crown prosecutor. Previous orders of this office have held that "for" in section 27(1)(b) has the meaning "on behalf of". As discussed in previous orders of this office, information that is sent to a lawyer or agent is not necessarily information prepared *for* a lawyer, in the sense of being prepared on the lawyer's behalf. I am therefore unable to say that section 27(1)(b) applies on the basis of the Public Body's

description of record 1052 as I do not have evidence as to whether the staff sergeant asked a question on behalf of a Crown prosecutor.

[para 141] However, I am told that the correspondence is between a staff sergeant and a Crown prosecutor regarding the matter that is the subject of records 744 – 752 and 975 – 984. I have found these records constitute a Crown prosecutor's decision regarding prosecution. As discussed above, in my view, a prosecution is a legal service, in the sense that it is a service performed by the Crown for the benefit of the public.

[para 142] I find that section 27(1)(c)(ii) likely applies to information in record 1052, given that section 27(1)(c)(ii) applies to information in correspondence between an agent of the Minister of Justice and Solicitor General and another person in relation to a matter involving the provision of legal services by the Minister and I am told record 1052 falls within this description.

[para 143] I have also considered whether section 20(1)(g) could be said to apply to these records. However, as with records 967 – 968, I have been provided conflicting descriptions of the records. It is not clear to me whether the emails in question reveal the Crown prosecutor's questions, as the information is also characterized as referencing "substantive legal advice sought by the EPS and provided by the Crown Prosecutor". The latter description suggests that the records contain questions posed by the Public Body to the Crown prosecutor, which would not necessarily reveal considerations relating to the exercise of discretion. As with records 967 – 968, had the Public Body provided the records for my review, I would have the benefit of the evidence records provide, and would be able to determine which of the conflicting descriptions of the records I have been provided is accurate. However, as I am unable to do so on what I have been provided, I am unable to say that section 20(1)(g) applies to this record.

Record 1078

[para 144] The Public Body applied sections 17 and section 27(1)(a) to withhold information from record 1078. The Public Body's solicitor provided the following description of record 1078:

> Page 1078 of the Responsive Records consists of a handwritten note regarding a question posed to a Crown Prosecutor in relation to the preparation of the Legal Opinion. I believe from my review of this record that this note was written by an EPS member in the Professional Standards Branch. Page 1078 documents communications between the EPS and a Crown Prosecutor regarding the preparation of the Legal Opinion.
>
> Page 1078 is part of the continuum of legal advice sought by the EPS and provided by the Crown Prosecutor in relation to the preparation of the Legal Opinion. Information recorded in this page passed between the EPS and the Crown Prosecutor in order to keep both solicitor and client informed so that confidential advice may be sought and given. Page 1078 records a communication between a solicitor (the Crown Prosecutor) and a client (the EPS), it references and supports the giving and seeking of legal advice, and it is intended to be confidential by the parties.

[para 145] The affidavit of the investigative manager describes this record in the following way:

> Page 1078 of the Responsive Records consists of a handwritten note regarding a question posed to Crown prosecutors in relation to the Legal Opinion.

[para 146] I have already found that the Public Body and the Crown prosecutor did not enter a solicitor-client relationship. It follows from this that I also find that record 1078 is not subject to solicitor-client privilege.

[para 147] As the matter for which the note was prepared has concluded, and all other related proceedings have also concluded, I find that record 1078 is not subject to privilege and that section 27(1)(a) of the FOIP Act does not apply to it.

[para 148] I have also considered whether section 20(1)(g) applies to record 1078. However, the descriptions I have been given of the record indicate that the record contains a question intended for a Crown prosecutor. As a result, it is not clear to me that this record could contain information relating to or used in the exercise of prosecutorial discretion.

Records 1307 – 1308, 1312 - 1313

[para 149] The Public Body severed records 1307 – 1308 and 1312 – 1313 under sections 27(1)(a) and 17(1). The affidavit of the investigative manager describes these records in the following terms:

> My review of the Responsive Records at pages 743 – 755, 967 – 968, 974 – 986, 1052, 1078, 1228, 1295 – 1300, 1307-1308, 1312 – 1313, 1314, 1315, 1339, 1340, 1244 – 1349, 1356 – 1359 indicates to me that records consist of (or reference) a communication between a solicitor and a client, they entail the giving or seeking of legal advice, and they are intended to be confidential by the parties.

[para 150] Elsewhere in his affidavit, he states:

> Pages 1312 to 1313 of the Responsive Records consist of correspondence dated March 3, 2010, from external legal counsel to [a paralegal employed by the Public Body], requesting copies of particular records required by external legal counsel in the provision of legal analysis and legal services to PSB. Pages 1307 to 1308 of the Responsive Records consists of correspondence dated March 17, 2010, from [the paralegal employed by the Public Body] to external legal counsel in response to the request for records.

[para 151] It is unclear to me from the foregoing description what the phrase "required by external legal counsel in the provision of legal analysis and legal services" to PSB" is intended to mean. It could mean that the presenting officer requested specific records and indicated that he needed them in order to provide advice, in which case, the request for records would reveal the substance of legal advice. Alternatively, the phrase "in the provision of legal analysis and legal services: may reflect the investigative manager's own interpretation of the purpose of the request. If the email is only a response to a request for records, and it is not possible to discern the substance of any legal advice

sought or given from the record, the record would not be privileged. I am unable to determine which of these possibilities is correct. Moreover, if it is the latter possibility, I have not been told the source of the investigative manager's opinion so that I could determine whether it is grounded in evidence. For example, I do not know whether he consulted the presenting officer to determine his purpose in writing the email or the paralegal with regard to hers or whether this purpose is clear in the email.

[para 152] In response to my request for further evidence, the Public Body provided the affidavit of its solicitor. The solicitor states, with regard to these records:

> Pages 1307 to 1308 of the Responsive Records consists of correspondence dated March 17, 2010, from [a paralegal of the Public Body] to external legal counsel in response to the request for records. *The information contained in pages 1312 to 1313 and 1307 to 1308 records facts in relation to which the confidential legal advice was sought and given, and provides factual background for the advice.* [my emphasis]
>
> Pages 1312 to 1313 and 1307 to 1308 are part of the continuum of legal advice sought by the EPS and provided by external legal counsel. Information in these pages was passed between the EPS and external legal counsel in order to keep both solicitor and client informed so that confidential advice may be sought and given. Revealing this information would reveal the nature of the confidential legal advice sought by the EPS and would reveal particular information sought by or provided to external legal counsel in relation to the provision of legal advice. These records consist of a communication between a solicitor (external legal counsel) and a client (the EPS), they reference the giving and seeking of legal advice, and they are intended to be confidential by the parties.

[para 153] It is difficult to reconcile the descriptions of the records I have been provided. The investigative manager describes records 1307 – 1308 as a response to a request for records. The solicitor describes records 1307 – 1308 as recording facts in relation to which legal advice was sought and given, and as providing factual background for advice. Elsewhere, the solicitor does state that revealing the content of the record would reveal particular information provided to the presenting officer in relation to the provision of legal advice, which is consistent with the investigative manager's description.

[para 154] Ultimately, it is unclear to me that disclosing records 1307 – 1308 would reveal privileged communications, or information falling on the continuum of communications if disclosed. On the one hand, she describes the information as factual and as falling on the "continuum of communications"; on the other, she states that the records reference the giving and seeking of legal advice. The solicitor does not explain the basis of her conclusion that revealing the paralegal's response to the presenting officer's request for records would reveal privileged communications. Added to this, the investigative manager describes the records as responding to a request for records, but does not suggest that these records refer to the substance of legal advice.

[para 155] The descriptions of the records I have been given are inconsistent to a certain extent and do not contain sufficient information about the subject matter of the records and the circumstances in which records 1307 – 1308 were exchanged by the Public Body and the presenting officer (referred to as external legal counsel in the

affidavits) to enable me to determine independently whether these records are subject to solicitor-client privilege.

[para 156] Records 1307 – 1308 and 1312 – 1313 have not been established as subject to solicitor-client privilege. As no other privilege has been asserted over these records, I find that section 27(1)(a) does not apply to them.

Record 1315

[para 157] The investigative manager describes record 1315 in the following terms:

> Page 1315 of the Responsive records consists of email correspondence dated February 23, 2010, from [a paralegal employed by the Public Body] to external counsel regarding the draft documents referenced in external legal counsel's February 18, 2010, correspondence, and requesting additional information relating to the documentation.

[para 158] The solicitor states:

> Page 1315 of the Responsive Records consists of correspondence dated February 23, 2010 from [a paralegal employed by the Public Body] to external counsel regarding the documents referenced in external legal counsel's February 18, 2010, correspondence, and requesting additional information relating to the documentation […] The information contained in pages 1339, 1315, and 1314 *records facts in relation to which the confidential legal advice was sought and given, and provides factual background for the advice*. [my emphasis]

[para 159] The Public Body provided record 1314 for the inquiry. This record contains an email in which a paralegal asks whether a particular step had been taken in proceedings, and an email from the presenting officer which answers this question. In Order F2013-13 I found that this record was not subject to solicitor-client privilege. I am told by the solicitor in her affidavit that records 1307 – 1308, 1312 – 1313, and 1315, like record 1314, "records facts in relation to which the confidential legal advice was sought and given and provides factual background for the advice".

[para 160] I am also told by the investigative manager in his affidavit that his review of records 1307 – 1308, 1312 – 1313, 1314, 1315, 1339, and 1340 indicates to him "that these records consist of (or reference) a communication between a solicitor and client, they entail the giving or seeking of legal advice, and they are intended to be confidential by the parties".

[para 161] Record 1314 contains emails that I find were intended to ask and answer whether a procedural step in relation to disciplinary proceeding had been taken. The only information that could be revealed by the contents of record 1315 is that the presenting officer was representing the position of the Public Body in a disciplinary hearing, and had taken a procedural step in relation to it. All of this information was known to the other side in the proceedings at the time the email was written. Moreover this information does not "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"[9]. I say this because there is no indication that the Public Body was asking (or intended to ask) whether a step *should* be taken, only whether it *was* taken. There is nothing to suggest that the answer to the question as to whether a procedural step had taken would necessarily lead the Public Body to ask for legal advice from the presenting officer. Moreover, despite the assertions of the investigative manager and the solicitor, there is nothing in record 1314 that appears to entail the giving or seeking of legal advice.

[para 162] I considered, and initially attempted to treat, the Public Body's assertions in the affidavits as evidence to ground the Public Body's claim of privilege. The Public Body has used exactly the same language in the affidavits to describe the purpose and content of record 1314, (and those records containing or referencing a Crown prosecutor's charging decision) as the language as is used to describe the purpose and content of records 1307 – 1308, 1312 – 1313, 1315, and 1339 – 1340. However, I have found that record 1314 is not privileged and that the descriptors appear to be inaccurate with regard to the purpose and content of this record.

[para 163] It would be unreasonable on my part to apply the assertions in the affidavits as evidence supporting the claim of privilege in relation to records 1307 – 1308, 1312 – 1313, 1315, and 1339 – 1340, when I have found that the same descriptors employed in the affidavits did not ground the Public Body's claim of privilege with regard to the record I was shown or for the records created by Crown prosecutors. For this reason, I have decided that I am 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 the content and nature of the records. This conclusion applies equally to my analysis with regard to records 1307 – 1308, and 1312 – 1313.

[para 164] I am told that record 1315 contains a request for information from the paralegal to the presenting officer, regarding a draft document. As discussed above, I am unable to accept as evidence the assertions contained in the affidavits characterizing the records as privileged or as created for the purpose of giving or seeking legal advice. As a result, I am unable to say, based on the description I have been provided, that record 1315 is privileged.

[para 165] For the foregoing reasons, I find that record 1315 has not been established as privileged and therefore section 27(1)(a) does not apply to it.

Records 1339 – 1340

[para 166] The Public Body withheld records 1339 and 1340 from the Applicant in their entirety under section 27(1)(a).

[para 167] The investigative manager describes these records as containing the following information:

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

> Page 1339 of the Responsive records consists of email correspondence dated February 18, 2010, from external legal counsel to [a paralegal employed by the Public Body] and [an inspector] regarding draft documents sent to PSB for further processing and requesting additional information relating to external legal counsel's provision of legal advice and legal services.

[para 168] The Public Body's solicitor states:

> Page 1340 of the Responsive Records consists of correspondence dated January 29, 2010, from [a paralegal in the Professional Standards Branch] to external legal counsel referencing a copy of an additional record required by external legal counsel in relation to the provision of legal advice and legal services to the EPS. The information contained in page 1340 records facts in relation to which the confidential legal advice was sought and given, and provides factual background for the advice.
>
> Page 1340 is part of the continuum of legal advice sought by the EPS and provided by external legal counsel. Information in this page was passed between the EPS and external legal counsel in order to keep both solicitor and client informed so that confidential advice may be sought and given. Revealing this information would reveal the nature of the legal advice sought by the EPS and would reveal particular information sought by or provided to external legal counsel in relation to the provision of legal advice. These records consist of a communication between a solicitor (external legal counsel) and a client (the EPS), they reference the giving and seeking of legal advice, and they are intended to be confidential by the parties.

[para 169] From the investigative manager's affidavit I understand that records 1339 – 1340 contain an email from the presenting officer to the Public Body. This email asks about draft documents sent to the Public Body for processing and also asks a question. The question is described as being in relation to a matter regarding which the presenting officer was providing advice and services.

[para 170] The description I have been provided of records 1339 – 1340 does not enable me to find that these records are privileged. Information may be accurately characterized as "a request for "additional information relating to external legal counsel's provision of legal advice and legal services" and be subject to solicitor-client privilege, or it may not be. For example, if the presenting officer needed the information for the purpose of undertaking a legal analysis about which he communicated with the Public Body, it would be, whereas if he asked whether a hearing date had been set, the information could be described in the terms employed by the investigative manager, but such information may not be privileged.

[para 171] The context in which the communications contained in records 1339 – 1340 were made has not been established for the inquiry. I am unable to say that the request for additional information I am told records 1339 – 1340 contain, is anything more than that. As noted above, I am unable to accept the characterizations of the records in the affidavits as containing or referencing legal advice as evidence, but only as arguments made in support of the Public Body's position in the inquiry.

[para 172] For the reasons above, I find that records 1339 – 1340 have not been established as privileged. It follows that I find that section 27(1)(a) does not apply to records 1339 – 1340.

Records 1303 – 1304

[para 173] The Public Body withheld records 1303 – 1304 from the Applicant under sections 27(1)(a), (b), and (c) and section 17(1). In Order F2013-13, I held that section 27(1)(b) applied to records 1303 – 1304. I reserved my decision as to the application of section 27(1)(a) until I received submissions from the parties regarding an Alberta Court of Appeal decision, *Mahe v. Boulianne* 2010 ABCA 74 and received further information from the Public Body as to its exercise of discretion under section 27(1)(a) and (b).

[para 174] Records 1303 – 1304 consist of a communication between the presenting officer and the Affected Party's counsel. The privilege asserted in this case is settlement privilege.

[para 175] The Public Body submitted these records for my review. The investigative manager provided the following evidence in relation to them:

> Pages 1303 to 1304 of the Responsive Records indicates that it consists of correspondence dated March 30, 2010, from external legal counsel to then-counsel for the EPS member investigated in relation to EPS file IA2006-0014. This correspondence is marked with the notation "Without Prejudice". Page 1301 is the delivery slip indicating where and how this correspondence was delivered.
>
> My review of this correspondence at pages 1303 to 1304 indicates that it relates to legal matters at issue in the disciplinary proceedings which is in the nature of a litigious dispute. My review of this correspondence also leads me to believe that the parties were attempting to come to a resolution about legal matters at issue in the proceedings. Because of the context of the proceedings and the use of the term "Without Prejudice" on the correspondence, I believe that the parties were attempting to settle a dispute in a manner that would remain confidential if a resolution of the dispute was not reached. My review of the Responsive Records indicates that there were legal matters still in dispute at the time of the correspondence and that the correspondence requested that further information be provided in order that a resolution be reached.

[para 176] From the foregoing description, I conclude that the Public Body is withholding records 1303 – 1304 on the basis of settlement privilege.

[para 177] I turn now to the question of whether settlement privilege applies to these records.

[para 178] In *The Law of Evidence*, the authors set out three preconditions for the application of settlement privilege:

> 1. A litigious dispute must be in existence or within contemplation;
> 2. The communication must be made with the express or implied intention that it would not be disclosed to the Court in the event that negotiations failed.
> 3. The purpose of the communication must be to attempt to effect a settlement.[10]

[10] David M. Paciocco, Lee Stuesser, *The Law of Evidence*, (Toronto; Irwin Law Inc. 2011) p. 249

[para 179] In *Sable Offshore Energy Inc. v. Ameron International Corp*., [2013] 2 SCR 623, the Supreme Court of Canada held that settlement privilege applies to settlement agreements and not merely to the communications leading to them. The Court stated:

> Since the negotiated amount is a key component of the "content of successful negotiations", reflecting the admissions, offers, and compromises made in the course of negotiations, it too is protected by the privilege. I am aware that some earlier jurisprudence did not extend the privilege to the concluded agreement (see *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, , 281 A.R. 185, at para. 40, citing *Hudson Bay Mining and Smelting Co. v. Wright* (1997), 120 Man. R. (2d) 214 (Q.B.)), but in my respectful view, it is better to adopt an approach that more robustly promotes settlement by including its content.

[para 180] It is unclear that a concluded settlement agreement meets the three preconditions for settlement privilege, reproduced above, given that a signed agreement ends litigation between the parties, and the purpose of signing a settlement agreement is not *to attempt to effect* settlement, but *to effect* settlement.

[para 181] However, I do not interpret the Court in *Sable Offshore* as abandoning the three preconditions for settlement privilege, but rather, as determining that a settlement agreement should be privileged as are the communications leading up to it, given that in its view, extending the privilege to the agreement would serve the same public policy – encouraging settlement.

[para 182] I note, too, that the preconditions for settlement privilege have been applied in decisions of the Alberta Courts, most recently in *McGovern-Burke v Martineau*, 2016 ABQB 514. In that case, Yamauchi J. determined that a communication was not subject to settlement privilege as litigation was not in contemplation at the time the communication was made.

[para 183] I conclude that the three preconditions for settlement privilege continue to apply in Alberta. In this case, I find that the three preconditions are met in relation to records 1303 and 1304, as they correspondence in these records is marked "without prejudice" and the author of the correspondence clearly proposes settling a litigious matter without the need to hold a hearing of the issues.

[para 184] However, the presence of the pre-conditions does not conclusively decide the matter. In *Mahe, supra,* the Alberta Court of Appeal held that settlement privilege ends once the litigious dispute (and any related litigation) for which settlement communications are made, has been decided. The Court stated:

> Not all privileges are of perpetual duration. For example, the litigation privilege ends when the litigation (and any collateral litigation) is over: *Blank v. Canada (Minister of Justice),* [2006] 2 S.C.R. 319. The primary purpose of the "without prejudice" settlement privilege is to encourage efforts to resolve the dispute, by giving assurances that any concessions of fact or liability in the negotiations and the offer will not be shown to the trier of fact. Once the litigation (and any related litigation) is concluded, the reason for the privilege is ordinarily spent. As the Court held in *Blank* at para. 34 with respect to litigation privilege: "Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose - and therefore its

> justification". So absent any specific agreement between the parties (or other special circumstances) the "without prejudice" privilege is presumed to expire once the merits of the dispute have been decided.

[para 185] Subsequently, in *Chisholm v. Lindsay*, [2013] A.J. No. 1121, Kenny J. stated:

> In dealing with the offer of November 18, 2011, I am satisfied, based on *Mahe* and *Leonardis*, that the "without prejudice" privilege as it relates to settlement offers expires once the merits of the dispute have been settled or judgment has been rendered. Therefore, the settlement offers can be referred to when costs are spoken to.

[para 186] The Alberta Court of Appeal upheld the Court of Queen's Bench Decision in *Chisholm v. Lindsay* 2015 ABCA 179 in relation to the application of *Mahe*. It also declined to reconsider *Mahe*.

[para 187] In the case before me, the merits of the matter for which the settlement was proposed in records 1303 – 1304 were decided by the presiding officer many years ago. There is nothing in the proposal contained in records 1303 – 1304 that suggests that without prejudice privilege was expected to continue after a final decision was made in the matter. As a result, I find that the privilege that originally attached to records 1303 – 1304 expired once the presiding officer made the decision in the disciplinary hearing. As a result, I find that records 1303 – 1304 are not subject to privilege and section 27(1)(a) does not apply to them.

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

[para 188] As noted above, the Public Body also applied sections 27(1)(b) and (c) to records 1303 – 1304. I have already discussed the requirements of sections 27(1)(b) and (c) in my analysis regarding records 743 – 755 and 975 – 986.

[para 189] I find that records 1303 – 1304 fall within the terms of section 27(1)(c), as this correspondence is between the presenting officer, who is an agent or lawyer of the Public Body, and another person, and the subject matter of these records is a matter involving services provided by the presenting officer.

[para 190] I have found that records 744 – 752 and 975 – 983 are subject to section 27(1)(b), records 753 – 755 and 984 – 986 are subject to section 20(1)(g), and records 743, 974, and 1303 – 1304 are subject to section 27(1)(c). As a public body's decisions to apply sections 20(1)(g) and 27(1)(b) and (c) are discretionary, I turn now to the question of whether the Public Body has established that it exercised its discretion appropriately to withhold information from the Applicant under these provisions.

Exercise of Discretion – Records 743 – 752, 974 – 983, 1052, 1303 – 1304

[para 191] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that

are involved. The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

> In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[para 192] While the foregoing case was decided in relation to the law enforcement provisions in Ontario's legislation, it is clear from paragraphs 45 and 46 of this decision that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in freedom of information legislation in particular. As noted above, the sections 20(1)(g) and 27(1)(b) and (c) of Alberta's FOIP Act are discretionary.

[para 193] As I noted in Order F2013-13, sections 27(1)(b) and (c) are drafted in such a way that they apply to information regardless of whether disclosure of the information would result in harm. These provisions may be said to apply to information that is not privileged or confidential, and would not result in harm if disclosed. If a lawyer or agent (or someone acting at the direction of the lawyer or agent) has prepared information for use in the provision of advice or legal services, section 27(1)(b) applies, and if the lawyer is a party to correspondence in relation to a matter for which the lawyer is providing advice or services, then section 27(1)(c) applies. However, when applying discretion to sever information under these provisions it is not sufficient to find that they apply; the Public Body must determine that there are reasons that support severing the information relevant to the purpose of the provision, that outweigh interests in disclosing the records.

[para 194] As noted above, section 27(1)(b) appears intended to protect a government lawyer's or Crown prosecutor's work product in relation to a matter involving the provision of legal services from disclosure, while section 27(1)(c) protects correspondence with other persons regarding a matter that a lawyer or Crown prosecutor has carriage of from disclosure. In my view, sections 27(1)(b) and (c) both serve to protect a public body's position in a legal matter, given that these provisions may be used to protect communications and work product in relation to legal matters from disclosure.

[para 195] Both litigation privilege and settlement privilege have evolved to protect the kinds of information that sections 27(1)(b) and (c) encompass. However, both litigation privilege and settlement privilege relate to the admissibility of documents in the proceedings (or related proceedings) for which work product or settlement communications were made. As a result, it is not clearly the case that records containing work product or settlement communications are privileged in situations where their admissibility in proceedings is not at issue, as in the case where an access request is made

for the records under the FOIP Act. Sections 27(1)(b) and (c) may have been considered necessary to protect work product and settlement communications from disclosure in matters outside the proceedings for which the work product or settlement communications were prepared. Arguably, it would be a disadvantage to a public body engaged in legal proceedings to disclose work product or settlement communications when adversaries in the private sector, who are not subject to freedom of information legislation, would not be required to disclose this information. That being said, I note that sections 27(1)(b) and (c) are not restricted to work product or settlement communications, but may also encompass non-privileged, and non-confidential work product or communications, or information that would not affect a public body's position if disclosed.

[para 196] Exercising discretion is a process by which factors weighing in favor of withholding information must be weighed against those favoring disclosure. As a result, discretion cannot be exercised reasonably in favor of withholding records under section 27(1)(b) or (c), if a public body's position in a legal matter or litigation, for which a lawyer or agent created work product or communicated with other persons, would not be harmed in some way by disclosure. If no harm recognized by an exception to disclosure could come to the Public Body from disclosing information, then discretion is reasonably exercised by giving an applicant access to it. To put the point differently, even though sections 27(1)(b) and (c) do not refer to harm and may encompass information that would not affect a public body's conduct of legal matters or litigation if disclosed, to exercise discretion reasonably when applying this provision, a public body must consider whether harm to its conduct of a legal matter would result from disclosure. If the answer is no, then the public body should, in most cases, exercise discretion in favor of disclosure.

[para 197] The Public Body's disclosure analyst provided the following explanation of her severing decisions under section 27(1) in an affidavit. She states:

> In deciding to withhold information in the Responsive Records pursuant to s. 27 of FOIPPA, I considered the nature of these portions of the Responsive Records, the purposes of the section, as well as the following:
>
> a) The impact the disclosure would reasonably be expected to have on the EPS's ability to carry out similar communications in the future;
> b) That the release of the information could make consulting with legal counsel less candid, open and comprehensive in the future if it is understood that such information would be made publicly available;
> c) That the members of the EPS had a reasonable expectation that consultations with legal counsel would be kept confidential;
> d) The objectives and purposes of the Act, including the Applicant's right of access; and
> e) Whether the decision to release some information to the Applicant regarding the outcome of the disciplinary action would satisfy the need for public scrutiny.

[para 198] It is unclear why the disclosure analyst considers that disclosure of the records would harm the EPS's ability to "carry out similar communications in the future". As noted above, records 744 – 752 and 975 – 983 consist of the work product of a Crown prosecutor, records 743 and 974 consist of a letter from a Crown prosecutor, and 1303 – 1304 consist of a proposal written by the presenting officer to counsel for the Affected

Party. From what I have been told or shown of these records, I am unable to identify information that may be classified in these records as a communication *from* an EPS member or as information referring to such communications. As the records in question were not created by EPS members, and the records do not record consultations with EPS members, the disclosure analyst's decision to withhold information in order to preserve the ability of EPS members to communicate confidentially with each other or with counsel (factors a, b, and c, in the foregoing excerpt) has not been shown to be based on relevant considerations. Record 1052 was apparently created by a staff sergeant and sent to a Crown prosecutor to answer the Crown prosecutor's questions. However, it is not clearly the case that the staff sergeant would not have answered the Crown prosecutor's case if he had known that his response might become public; rather, it appears that he may have been under a duty to do so.

[para 199] The Public Body has not identified any relevant factors supporting the withholding of information from records, and yet it has determined that factors favoring withholding the information outweigh any factors weighing in favor of disclosure. Moreover, I note that the proceedings for which records 743 – 752, 974 – 983, 1052, and 1303 – 1304 were prepared, were concluded many years ago. As a result, it is not obviously the case that the matters to which these records refer or for which they were prepared could be affected by disclosure of the records. Finally, it appears to be the case that records 743 – 752, 974 – 983 may, like records 753 – 755 and 984 – 986, be subject to section 20(1)(g), which is a provision intended to protect decisions made in the exercise of prosecutorial discretion from disclosure. The Public Body is not precluded from exercising its discretion in relation to the application of section 20(1)(g), instead of section 27(1)(b) or (c), given that its concerns that Crown prosecutor's decisions should be kept confidential, is consistent with the purpose of this provision.

[para 200] I find that the Public Body has not demonstrated that it applied its discretion reasonably in relation to records 753 – 755 or 984 – 986. I say this because it made its decision under sections 27(1)(a), (b), and (c), which do not apply to these records. I must therefore require it to make a new decision in relation to these records under section 20(1)(g).

[para 201] For the foregoing reasons, I have decided that I must ask the Public Body to make a new decision as to whether it will sever or disclose information from records 743 – 755, 974 – 986, 1052, and 1303 – 1304 that is based on considerations applicable to the information in the records and the purpose of sections 27(1)(b) and (c) or alternatively, section 20(1)(g), rather than on irrelevant considerations.

Issue B: Does section 17(1) of the FOIP Act require the Public Body to sever information from records 743 – 752, 967 – 968, 974 – 984, 1052, 1078, 1307, 1308, 1312, 1313, 1315, 1339, and 1340?

[para 202] As noted above, the Public Body also severed information from records 743 – 752, 967 – 968, 974 – 984, 1052, 1078, 1307, 1308, 1312, 1313, 1315, 1339, and 1340 under section 17(1).

[para 203] In Order F2013-13, I reviewed the Public Body's submissions regarding the application of section 17 and records containing severing under section 17 and found that the Public Body's severing decisions were inconsistent and appeared to have been made by considering factors that did not appear to be relevant. I held the following:

> In Order F2012-24, the Director of Adjudication ordered the Public Body to reconsider its decision to withhold information under section 17, on the basis that it was not practical or possible to conduct a review of the Public Body's decision. She said:
>
> > I note first, however, that although my views about the relevant factors and how they apply differ on some points from those of the Public Body, it is not my intention in this case to substitute my decision as to whether disclosure would be an unreasonable invasion of privacy for that of the Public Body.
> >
> > This is so despite the fact that in past orders in which adjudicators have found that a public body has failed to take into account what the adjudicator has regarded as a relevant factor in favour of disclosure, the adjudicator has refused to confirm the public body's decision and has ordered the records to be disclosed. (See, for example, Order F2010-031.)
> >
> > In this case I have decided that rather than performing the weighing exercise myself taking into account these additional factors and points as to how they are to be applied, I will ask the Public Body to do so, and to make a new decision as to which portions of the personal information should be disclosed and which withheld. I have chosen this approach for the following reasons.
> >
> > By the terms of the Act, my task is to review the decisions of public bodies rather than to make decisions in the first instance, Though the Act gives me the ability to substitute my own decision for that of a public body, section 17(5) also places a positive duty on public bodies to make the decision initially, taking into account all relevant factors, including information from the Applicant and from third parties. My review is to be done with the benefit of the reasoning of the public body as to why particular items of information were withheld, and as well on the basis that the public body has gathered relevant factual information before making its decision. In this case I do not find it either practical or possible to conduct a "review" of the Public Body's decision at this time.
> >
> > The primary reason for this is that all the factors that the Public Body says in its submission that it applied in this case by reference to section 17(5) were factors that weighed against disclosure, whereas I believe that there are two significant factors, which I will discuss below, that apply in favour of disclosure of the information that has not yet been disclosed.
>
> In my view, this approach has merit in this inquiry as well. In relation to many of the records, I am unable to determine whose personal information has been withheld, and for what reason. This is primarily because of the Public Body's decision to withhold information about its employees performing their duties and because it is not indicated in the records whose information has been withheld or why. In addition, it appears that the Public Body has not gathered factual information to support its consideration of factors under section 17(5), but has given weight to factors that have not been established as applying, such as the possibilities that personal information was supplied in confidence or that reputations would be damaged by disclosure. As a consequence, I am not in a position to review the Public Body's decision. Moreover, the Public Body has not considered factors weighing in favor of disclosure, and as a

result, has not provided section 30 notice to parties who may consent to the disclosure of their records (such as the complainant in the criminal action), or who may provide relevant information regarding the decision the Public Body must make.

Under section 72 of the FOIP Act I may require the head of a public body to perform a duty under the Act to be performed. As I am not satisfied that the Public Body has met its duty to consider all relevant circumstances under section 17(5), I must require the Public Body to make a new decision under section 17(1) in view of the following:

- that a relevant consideration under section 17(5) is that portions of the decision that have been withheld have already been placed in the public realm in the sense that the written decision was read aloud in public and discussed in the media by the Third Party's counsel; disclosure of the same information is not as invasive of privacy as disclosure of information that has not already been publicly disclosed in this manner, regardless of whether it appears in the decision or elsewhere in the records

- that it consider only factors that have been established as applying

- that only personal information of identifiable individuals may be withheld under section 17

- if, once the Public Body has made its new decision, it finds it necessary to consider severing information, it may only withhold information on the basis that "meaninglessness" will result, if it makes that determination after consideration of each specific piece of information that is left after severing.

[para 204] I ordered the Public Body to reconsider its decision under section 17(1) in view of the considerations described in the excerpt above.

[para 205] I find that the same problems arise in relation to the Public Body's severing decisions and its explanation of them in relation to records 743 – 752, 967 – 968, 974 – 983, 1052, 1078, 1303 – 1304, 1307, 1308, 1312, 1313, 1315, 1339, and 1340. I will therefore make the same order with regard to its application of section 17 to these records.

IV. ORDER

[para 206] I make this Order under section 72 of the Act.

[para 207] I order the Public Body to reconsider its exercise of discretion to withhold records 743 – 752, 753 – 755, 977 – 983, 984 – 986, 1052, and 1303 – 1304 by taking into consideration only factors that are relevant to the exercise of discretion.

[para 208] I require the Public Body to reconsider its decision under section 17(1) in view of the following:

- that a relevant consideration under section 17(5) is that portions of the decision that have been withheld have already been placed in the public realm in the sense that the written decision was read aloud in public and discussed in the media by the Third Party's counsel; disclosure of the same information is not as invasive of

privacy as disclosure of information that has not already been publicly disclosed in this manner, regardless of whether it appears in the decision or elsewhere in the records

- that it consider only factors that have been established as applying

- that only personal information of identifiable individuals may be withheld under section 17

- if, once the Public Body has made its new decision, it finds it necessary to consider severing information, it may only withhold information on the basis that "meaninglessness" will result, if it makes that determination after consideration of each specific piece of information that is left after severing.

[para 209] Once the Public Body has made a new decision under section 17 and reconsidered its decision to withhold information from the Applicant under sections 27(1)(b) and (c), or section 20(1)(g), if there is any information that is no longer subject to an exception to disclosure, I order the Public Body to disclose that information to the Applicant.

[para 210] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this order, that it has complied with it.

_____
Teresa Cunningham
Adjudicator