ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2017-61

July 18, 2017

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Numbers F6525/F6761

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Summary: The Applicants made separate access requests under the *Freedom of Information and Protection of Privacy Act [FOIP]* to Alberta Justice and Solicitor General [Public Body]. They both requested all records containing information relating to the requests for proposals and agreements with respect to awarding a contract for external legal services related to the recovery of health care costs associated with tobacco under the *Crown's Right of Recovery Act.*

The Inquiry began with the External Adjudicator issuing a Notice of Inquiry on June 6, 2014. Shortly after the Notice was issued and the Public Body had submitted its Initial Submission [2014], one of the Applicants raised a Preliminary Evidentiary Objection [PEO] to an opinion letter submitted by the Public Body. After the PEO was raised and the parties had the opportunity to provide submissions, the External Adjudicator released Decision F2014-D-03/Order F2014-50 [Decision/Order] on December 31, 2014, which found the opinion letter proffered by the Public Body to be inadmissible and ordered the Public Body to provide the records to the External Adjudicator, as none of the Records at Issue had been provided to the Commissioner's Office. The Public Body filed for Judicial Review of the Decision/Order.

On June 10, 2016, unexpectedly, counsel for the Public Body provided a small package of documents (some of which were a small sample of the Records at Issue) to the Commissioner's Office, which correspondence was re-routed to the External Adjudicator. The provision of the documents complied in part with the Decision/Order. The documents were provided as a result of counsel receiving new instructions from the Public Body following the same documents being provided to the Ethics Commissioner following the release of the Iacobucci Review Report. The correspondence from the Public Body disclosed several factors it had considered in defining the scope of the Records at Issue, which appeared to be considerations not known to the Applicants. An exchange of submissions took place with respect to the new information disclosed by the Public Body, which resulted in the issue of the scope of the records being referred to another forum and being removed as an issue in this phase of the Inquiry.

The June 10, 2016 Records at Issue were made up of 15 pages of responsive records already identified in the main Inquiry and 23 pages of documents designated as Non-Responsive that were not records in the main Inquiry that included 4 pages of records from another access to information request. Three of the Non-Responsive pages were released by the Public Body during this phase of the Inquiry leaving 35 pages at issue.

The External Adjudicator provided instructions to the parties on November 16, 2016 with respect to the adjudication of the June 10, 2016 package of documents. The parties made submissions with respect to the issues identified as relevant at this phase of the Inquiry, specifically, with respect to s. 16, s. 24, s. 27 and s. 32. This phase of the Inquiry was restricted to the 35 pages of documents provided by the Public Body on June 10, 2016.

The External Adjudicator found the Public Body did not properly rely on the exceptions under s. 27(1)(a), s. 27(1)(b)(ii) or s. 27(1)(c)(ii) for any of information in the June 10, 2016 Records at Issue. Because the s. 27 exceptions were not properly relied on by the Public Body, the External Adjudicator decided it was unnecessary to consider whether the Public Body had properly exercised its discretion in applying the s. 27 exceptions and quashed its decisions with respect to s. 27. Further, she found that while the s. 24(1)(a) and s. 24(1)(b)(i) exceptions had been properly relied on for some of the information, the Public Body had failed to provide evidence or submissions to demonstrate how it applied the s. 24 discretionary exceptions. The External Adjudicator held that the Public Body failed to demonstrate that its exercise of discretion was demonstrable and reasonable. The External Adjudicator found that while the s. 16 mandatory exception may apply to some of the information on some of the pages where it was relied on, the Public Body had failed to meet the three-part test under s. 16, specifically, failing to show that disclosure of the information could reasonably be expected to harm significantly the business interests of third party(ies). With respect to the Applicants' submissions that the s. 32 public interest override ought to apply, the External Adjudicator held that the issue ought to be postponed for consideration until the main Inquiry when the remaining 2,570 Records at Issue will be reviewed.

The External Adjudicator made an Order for Reconsideration ordering the Public Body to make a new decision with respect to s. 24 and to provide reasons as to how it applied its discretion. In addition, if the Public Body's reconsideration resulted in a decision to release some or all of the records, for those pages where there was information that fell under the terms of the s. 16 mandatory exception, the External Adjudicator ordered the Public Body to comply with s. 30(4) of the *FOIP Act* by giving notice to the third party(ies) to enable them to provide their consent to the release of the records or to Request a Review.

Statutes Cited: ***AB:*** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2, 12, 16, 17, 21, 24, 25, 27, 30, 31, 32, 56, 59, 71, 72; *Crown's Right of Recovery Act*, S.A. 2007, c. C-35; *Interpretation Act*, R.S.A. 2000, c. I-8.

Authorities Cited: AB: *Decisions:* F2014-D-03, P2011-D-003; *Orders:* 96-006, 96-011, 96-012, 97-004, 98-013, F2004-024, F2004-026, F2005-011, F2007-013, F2008-020, F2008-021, F2008-028, F2009-024, F2010-030, F2010-036, F2012-01, F2012-06, F2012-10, F2012-13, F2012-14, F2012-17, F2013-01, F2013-51, F2014-16, F2014-22, F2014-23, F2014-25, F2014-26, F2014-29, F2014-38, F2014-44, F2014-49, F2014-50, F2014-R-01, F2015-22, F2015-28, F2015-29, F2015-34, F2016-31, F2016-35, F2016-65, F2017-54, OIPC External Adjudicator Order #4.

Cases Cited: *Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53; Lizotte v. Aviva Insurance Company of Canada, 2016 SCC 52; Blank v. Canada (Minister of Justice) 2006 SCC 39; Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23; R v Proulx, [2000] 1 SCR 61; Alberta v. Suncor Inc., 2017 ABCA 221; Canada (Privacy Commissioner) v. Blood Tribe Department of Health, [2008] 2 SCR 574; R. v McClure, [2001] 1 S.C.R. 445, 2001 SCC 14; Lavallee, Rackel & Heintz v. Canada (Attorney General), [2002] 3 S.C.R. 209, 2002 SCC 61; Solosky v. The Queen, [1980] 1 SCR 821; Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner), 2013 FCA 104; Pritchard v. Ontario (Human Rights Commission) [2004] 1 SCR 809; The Office of the Information and Privacy Commissioner, Saskatchewan v. The University of Saskatchewan, 2017 SKQB 140; R. v. Campbell, [1991] 1 SCR 565; Moseley v. Spray Lakes Sawmills (1980) Ltd., 1996 ABCA 141; Covenant Health v. Alberta (Information and Privacy Commissioner, 2014 ABQB 562; John Doe v. Ontario (Finance), 2014 SCC 36; Leahy v. Canada (Minister of Citizenship and Immigration), 2012 FCA 227; Imperial Oil Limited v. Alberta (Information and Privacy Commissioner, 2014 ABCA 231; Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner), 2006 ABQB 515; Edmonton Police Service v. Alberta (Information and Privacy Commissioner), 2012 ABQB 595; Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3; Imperial Oil Ltd v. Calgary (City),*

2014 ABCA 231; ABC Benefits Corporation v. Alberta (Information and Privacy Commissioner), 2015 ABQB 662; Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31; Dagg v. Canada (Minister of Finance), [1997] 2 SCR 403; Alberta (Employment and Immigration) v. Alberta Federation of Labour, 2009 ABQB 344; Edmonton Police Commissioner v. Alberta (Information and Privacy Commissioner) 2011 ABQB 291

Other Sources Cited: *Iacobucci Review Report (March 2016); Privilege Practice Note; Adjudication Practice Note 1; Solicitor-Client Privilege Adjudication Protocol; FOIP Guidelines and Practices 2009; Robert W. McCauley and James L.H. Sprague, Hearings Before Administrative Tribunals 2nd Edition; R.J. Sharpe, "Claiming Privilege in the Discovery Process", in Special Lectures of the Law Society of Upper Canada (1984), 163.*

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I. BACKGROUND

[para 1] On June 12, 2012, the First Applicant filed a request to access information to Alberta Justice and Solicitor General [Public Body], which read as follows:

> *We request all records available from the [Public Body], with respect to the following matters:*
>
> *1. Any requests for proposals for external legal services from the [Public Body] or any other "public body," as defined in s. 1(p) of the FOIP, relating to the recovery of health care*

costs pertaining to tobacco use, including, without limitation, the recovery of health care costs under the Crown's Right of Recovery Act, SA 2009, C-35 (the "CRRA"), and including, without limitation, any deliberations, discussions, evaluations, or other information related to any such requests for proposals, and the preparation of any such proposals.

2. *Any agreements entered into for external legal services relating to the recovery of health care costs pertaining to tobacco use, including recovery under the CRRA, or pursuant to any requests for proposals for external legal services described in point 1, supra.*

3. *Any policies, standing orders, terms and conditions, or other documents regarding procurement applicable to requests for proposals for external legal services, described in point 1, supra, or agreements described in point 2, supra.*

4. *Without limiting the request set out in point 2, supra, any agreements entered into between:*

    (a) the Government of Alberta, or any "public body," as defined in s. 1(p) of the FOIP; and

    (b) any law firms, including without limitation:

        (i) [name of law firm]
        (ii) [name of law firm]
        (iii)[name of law firm]

relating to the recovery of health care costs pertaining to tobacco use, including recovery under the CRRA, or pursuant to any requests for proposals for external legal services described in point 1, supra.

[para 2] On July 30, 2012, the Second Applicant filed a request to access information [amended to include a second paragraph on September 11, 2012] to the Public Body, which read as follows:

> *This request for all records as defined by Section 1(q) of the Act related to the awarding of the contingency contract between Alberta Justice and* [name of law firm]*. The request would include, but not* [be] *limited to, the contingency contract itself. [Time period of the records: Sept. 1, 2010 – July 1, 2011]*
>
> [A]*ny records as defined by Section 1(q) to the process of awarding the tobacco litigation legal work, including but not limited to the approval of the firm* - [name of law firm] - *by the minister. Specifically, I am seeking any records related to how* [name of law firm] *were chosen over their competitors.*

[para 3] Requests for Inquiry were filed by both Applicants in 2013 for which I issued a Notice of Inquiry on June 6, 2014. Near the beginning of the Inquiry following the Public Body Initial Submission [2014], a Preliminary Evidentiary Objection [PEO] was filed by the First Applicant on August 14, 2014. On December 31, 2014, I issued Decision F2014-D-03/Order F2014-50 [Decision/Order] dealing with the PEO. The PEO, supported by both Applicants, was with respect to an Opinion Letter proffered by the Public Body in its Initial Submission [2014]. In the Decision/Order I held the Opinion Letter was inadmissible outlining the grounds for exercising my discretion to do so in detail. In addition, up to that point, as none of the Records at Issue had been provided to me as the External Adjudicator at any point since the Inquiry began, part of the Decision/Order was an Order for the Public Body to comply with s. 56(3) and s. 72(3)(a) of the *FOIP Act* to produce the complete Records at Issue for examination. The Public Body refused to comply and filed an application for Judicial Review. The latter has not been heard and has since been adjourned *sine die*.

[para 4] Unexpectedly, on June 10, 2016, counsel for the Public Body sent correspondence to the Information and Privacy Commissioner [Commissioner] with respect to new instructions he had received from the Ministry regarding the need to provide some of the Records at Issue to the Commissioner's Office. This came as a result of the Public Body having recently provided documents to the Ethics Commissioner with respect to an ongoing investigation at that office following the release of the Iacobucci Review Report that found important information had not been provided to the Ethics Commissioner. The Public Body instructed its counsel to provide the same documents to the Commissioner. The documents included a small portion of the Records at Issue, a sizeable portion of those pages designated Non-Responsive, and some pages from a different access to information request [2012-G-0102]. The portion of the Records at Issue delivered on June 10, 2016 complied, in part, with my Decision/Order. The correspondence from counsel for the Public Body was not shared with the Commissioner. In accordance with office policy, the Public Body's letter was brought to my attention because, as the External Adjudicator, I continued to have conduct of this Inquiry.

[para 5] On June 17, 2016, I wrote to the parties acknowledging receipt of the Public Body's June 10, 2016 correspondence and advising that as this Inquiry was not finished, the Public Body's letter to the Commissioner had been re-routed to me as the External Adjudicator and not given to the Commissioner, who remains at arm's length throughout any inquiry being heard by an External Adjudicator. The Public Body was asked to share its letter with the Applicants, which it did on the same day, without the accompanying records that were being withheld from the Applicants. After the Public Body had provided the June 10, 2016 Records at Issue, several issues arose with respect to the way in which the Public Body had defined the scope of the records in response to the access to information requests, which issues only became known from the Public Body's June 10, 2016 correspondence. The parties were given an opportunity to make submissions to me with respect to this new information. Thereafter, the issue of the Public Body unilaterally defining the scope of the Records at Issue in a manner inconsistent with the Applicants' access requests was referred to another forum, as outlined in my October 24, 2016 correspondence to the parties, advising all the parties that this issue, therefore, would not be an issue during this phase of the Inquiry. The diversion caused by these revelations resulted in unexpected delay in proceeding with this phase of the Inquiry dealing with the June 10, 2016 Records at Issue.

[para 6] On November 16, 2016, I set out the scope of this phase of the Inquiry in a detailed letter to the parties. I made it clear that this phase of the Inquiry is only to decide whether the Public Body properly relied on and applied the exceptions it had claimed for the small portion of the records provided to the External Adjudicator (June 10, 2016 Records at Issue). The Public Body's original access to information decisions (First Applicant: August 31, 2012 and Second Applicant: September 21, 2012) concerned what was the complete Records at Issue at that time, which included some of the June 10, 2016 Records at Issue, and read as follows:

> *564 pages of records were located in response to your request. Some of the records requested contain information that is exempted from disclosure under sections 16, 17, 21, 24, 25 and 27 of the Freedom of Information and Protection of Privacy Act or contain information non-responsive to your request. We have severed the exempted and non-responsive information so that we could disclose to you the remaining information in the records.*
> *[Decision/Order, at para. 11]*

[para 7] While this phase of the Inquiry only relates to the June 10, 2016 Records at Issue, it is important to explain other reasons for delay in this phase of the Inquiry. Adjudicating this part of the Inquiry has been challenging because during it the Public Body released additional Records at Issue to the External Adjudicator and both Applicants on September 30, 2016, committed various errors with respect to records' numbering, produced multiple indices, and referred to records in its Initial Submission [2016] that were not listed in the Amended Index for the June 10, 2016 Records at Issue. These developments meant defining the parameters of this phase of the Inquiry took some time. On a number of occasions, the confusion and mistakes were pointed out to the Public Body who was given several opportunities to explain and clarify these issues. On February 2, 2017 and April 7, 2017, the Public Body provided letters acknowledging its errors and offering an explanation or recitation of former submissions with respect to the renumbering. On January 19, 2017, the Public Body provided another portion of the

Records at Issue with another revised Index, which once again I accepted as partial compliance with my Decision/Order. The parties were advised by my letter dated March 23, 2017 that that portion of the records will not be dealt with in this phase of the Inquiry but will form part of the main Inquiry when it continues, after the disposition of the June 10, 2016 Records at Issue is completed.

II. RECORDS AT ISSUE

[para 8] I have prepared a Table of Concordance [Table] for the June 10, 2016 Records at Issue and all of the indices provided by the Public Body, which Table is attached to this Order as Appendix A. This has been prepared and included to provide a visual overview of, and details about, the morass of indices produced by the Public Body; some intended for the June 10, 2016 Records at Issue, the records that are the subject of this phase of the Inquiry. Other indices were provided to correct various errors while others were provided by the Public Body to update the index and number of pages for the main Inquiry, most of which included pages in the June 10, 2016 Records at Issue as responsive records. I considered this Table necessary to establish with certainty the exact pages and exceptions being considered for the June 10, 2016 Records at Issue, the sole subject matter during this phase of the Inquiry, and to assist the parties as a quick reference. With its Initial Submission [2016] provided on December 14, 2016, the Public Body included an Amended Index of Records, as I had requested it to do, that reflected the fact that the Public Body had made a decision to release three additional pages of records to the Applicants and to apply exceptions to all the pages previously designated Non-Responsive. The pages of the June 10, 2016 Records at Issue shown as released [32, 120, 565] have not been included in the count of the pages of records presently at issue. As undertaken in my Decision/Order with respect to the records, I attended the office of the Commissioner in January 2017 and July 2017 to examine the portion of the Records at Issue provided to me by the Public Body on June 10, 2016. I have done a line-by-line examination of each page of the Records at Issue, which total 35 pages. The totals for the number of pages of records from the original and the latest index are as follows:

1. June 10, 2016 Records at Issue Index: 23 pages designated Non-Responsive. There was a total of 38 pages at the outset of this phase of the Inquiry, during which 3 pages were released [32, 120, 565]. As a result, there are 35 pages of records remaining at issue in this phase of the inquiry [98, 99-102, 103-107, 113-110, 129, 210, 211, 258-261, 262-264, 265-268, 645-648].
   [**NOTE**: For the purpose of clarification; 3 pages of the June 10, 2016 Records at Issue have been released to the Applicants: 32, 120, 565. The Amended Index that accompanied the Public Body Initial Submission [2016] had 12 clusters of records listed in the Table (Appendix A) showing 3 records released. In its Initial Submission [2016], the Public Body refers to 12 records. In the updated April 7, 2017 Amended Index the Public Body has merged two clusters listed in the December 14, 2016 Amended Index pages 113-116 and pages 117-119 into one cluster pages 113-119. This is how those pages appeared in the original June 10, 2016 Index. Thus, the number of records as counted by the Public Body in the most recent index totals 11. Despite the recalibration of the clusters, I will refer to 12 records, but only when referencing the parties' submissions. I will continue to refer to a Record by page number and count. Lastly, the Public Body acknowledged that the Index now included pages as part of the June 10, 2016 Records at Issue, previously excluded from the scope of the Records at Issue that had been designated as Non-Responsive. These new pages were listed with exceptions in the December 14, 2016 Amended Index accompanying the Public Body Initial Submission [2016].]

2. December 14, 2016 Amended Index for the June 10, 2016 Records at Issue: 20 pages previously designated as Non-Responsive have had the designation removed and replaced with multiple exceptions discussed below under Part III of this Order. Pages 32, 120, and 565 (previously designated as Non-Responsive) are marked as released to the Applicants. There is a total of 35 pages at issue in this phase of the Inquiry.
   [**NOTE**: The Public Body renumbered pages 566-569 to 645-648 for the purpose of its Amended Index (the Index provided with its Initial Submission [2016] on December 14, 2016 and also included in other amended indices, the last version provided on April 7, 2017). In its April 7, 2017 correspondence, the Public Body explains the original numbering resulted from the fact that *"two*

of the June 2016 documents ***came from a different FOIP package,*** *specifically, records 565 and 566-569 (as 566-569 were then numbered).* ***These two documents were not records that had originally formed part of OPIC*** [sic] ***File F6525/F6761.*** *This is why they were not listed in the August 6, 2014 Index."* In later indices in the main Inquiry, including the September 30, 2016 Index, there are pages newly numbered 566-569. The latter pages are not at issue in this phase of the Inquiry. The replacement pages for 566-569 in the June 10, 2016 Index that are pages newly numbered 645-648 are at issue in this phase. None of these pages have been released to the Applicants. The Public Body indicated it had made a decision to release 3 pages [32, 210, 565] of the June 10, 2016 Records at Issue to the Applicants when it provided its September 30, 2016 package to the Applicants. However, in the September 30, 2016 Index only two of those released pages were shown as such in the accompanying Index [32, 565]. Page 120 continued to be designated as Non-Responsive. The Public Body indicated it had applied exceptions to the remaining pages designated Non-Responsive [99-107, 113-119]. However, those pages continued to be shown as Non-Responsive in the Index as well. It was not until the December 14, 2016 Amended Index, however, that the Public Body added exceptions for these pages of records to the index. As this phase of the Inquiry progressed, I became concerned that page 120 had not in fact been released to the Applicants as it did not appear in my copy of the records released to the Applicants and was not shown as released in the September 30, 2016 Index. I felt it imperative to confirm with the Applicants whether they had received page 120 because, if not, that page of the records would be at issue during this phase of the Inquiry. On June 15, 2017, I communicated with the parties and discovered that page 120 (neither hard copy nor electronic) had not been received by the Applicants with the September 30, 2016 package from the Public Body. Upon realizing its error, the Public Body immediately released a copy of page 120 to the Applicants on the same day. At no time did the Public Body make it clear whether its decision(s) to disclose 3 additional pages of the June 10, 2016 Records at Issue to the Applicants in September 30, 2016 and June 15, 2017 and its decision to rely on and apply exceptions to the 20 newly included pages (previously designated Non-Responsive) in the December 14, 2016 Amended Index constituted a new decision(s) under s. 12 of the *FOIP Act.*]

[para 9] Throughout this phase of the Inquiry, there has been considerable tension with respect to exactly what constitutes the Records at Issue and which exceptions have been applied to the contents of the records. Considerable time and effort has gone into ensuring which pages of records are at issue and where and how exceptions have been applied. The problem has been confounded by this fact: for every page designated *"Non-Responsive"* in the June 10, 2016 Index, which included 23 pages of the total of 38 pages, when it was added as a responsive record for this phase of the Inquiry, there were no markings on the page showing what exceptions have been applied and how they have been applied to the contents of each page line-by-line. In other words, the only way to discern what exception or exceptions have been applied is to refer to that page in the index (and Amended Indices) and see what exception(s) is listed. The result is that for the remaining June 10, 2016 Records at Issue, the Public Body has applied sections of either two or three exceptions to disclosure it is claiming to all of the information on each page for 33 pages of the total 35 pages. That means, for example, for page 99 (previously designated Non-Responsive), the Public Body has applied, without specificity, exceptions under sections 16, 24 and 27 to the whole page 99 with no indication on the page which exception(s) applies to which lines or portions of the information on the page. The only exceptions as to how an exception has been applied, line-by-line with clear redactions are 2 pages: 210 and 211, which were never designated Non-Responsive. The Public Body may have intended to assert the exceptions in this blanket manner to the previously designated *"Non-Responsive"* records but regardless how this has been done does not accord with best practice taking into account the purpose of the legislation: *"right of access … subject to limited and* ***specific*** *exceptions."* This coupled with the confusion over the indices, the way the pages of the June 10, 2016 Records at Issue have been prepared makes it very difficult to assess whether or how an exception or exceptions apply to specific information on each page of the records.

III. ISSUES IN THIS PHASE OF THE INQUIRY

[para 10] On June 6, 2014 at the start of the main Inquiry, I sent the Notice of Inquiry to the parties outlining the relevant issues in the Inquiry, which were reproduced in my Decision/Order, and read as follows:

1. *Whether the Public Body properly relied on and applied s. 16 of the FOIP Act [reasonable expectation disclosure harmful to business interests of a third party] to the information in the records.*

2. *Whether the Public Body properly relied on and applied s. 17 of the FOIP Act [disclosure of personal information unreasonable invasion of privacy] to the information in the records.*

3. *Whether the Public Body properly relied on and applied s. 21 of the FOIP Act [reasonable expectation disclosure harmful to intergovernmental relations] to the information in the records.*

4. *Whether the Public Body properly relied on and applied s. 24 of the FOIP Act [reasonable expectation disclosure could reveal advice from officials] to the information in the records.*

5. *Whether the Public Body properly relied on and applied s. 25 of the FOIP Act [reasonable expectation disclosure harmful to economic and other interests of a public body] to the information in the records.*

6. *Whether the Public Body properly relied on and applied s. 27 of the FOIP Act [privileged information] to the information in the records.*

7. *Whether the Public Body properly removed some information in the records on the basis the information was non-responsive to the request to access information.*

8. *Whether public interest under s. 32 of the FOIP Act is an issue in the inquiry.*

[Decision/Order, at para. 11]

[para 11] For the purpose of this phase of the Inquiry dealing solely with the June 10, 2016 Records at Issue, the question is which of all of these issues are relevant? By correspondence dated November 16, 2016, I advised the parties that Issue #7 would not be considered in this phase of the Inquiry, as the matter had been referred to another forum. In addition, there are no examples in the Index or Amended Index for the June 10, 2016 Records at Issue where the following exceptions have been relied on by the Public Body: s. 17, s. 21, and s. 25. As a result, issues #2, #3, #5 and #7 will not be considered during this phase of the Inquiry.

[para 12] In its Initial Submission [2016], the Public Body submitted there were two issues in this phase of the Inquiry. In identifying the first issue: *"Did the public body properly exercise its discretion to withhold information as set out in the Amended Index for the June 10, 2016 Records?"* (the Public Body did not refer to any specific discretionary exceptions and made no reference to a mandatory exception in stating the issue). In the text of its submissions, however, the Public Body made submissions with respect to two discretionary exceptions: s. 24 and s. 27, and one mandatory exception: s. 16.

[para 13] With respect to the s. 16 exception, on a review of the index that was at Tab 3(c) of the Public Body Initial Submission [2014], the *"list of exemptions applied to the records"* referred only to s. 16(1)(a)(ii), 16(1)(b) and s. 16(1)(c)(i) for pages 258-271. This was the List of Exemptions that was provided with the access to information decision letters. These pages are not included in the index at Tab 1 of the Public Body Initial Submission [2014]. In the Amended Index for the June 10, 2016 Records at Issue attached to its Initial Submission [2016], the Public Body did not specify any subparagraph under s. 16(1)(c) for pages 258-261 and 265-268 (but did for pages 262-264). Yet in the September 30, 2016 Index and the January 19, 2017 Index the Public Body claims s. 16(1)(a)(ii), s. 16(1)(b), and s. 16(1)(c)(i). But then again in the February 2, 2017 Amended Index and the April 7, 2017 Amended Index, the Public

Body once again makes no reference to a subparagraph for the following pages of the records: pages 258-261 and 265-268 citing only s. 16(1)(c).

[para 14] I am going to treat the absence of a designation of a subparagraph (i) under s. 16(1)(c) that is not cited in some of the indices for pages 258-261 and 265-268 to be either a typographical error or an oversight and that the Public Body's intention is reflected in the index that accompanied its access to information decision letters: to claim three specific subsections of s. 16. The purpose section of the legislation provides in s. 2 of the *FOIP Act* that a person has a right of access *"subject to limited and* ***specific*** *exceptions."* Despite the lack of specificity, I am giving the Public Body the benefit of the doubt, that it intended to claim the three subparagraphs cited most often in the various indices, notably to include s. 16(1)(c)(i) when it relied on the s. 16 exception. The latter will be considered in deciding Issue #3 discussed below.

[para 15] At the outset of the Inquiry in 2014, the last issue listed was; whether public interest under s. 32 of the *FOIP Act* is an issue in the Inquiry. In its Initial Submission [2016], the First Applicant submitted one of the critical factual and legal matters to consider is: *"the burden of proof and test for disclosure in the public interest under section 32 of the Act."* The Second Applicant restricted his/her Initial Submission [2016] to the issues of *"privilege, and to the admissibility of evidence and the public body's failure to acknowledge it unilaterally restricted the time frame of my access request."* In Issue #4 below, I have modified public interest to reflect how this issue has emerged since the outset of the Inquiry in 2014 and how it relates at this phase of the Inquiry.

[para 16] When setting out the schedule for exchange of submissions in my November 16, 2016 letter to the parties, I requested that the Public Body provide a revised Index of the Records removing Non-Responsive and replacing that designation with the exceptions to disclosure it intended to rely on. The Amended Index was provided by the Public Body with its Initial Submission [2016] at Tab 1. In replacing the designation of Non-Responsive, the Public Body relied on the same three exceptions it had already applied to the other pages in the June 10, 2016 Records at Issue. The specific exceptions newly claimed are itemized in the attached Table (Appendix A) and have been specified in the issues below.

[para 17] To summarize, the relevant Issues for the June 10, 2016 Records at Issue are as follows:

1. Whether the Public Body properly relied on and applied the s. 27 exceptions, specifically s. 27(1)(a), s. 27(1)(b)(ii), and s. 27(1)(c)(ii) of the *FOIP Act*, to the information in the June 10, 2016 Records at Issue.

2. Whether the Public Body properly relied on and applied the s. 24 exceptions, specifically s. 24(1)(a) and s. 24(1)(b)(i) of the *FOIP Act*, to the information in the June 10, 2016 Records at Issue.

3. Whether the Public Body properly relied on and applied s. 16(1)(a)(ii), s. 16(1)(b), and s. 16(1)(c)(i) of the *FOIP Act*, to the information in the June 10, 2016 Records at Issue.

4. Whether the s. 32 public interest override applies to any of the information in the June 10, 2016 Records at Issue and, if so, who has the onus of proof and what is the test for disclosure of information when the override applies.

IV. SUBMISSIONS OF THE PARTIES

[Throughout the review of the submissions and evidence provided by the parties, I have included some commentary [**NOTE**] to provide clarity where I thought it would be helpful to the parties.]

A. PUBLIC BODY INITIAL SUBMISSION [2016]

[para 18] The following is a summary of the Public Body Initial Submission [2016] with respect to the June 10, 2016 Records at Issue, which was provided on December 14, 2016:

Description of the Inquiry

1. The Public Body describes this phase of the Inquiry, under the *FOIP Act*, as pertaining only to Records provided to the External Adjudicator on June 10, 2016.

2. The Public Body indicates that these submissions are in addition to those it provided on August 6, 2014, September 7, 2016 and September 19, 2016.

Documentation of the Inquiry: Amended Index for the June 10, 2016 Records

3. At Tab 1, the Public Body attaches an Amended Index for the June 10, 2016 Records at Issue. It further indicates that the Amended Index lists 15 records, 3 of which have been released, leaving 12 at issue (the Public Body has chosen to tally the Records by cluster, not by page). The Public Body confirms these 12 clusters of Records were included in the September 30, 2016 Index provided to the External Adjudicator and the Applicants. The Public Body states the original Index of Records *"was revised to take account of (a) including draft records, (b) extending the time frame of the records request, and (c) the records which were provided to the External Adjudicator in June 2016."* At Tab 2, the Public Body provides an explanation for the creation of the September 30, 2016 Index, which is a complete Index for all of the Records at Issue in the main Inquiry with some of the June 10, 2016 Records at Issue added.
[**NOTE**: As stated above, the Public Body stated that the September 30, 2016 Index was intended to include the new pages from the June 10, 2016 Records at Issue, previously excluded as beyond the scope, that had been designated Non-Responsive. However, it was not until the December 14, 2016 Amended Index that the exceptions were applied. The Public Body appears to have intended to release 3 pages and add the exceptions in September 2016 but only part was achieved. In its Initial Submission [2016], the Public Body did not make it clear as to whether its decision to disclose 3 pages and to rely on and apply exceptions to the newly included pages constituted a new decision(s) under s. 12 of the *FOIP Act*.]

Issues

4. The Public Body states there are two issues at this point in the Inquiry:

    a. Did the Public Body properly exercise its discretion to withhold information as set out in the Amended Index for the June 10, 2016 Records?
    b. Did the Applicants demonstrate that the June 10, 2016 Records should be disclosed as a matter of public Interest?

    [**NOTE**: In its list of issues, the Public Body neither made reference to any of the specific discretionary exceptions nor to whether or not it had properly relied on and applied the mandatory exception in s. 16 of the *FOIP Act*.]

Evidence

5. The Public Body lists the evidence it has provided as follows:

    1. The Amended Index for the June 10, 2016 Records;
    2. The Public Body's letter dated September 19, 2016;
    3. The Affidavit of the FOIP Advisor [FOIP Advisor] sworn April 16, 2013;
    4. The Affidavit of FOIP Director and Records Management [FOIP Director] sworn July 31, 2014; and
    5. Letter report dated July 2, 2014 from the Honourable Edward P. MacCallum, a retired Justice of the Court of Queen's Bench of Alberta [Opinion Letter].

    [**NOTE**: The final item in the list of evidence, the Opinion Letter, was the subject of my Decision/Order released December 31, 2014 with respect to the PEO, in which I found the Opinion Letter to be inadmissible in the Inquiry. The Public Body has filed a Judicial Review of

that Decision/Order, which has been adjourned *sine die.* During this phase of the Inquiry, because I have the June 10, 2016 Records at Issue, I find it unnecessary to consider the propriety of the Public Body trying to resubmit the Opinion Letter found to be inadmissible into evidence during this phase of the Inquiry, a step the Applicants strongly oppose. I find it unnecessary to consider particularly given that the Public Body itself does not refer to it in the text of its Initial Submission [2016]. The Opinion Letter has not been re-read or considered during this phase of the Inquiry.]

Section 27 Records: Legal Privilege

6. The Public Body submits that *"s. 27(a)(a)* [sic]*"* permits the non-disclosure of information which is protected by any type of legal privilege, including solicitor-client privilege, citing s. 27(1)(a).

7. The Public Body distinguishes between solicitor-client and litigation privilege summarizing them as follows:

> *Solicitor-client privilege pertains to communications related to seeking legal advice from a lawyer (sometimes called "legal advice privilege"). Litigation privilege pertains to materials created or obtained for existing or contemplated litigation. Litigation privilege is now recognized as being a separate legal privilege from solicitor-client privilege.*

8. The Public Body points to two recent decisions of the Supreme Court of Canada that reaffirmed the cardinal importance of both types of class privileges, which are not to be undermined on a case-by-case basis or by weighing of other factors.

9. After highlighting portions of the two judgments *(Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53 [U of C], at paras. 34-35* and *Lizotte v. Aviva Insurance Company of Canada, 2016 SCC 52 [Lizotte], at para. 24; See also Blank v. Canada (Minister of Justice) 2006 SCC 39 [Blank]*, the Public Body references Justice Gascon's description of the differences between litigation privilege and solicitor-client privilege in that case as follows:

    1. *The purpose of solicitor-client privilege is to protect a relationship, while litigation privilege is to ensure the efficacy of the adversarial process (para. 27);*
    2. *Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends (paras. 34 and 36);*
    3. *Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services (para. 32);*
    4. *Litigation privilege applies to non-confidential documents (para. 28, quoting R.J. Sharpe, "Claiming Privilege in the Discovery Process", in Special Lectures of the Law Society of Upper Canada (1984), 163, at pp. 164-65);*
    5. *Litigation privilege is not directed at communications between solicitors and clients as such (para. 27).*

    [**NOTE**: In its Initial Submission [2016], the Public Body cites paragraph numbers that are in fact paragraph references from the Blank decision cited by Justice Gascon in the Lizotte decision.]

10. Referring to the affidavit of the FOIP Director, the Public Body submits that the 12 unreleased records are confidential communications between a solicitor and client in the context of obtaining legal advice and those records all relate to Alberta's lawsuit against the tobacco companies, which remains ongoing. Accordingly it submits that all of the 12 unreleased June 10, 2016 Records at Issue are protected by both types of legal privilege.

11. Again relying on the FOIP Director's affidavit, the Public Body submits that the affidavit makes clear that the records described in the Amended Index of the June 10, 2016 Records at Issue are exempt from disclosure based on the exemptions in paragraphs 27(1)(b) and 27(1)(c) of the *FOIP Act*, which go beyond legal privilege, referencing two additional subparagraphs of s. 27. Accordingly, it submits, all of the 12 unreleased Records at Issue are exempt from disclosure by virtue of s. 27.

[**NOTE**: Despite its point 7 above, the Public Body makes no distinction between the pages it claims s. 27(1)(a) solicitor-client privilege applies to versus pages it claims litigation privilege applies to versus pages to which s. 27(1)(b) and s. 27(1)(c) apply, respectively. In essence, the Public Body claims all 12 of the June 10, 2016 Records at Issue are exempt under all of the provisions under s. 27: s. 27(1)(a), s. 27(1)(b) and s. 27(1)(c). In addition, the Amended Index included with the Public Body Initial Submission [2016] was provided on December 14, 2016 after a request from me on November 16, 2016 for additional evidence. There is no reference in the FOIP Director's affidavit to the December 14, 2016 Amended Index for the June 10, 2016 Records at Issue because his/her affidavit was sworn on July 31, 2014 and the Amended Index was not prepared or provided by the Public Body until December 14, 2016.]

Burden of Proof for establishing privilege

12. Referring to the *U of C* case (provided at Tab 3 of its Initial Submission [2016]), the Public Body cites the Supreme Court of Canada decision as authority for the proposition that a public body is not required under the *FOIP Act* to meet a higher burden or standard to assert legal privilege beyond the burden or standard under provincial civil litigation practice, which reads in part:

> *…the prevailing authority in Alberta in civil litigation allowed a party to bundle and identify solicitor-client privileged documents by document numbers, as the University had done… No evidence or argument was made to suggest that solicitor-client privilege had been falsely claimed by the University. In these circumstances, the delegate erred in concluding that the claim needed to be reviewed to fairly decide the issue.*
> *[U of C, at para. 70]*

13. The Public Body, relying on *Lizotte* in the Supreme Court of Canada submits that a public body does not bear the onus to prove on a case-by-case basis that privilege applies once it has asserted the privilege and provided evidence about the nature and circumstances in which privilege applies. Thereafter, the evidentiary burden shifts to the party alleging privilege does not apply.

> *[A]ny document that meets the conditions for the application of litigation privilege will be protected by an immunity from disclosure unless the case is one to which one of the exceptions to that privilege applies. As a result, the onus is not on a party asserting litigation privilege to prove on a case-by-case basis that the privilege should apply in light of the facts of the case and the "public interests" that are at issue (National Post, at para. 58).*
> *[Lizotte, at para. 37]*

14. The Public Body submits that it is not required under the *FOIP Act* to meet a higher burden or standard to assert legal privilege beyond what is required in provincial civil litigation practice. That is, once a public body asserts privilege and provides evidence about the nature and circumstances in which privilege applies, short of evidence that a public body has inappropriately claimed either privilege, the onus shifts to any party alleging the privilege does not apply. The Public Body asserts that there is no evidence in the record to suggest that it has inappropriately claimed either solicitor-client or litigation privilege or any other exemptions in paragraphs 27(1)(b) and 27(1)(c) of the *FOIP Act*.

Section 16 Records

15. The Public Body cites the exception in s. 16 of the *FOIP Act* and submits that as it noted in its Initial Submission [2014] in response to the PEO, the Records in the Amended Index include information described in s. 16. The Public Body submits the following: *"For example, the Contingency Fee Agreement directly affects the financial interests of the other party to it - the Province's lawyers in the tobacco recovery litigation. The applicants refer to these lawyers being the successful group in obtaining the retainer from the Province to prosecute the tobacco recovery litigation."*

[**NOTE**: It is noteworthy that the Public Body used the Contingency Fee Agreement [CFA] as its example in its submission with respect to the applicability of s. 16 despite the fact that the pages assigned to the CFA [551-564] do not form part of the June 10, 2016 Records at Issue. It is also worth noting that despite the fact the Public Body used the CFA in its argument regarding s. 16, in the original Index prepared by the FOIP Advisor, in the index provided with its Initial Submission [2014], in the September 30, 2016 Index and in the January 19, 2017 Index, the Public Body has never claimed s. 16 for pages 551-564, the pages assigned to the CFA. Given the Public Body's reference in its Initial Submission [2016] to the CFA, by letters dated March 1, 2017 and March 23, 2017, I offered the Public Body the opportunity to provide these pages to me, along with a request to provide a further explanation about other pages that had been renumbered. The response from the Public Body was delayed due to unforeseen and unavoidable circumstances. An explanation of the renumbering was provided by the Public Body on April 7, 2017 attributing it to the addition of records, but it declined my suggestion to provide the pages of records 551-564, which it confirmed are the CFA. This is despite its reference to the CFA in its submissions with respect to s. 16 in this phase of the Inquiry. When this was pointed out by me, the Public Body failed to provide another example from the June 10, 2016 Records at Issue with respect to s. 16.]

16. Further, with respect to s. 16, the Public Body notes that the June 10, 2016 Records at Issue contain information provided by other prospective law firms and disclosure could reasonably be expected to affect their financial interests and competitive position and, if there is any doubt about the application of s. 16 of the *FOIP Act* to this information, the outside lawyers should be given notice and provided with the opportunity to make submissions as to whether s. 16 applies to the information relating to them.

Section 24 Records

17. The Public Body cites, in part, the discretionary exception in s. 24 of the *FOIP Act* and submits the following: "*The purpose of section 24 is to allow persons having responsibility to make decisions to freely and frankly discuss the issues before them in order to arrive at well-reasoned decision without fear of their discussions being made public."* [citing Order F2015-34, at para. 67 (provided at Tab 5 of the Public Body Initial Submission [2016]).]

18. After referring to the purpose of s. 24, the Public Body submits that as noted in its Initial Submission [2014] *"the records described in the Amended Index includes information described in paragraphs* [sic] *24(1)"* going on to cite the text from s. 24 of the *FOIP Act*. After paraphrasing s. 24(1)(a) and s. 24(1)(b), the Public Body reproduces most of the language of s. 24(1)(c): *"positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta, or considerations that relate to those negotiations"* and then adds: *"(which directly applies to the selection of external counsel and the negotiation of the Contingency Fee Agreement)."*
[**NOTE**: It is important to note two critical details: first, the Public Body has not relied on s. 24(1)(c) for any page of the June 10, 2016 Records at Issue and s. 24(1)(c) is not listed in any of the indices provided including any of the amended indices. The exception in s. 24(1)(c) is not at issue in this phase of the Inquiry. Second, it should be pointed out that the Public Body's reference to the Amended Index in relation to the information discussed in its Initial Submission [2014]] is misleading. This is because first, there was no Amended Index until 2016 and, second, 20 of the total 35 pages of the June 10, 2016 Records at Issue, for which s. 24 is now claimed, were, at the time the Public Body Initial Submission [2014] was provided, not part of the Records at Issue as those pages were designated Non-Responsive or were pages from another access to information request [2012-G-0102] that had not yet been included.]

19. The Public Body submits it properly exercised its discretion to withhold information pursuant to s. 24.
[**NOTE:** The Public Body did not provide any further details or explanation with respect to the exercise of its discretion under s. 24 other than referring to the purpose of the s. 24 exception referred to at point 17 above.]

20. The Public Body cites s. 32(1)(a) and (b) and, referring back to its Initial Submission [2014] in response to the PEO and its September 19, 2016 correspondence, submits, at para. 30, that *"s. 32 deals with situations where there is an urgent need to disclose information about an emergency involving a risk of significant harm to the environment or health and safety of the public."*

21. The Public Body asserts that a distinction must be made between information that may well be of interest to the public and information that is a matter of public interest. For the latter statutory test, the Public Body quotes the following: *"[T]he pre-condition that the information must be "clearly a matter of public interest" must refer to a matter of compelling public interest."* [citing Order F2012-14, at pg. 41 (provided at Tab 6 of the Public Body Initial Submission [2016]) [Emphasis in original]
[**NOTE**: The footnote citation for the quote from Mr. Justice Cairns is not correct. The quote from Justice Cairns is at p. 42 [para. 154] in Order F2012-14, not pg. 41.]

Section 32 and the burden of proof

22. The Public Body submits that the Applicants have the burden of providing the disclosure of the information in the records comes under s. 32:

> *The applicant has the burden of proof at this part of the investigation and it is not a burden that will be easily met. These pre-conditions are:*
>
> - *risk of significant harm to the environment*
> - *risk of significant harm to the health or safety of the public*
> - *release is clearly in the public interest.*
>
> *The latter of these pre-conditions was considered by Mr. Justice Cairns in Bosch [Order 96-014 (External Adjudication Order No. 1)]. In the portion of the Bosch decision dealing with section 31(1)(b) [now section 32(1)(b)], Mr. Justice Cairns considered what type of information might be "clearly in the public interest". He made an important distinction between information that "may well be of interest to the public" and information that is "a matter of public interest." I agree with this point. I cannot conclude that the Legislature intended for section 31 [now section 32] to operate simply because a member of the public asserts "interest" in the information. The pre-condition that the information must be "clearly a matter of public interest" must refer to a matter of compelling public interest. [citing Order F2012-14, at para. 154; citing from Order 96-011, at paras. 48-53]*

23. The Public Body submits this is consistent with the *Lizotte* decision and that there is no evidence that the information in the records meets any of the requirements in s. 32.

24. The Public Body submits that there is no evidence that the records contain information that meets any of the requirements in s. 32; the fact that one applicant is a member of the media who has an interest in the information that s/he considers the public may have an interest in and the other applicant being a law firm does not mean the information in the records is *"a matter of compelling public interest."* [citing Order F2014-25, at para. 97 (provided at Tab 7 of its Initial Submission [2016]).]

Summary

25. In the last paragraph of its Initial Submission [2016], the Public Body provides a summary, which reads in full as follows:

> *In summary, Alberta Justice submits that it has properly exercised its discretion to withhold the information in the Amended Index of the June 10, 2016 Records. In addition, the applicants have not met the requirements of section 32 that would allow*

overriding the exceptions to disclosure which the public body has properly asserted with respect to the June 10, 2016 records.

[**NOTE:** In its summary, the Public Body again only refers to the exercise of its discretion and makes no mention of the mandatory exception in s. 16.]

26. Attached to the Public Body Initial Submission [2016] are the following:

    Tab 1: Amended Index for the June 10, 2016 Records at Issue
    Tab 2: Additions to the Index: Summary of the Index provided September 30, 2016 - OPIC [sic] File 6525/F6761
    Tabs 3-7: Cases referred to in the Public Body Initial Submission [2016]

B. SECOND APPLICANT INITIAL SUBMISSION [2016]

[para 19] The Applicants' submissions are being provided in the order in which they were received. The following is a summary of the Second Applicant Initial Submission [2016], which was provided on January 5, 2017:

1. The Second Applicant indicates his/her Response Submission is limited to the issues of privilege, admissibility of evidence and the Public Body's failure to acknowledge its unilateral restriction of the time frame for his/her request to access information.
   [**NOTE**: The Applicant had already been made aware that the issue concerning the unilateral decision of the Public Body to limit the scope of the access request had been referred to another forum and was not an issue in this phase of the Inquiry.]

2. The Second Applicant acknowledges the recent ruling in *U of C* in the Supreme Court of Canada but contends that the Public Body has not provided sufficient information about the content of the June 10, 2016 Records at Issue as suggested by the Commissioner's Privilege Practice Note, a copy of which s/he attaches, released by the Commissioner's Office following the recent rulings in *U of C* and *Lizotte.*

3. The Second Applicant quotes from the Privilege Practice Note where it refers to a decision from the Alberta Court of Appeal cited by the Supreme Court of Canada in the *U of C* case, as the relevant authority in Alberta, as follows:

   In Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53 (CanLII), the Supreme Court of Canada (SCC) suggested that the rules applicable to claims of solicitor-client privilege in the context of civil litigation apply to privilege claims in the context of access requests. The SCC also cited Canadian Natural Resources Ltd. v. ShawCor Ltd., 2014 ABCA 289 … as the relevant authority in Alberta. In this case, the Alberta Court of Appeal discussed the application of Rules 5.7 and 5.8 of the Rules of Court (producible records, and records for which there is an objection to produce). The Court stated (at paras. 42-43):

   > *…Therefore, in explaining the grounds for claiming privilege over a specific record, a party will necessarily need to provide sufficient information about that record that, short of disclosing privileged information, shows why the claimed privilege is applicable to it. Depending on the circumstances, this may require more or less than the "brief description" contemplated under Rule 5.7 (1)(b) although we expect that oftentimes the brief description will suffice.*
   >
   > *Accordingly, under either interpretation of the relevant Rules, a party must provide a sufficient description of a record claimed to be privileged to assist other parties in assessing the validity of the claim. From this, it follows that all relevant and material records must be numbered and, at a minimum, briefly described,*

> *including those recorded for which privilege is claimed. As noted, though, this is subject to the proviso that the description need not reveal any information that is privileged.*
>
> *This is the basis for the practice note for the provision of evidence by Respondents claiming solicitor-client privilege over records. The practice note also applies to litigation privilege on the basis of the significance attributed to that privilege by the SCC in Lizotte…*
> *[Privilege Practice Note, at pg. 1]*

4. The Second Applicant recognizes that in his/her prior submissions s/he acknowledged that the Public Body was not required to provide more detailed information under the former Adjudication Practice Note 1, though the note recommended it as best practice. But, s/he submits, with the issuance of the Privilege Practice Note based on the case law cited above, the onus has been directly assigned to the Public Body to provide sufficient information to show why the claimed privilege is applicable.

5. The Second Applicant submits that the Amended Index provided by the Public Body does not contain sufficient information for the External Adjudicator to determine if legal privilege or any other exceptions cited to withhold records have been properly applied and that the Amended Index does not comply with the Privilege Practice Note.

6. The Second Applicant refers to the Public Body Initial Submission [2016] in which it states there is no evidence in the record to suggest that the Public Body has inappropriately claimed any part of legal privilege [s. 27] but the Second Applicant submits that the Public Body has not clearly provided sufficient evidence to show it <u>appropriately</u> applied the exceptions. [Emphasis in original]

7. The Second Applicant refers to a record that the Public Body chose to release (memorandum dated December 14, 2010 from the then Minister of Justice and Solicitor General) which contains similar information to other records that have been completely withheld based on solicitor-client or litigation privilege. The Second Applicant argues that this raises a question as to whether the Public Body has selectively released records and, therefore, whether it has appropriately claimed privilege over records it withheld.

8. With respect to the Opinion Letter that the Public Body has listed as evidence in this phase of the Inquiry, the Second Applicant refers to my Decision/Order that ruled the Opinion Letter inadmissible and objects to this evidence being included for the same reasons it was rejected previously, notwithstanding that the Decision/Order being under Judicial Review.
   [**NOTE**: The Public Body's application for Judicial Review had not been adjourned *sine die* until after the Second Applicant Initial Submission [2016] was provided to me.]

9. The Second Applicant's final point is that s/he submits it is troubling that the Public Body has once again failed to acknowledge it unilaterally restricted the time frame of his/her access request. S/he submits it is false for the Public Body to use language like *"extending the time frame of the record request"* when the time frame for his/her access request was to July 1, 2011; particularly given that the Public Body has no right under the *FOIP Act* to arbitrarily change the time frame of an access request.
   [**NOTE**: By way of emphasis, I repeat, by correspondence dated November 16, 2016, I advised the parties that issue regarding the Public Body unilaterally changing the scope of the access requests would not be considered in this phase of the Inquiry, as the matter was being dealt with in another forum.]

10. There is one attachment to the Second Applicant Initial Submission [2016]: Privilege Practice Note from the Office of the Information and Privacy Commissioner of Alberta dated December 2016.

C. FIRST APPLICANT INITIAL SUBMISSION [2016]

[para 20] The following is a summary of the First Applicant Initial Submission [2016], which was provided on January 15, 2017:

Introduction

1. The First Applicant Initial Submission is in response to the Public Body Initial Submission [2016] concerning the 12 unreleased Records at Issue provided to the External Adjudicator June 10, 2016 and includes its other prior submissions in the Inquiry by reference, namely July 9, 2014 and September 23, 2016.

2. The First Applicant submits that this phase of the Inquiry does not engage its primary access information issue with the Public Body; the refusal to disclose the CFA under which Alberta retained an external law firm to pursue the multi-billion dollar tobacco litigation on its behalf.

3. Notwithstanding, the First Applicant provides a submission to clarify critical factual and legal matters:
    1. The Public Body's improper reliance on inadmissible evidence;
    2. The Public Body's improper narrowing of the First Applicant's access to information request;
    3. The reasonableness requirement under the discretionary exemptions to disclosure under the *FOIP Act*, for example, solicitor-client privilege;
    4. The Public Body's improper attempt to bootstrap its refusals by claiming new exemptions to disclosure that were not applied by its FOIP Director; and,
    5. The burden of proof and test for disclosure under s. 32 (public interest) of the *FOIP Act*.

    [**NOTE**: With respect to the second matter listed above I repeat, by correspondence dated November 16, 2016, I advised the parties that issue regarding the Public Body unilaterally changing the scope of the access requests would not be considered in this phase of the Inquiry, as the matter was being dealt with in another forum.]

Scope of this Stage of the Inquiry

4. The First Applicant describes the unreleased Records at Issue disclosed to the External Adjudicator on June 10, 2016 as *"(i) four emails; (ii) three final documents); (iii) four draft documents; and (iv) one draft "Action Request Cover Sheet"."* The First Applicant submits that the Public Body's *"stated basis for providing the 2016 Records at Issue to the External Adjudicator is the disclosure of same to the Ethics Commissioner."*

5. The First Applicant observes that the Public Body has consistently represented that the CFA is contained in pages 551-564 (citing sources of those representations that were included in correspondence from the First Applicant to the External Adjudicator dated September 23, 2016 providing the audio and written transcript of a voicemail from a Public Body FOIP employee to a business partner of the First Applicant) and argues that the Public Body has nevertheless failed, despite repeated requests, to confirm whether it still takes this position (as to the page numbers assigned to the CFA), even after its revelation that it limited the scope of the Records at Issue.

6. In this regard, the First Applicant notes that the Public Body Initial Submission [2016] incorporates its Initial Submission [2014] in which it represented that pages 551-564 contain the CFA and confirms its intention to continue to rely on that representation. The First Applicant repeats its earlier request to the Public Body that it confirm whether its understanding is incorrect and that if so, the Public Body, forthwith, identify the pages in its Amended Index of Records that contain the CFA.

Submission: The Public Body's Inadmissible Evidence and Incorrect Statements

7. The First Applicant submits that the Public Body Initial Submission [2016] improperly relies on inadmissible evidence and repeats the Public Body's incorrect assertion that the First Applicant *"agreed"* to limit the scope of the Inquiry to records created on or before December 31, 2010.

8. In this regard, the First Applicant submits that the Public Body improperly relies on opinion evidence from a third party, which has been found to be inadmissible in this Inquiry in a Decision/Order by the External Adjudicator, which has not been overturned by a court on judicial review.

9. In this regard, the First Applicant submits that the Public Body continues to incorrectly assert that it agreed, which it did not, to limit the time frame of its access request. Accordingly, the First Applicant asserts "…the Public Body has not *"extend[ed] the time frame of the record request to "accommodate" the applicants' request."*
[**NOTE**: With respect to paras. 5-9 of the First Applicant Initial Submission [2016] above, I repeat, by correspondence dated November 16, 2016, I advised the parties that issue regarding the Public Body unilaterally changing the scope of the access requests would not be considered during this phase of the Inquiry, as the matter was being dealt with in another forum.]

Submission: Discretionary Nature of Allegedly Applicable Exemptions under the Act

10. The First Applicant argues that the Public Body, in submitting that the burden of proof for establishing privilege cannot be higher under the *FOIP Act* than in provincial civil litigation, has ignored a critical distinction. That distinction is that in civil matters the only issue with respect to privilege is whether it has been properly claimed and/or whether it has been waived.

11. This, the First Applicant argues, is in contrast to the *FOIP Act*, which involves a two-step test when claiming discretionary exemptions such as solicitor-client and litigation privilege, as follows: *"(i) whether the Public Body properly claimed the privilege; and (ii) whether the Public Body's exercise of discretion was reasonable." [*citing *Ontario (Public Safety and Security) v Criminal Lawyers' Association, 2010 SCC 23 [Ontario (Public Safety and Security], at para. 68]*

12. Relying on s. 71(1) of the *FOIP Act* and the *Blank* decision in the Supreme Court of Canada, the First Applicant submits that the burden of proof rests with the Public Body to establish both the proper application of the privilege and the reasonableness of its assertion and, contrary to the Public Body's claim, there is a higher standard to withhold records on the grounds of privilege under the *FOIP Act.*

The CFA is not at Issue in this Stage of the Inquiry

13. In its Initial Submission [2016] the Public Body identifies the CFA as an example of a record in the Amended Index of the June 10, 2016 Records at Issue that if disclosed would harm the business interests of a third party. This is despite the fact that the First Applicant's understanding is that the CFA is not a Record at Issue at this stage and the Public Body continues to represent the CFA is at pages 551-564.
[**NOTE**: Pages 551-564 confirmed by the Public Body to be the CFA are not listed as pages of the records in the Amended Index for the June 10, 2016 Records at Issue.]

14. The First Applicant notes that the Public Body has not identified the s. 16 exemption as a basis for withholding disclosure of the CFA in the exception sheet attached to the FOIP Director's Affidavit, the Index of Records with its Initial Submission [2014] or its (amended) Index of Records provided September 30, 2016.

15. The First Applicant submits that 'bootstrapping' of this nature in legal argument should not be permitted especially where the list of exceptions attached as an exhibit to the FOIP Director's Affidavit, wherein s/he swears s/he has reviewed the responsive records while being *"cognizant of possible legal privilege and other privilege* ***as well as other exemptions"*** omits reliance on s. 16 of the *FOIP Act.* [Emphasis in original] The First Applicant states at the very least the Public Body's *"bootstrapping should result in an adverse inference about the reliability of the Public Body's Amended Index of Records."*

The Public Interest

16. The First Applicant submits that the Public Body's interpretation of the public interest override in s. 32 of the *FOIP Act* in its Initial Submission [2014], where it limits its application to an urgent need to disclose information about an emergency involving a risk of significant harm to the environment or health and safety of the public, is flawed.

17. It is, the First Applicant argues, flawed for at least the following reasons:

    1. First, it deprives s. 32(1)(b) *"information the disclosure of which is, for any other reason, clearly in the public interest"* of any meaning whatsoever. That is, it restricts the scope of s. 32 of the *FOIP Act* according to the Public Body to the environment and health and safety that are dealt with in s. 32(1)(a) of the *FOIP Act*, an interpretation that is contrary to the *"well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage." [*citing *R v Proulx, [2000] 1 SCR 61, at para. 28]*

    2. The First Applicant goes on to argue that a decision relied on by the Public Body contradicts the Public Body's own interpretation regarding s. 32(1)(b) when the decision states:

> *In my view, the sense of urgency required to engage section 32(1)(b) does not have to meet the same threshold as for section 32(1)(a).*
> *…*
> *Still, there remains a high threshold in order to trigger section 32(1)(b). While the circumstances in question need not amount to an emergency -* ***in the same sense as an emergency arising from a risk of significant harm to health, safety or the environment*** *- the circumstances must be such that disclosure of information is "clearly" in the public interest. [Order F2012-14, paras. 191-192]*
> *[Emphasis in original]*

    3. Second, its reliance on *Lizotte* is misguided as that case does not interpret disclosure in the context of an access request under legislation that includes a public interest override; and

    4. Third, it improperly shifts the burden to an applicant to establish disclosure is in the public interest when in fact a public body is in the best position to demonstrate why disclosure of the June 10, 2016 Records at Issue is not in the public interest.

Conclusion

18. In the last paragraph of its Initial Submission [2016], the First Applicant provides a summary, which reads as follows:

> *The Public Body's Initial Submission [2016] relies on inadmissible evidence, ignores the discretionary nature of the privilege exemptions, improperly bootstraps its refusals and incorrectly narrows the public interest override. Its submissions on these issues should be refused.*

19. There is one attachment to the First Applicant's Initial Submission [2016]: case law. In addition, the First Applicant's submission cites and refers to other exhibits from its Initial Submission [2014] and correspondence in footnotes included in the submissions.

D. PUBLIC BODY REPLY [2016]

[para 21] The following is a summary of the Public Body Rebuttal [Reply] Submission [2016] with respect to the June 10, 2016 Records at Issue, which was provided on January 30, 2017:

Introduction

1. The Public Body states its response is provided in accordance with instructions set out by the External Adjudicator.

Scope of this Inquiry

2. The Public Body states as a general response to both Applicants, it notes this phase of the Inquiry relates only to the June 10, 2016 Records and the issue about whether or not the Public Body properly removed some information on the basis that it was Non-Responsive was an issue specifically excluded from the scope of this phase of the Inquiry. In the last paragraph of its Reply Submission, the Public Body repeats this point a second time.
   [NOTE: To be clear, the question of whether or not the Public Body properly excluded some information is not at issue in this phase of the Inquiry. The information itself, however, previously designated Non-Responsive that accounts for 20 pages of the June 10, 2016 Records at Issue with newly applied exceptions is the subject of this phase of the Inquiry.]

Reply to Second Applicant Initial Submission

3. Noting the Second Applicant has restricted its submissions to the issue of privilege, the Public Body claims it has identified the June 10, 2016 Records at Issue that are privileged and provided sworn evidence in support.
   [**NOTE**: It is important to point out that the only sworn evidence provided by the Public Body are the FOIP Director's and FOIP Advisor's respective affidavits that formed part of the Public Body Initial Submission [2014]. No affidavits were provided with respect to the June 10, 2016 Records at Issue, particularly the 20 new pages of the responsive records that were designated Non-Responsive at the time the 2014 affidavits were sworn. The Public Body now claims s. 27 for all 20 pages of the additional responsive records. No affidavit evidence was provided with respect to legal privilege over these new responsive records, despite my request to the Public Body to provide affidavits regarding the claim of legal privilege during this phase of the Inquiry.]

4. The Public Body submits that the Second Applicant has not presented any evidence that it has incorrectly asserted privilege, citing the *U of C* case, since, it submits, there is no such evidence.
   [**NOTE**: This response from the Public Body appears to suggest that the onus is on the Applicant to prove that the Public Body has incorrectly claimed legal privilege rather focussing on its own burden to prove the Applicants have no right of access under s. 71(1) of the *FOIP Act*.]

5. The Public Body asserts that the Second Applicant's reference to the Privilege Practice Note is irrelevant because it was released subsequent to the collection and processing of the Records at Issue and was released (by the Commissioner's Office) subsequent to direction from the External Adjudicator.
   [**NOTE**: The Public Body's assertion fails to acknowledge the dates of what has transpired with respect to the June 10, 2016 Records at Issue. While the access to information decision was made in 2012, it only involved the collection and processing of 15 pages (18 pages prior to the release of 2 pages in September 2016 and 1 page in June 2017). The remaining 20 pages originally designated as Non-Responsive (including the 3 released pages) were collected in June 2016 and *processed* in or before December 2016 when the designation of Non-Responsive was replaced with the exceptions the Public Body was claiming for those pages. The direction from the External Adjudicator was issued prior to that on November 16, 2016. Public Body Initial Submission [2016] was provided on December 14, 2016 prior to the Privilege Practice Note issued December 15, 2016 following the *U of C* and the *Lizotte* decisions both issued by the Supreme Court of Canada on November 25, 2016. The Second Applicant Initial Submission [2016] to which the Public Body is responding was provided on January 5, 2017. The Public Body Rebuttal [Reply] Submission [2016] was provided on January 30, 2017. Its right to reply gave the Public Body the opportunity to consider the Privilege Practice Note, as argued by the both Applicants, and a potentially opportune time to provide the kind of direct evidence with respect to legal privilege that I had already requested in my directions to the parties issued on November 16, 2016.

6. The Public Body submits that the *"Protocol"* is not law but only a guide, citing the *U of C* case at para. 69 and, regardless, the External Adjudicator can make her own determination about privilege by examining the Records at Issue provided to her.
[**NOTE**: The *"Protocol"* referred to in the Public Body's submission is the Solicitor-Client Privilege Adjudication Protocol developed by the Commissioner's Office; it has been replaced by the Privilege Practice Note.]

7. The Public Body repeats its assertion that the issue of the time frame (with respect to the access requests) is not in the scope of this phase of the Inquiry.
[**NOTE**: The Public Body refers to the fact that the scope is not at issue. Further to my November 16, 2016 correspondence to the parties, I advised that Issue #7 in the Inquiry has been referred to another forum. For the purpose of this phase of the Inquiry, no finding will be made regarding Issue #7.]

Reply to First Applicant Submission

8. The Public Body states that the First Applicant Submission refers to the CFA, which is not in the June 10, 2016 Records at Issue and thus is not at issue in the Inquiry.
[**NOTE**: The Public Body refers to the fact that because the CFA is not found within the June 10, 2016 Records at Issue, it is not at issue. The Public Body did, however, refer to the CFA in its own Initial Submission [2016] as part of its argument under s. 16. To be clear, the Public Body has confirmed that the CFA is within the Records at Issue at pages 551-564 and, therefore, while they are not being considered during this phase of the Inquiry with respect to the June 10, 2016 Records at Issue, the CFA pages will form part of the Records at Issue in the main Inquiry.]

9. The Public Body submits the First Applicant has not provided any evidence it has incorrectly asserted solicitor-client privilege and regardless the External Adjudicator can make her own determination by examining the Records at Issue, which have been provided to her.
[**NOTE**: Once again this response from the Public Body appears to suggest that the onus is on the Applicant to prove that the Public Body has incorrectly claimed legal privilege rather focussing on its own burden to prove the Applicants have no right of access under s. 71(1) of the *FOIP Act.*]

10. As s. 16 of the *FOIP Act* is a mandatory exception, records to which it applies must not be disclosed. The Public Body submits that it does not matter if the exception has been previously referred to by the Public Body; it is for the External Adjudicator to determine whether s. 16 applies.
[**NOTE**: In its correspondence dated January 19, 2017 providing another updated Index of Records in the main Inquiry (not correspondence or a submission specifically about the June 10, 2016 Records at Issue), the Public Body stated: *"In the course of its review after the U of C case, the Ministry noted that names of lawyers (or law firms) that submitted an expression of interest had previously been severed under section 17. If you find that section 17 does not apply in these circumstances, the Ministry submits that section 16 also applies. Disclosing the name of lawyers or law firms that submitted an expression of interest would reveal commercial information that was supplied in confidence."* The Public Body ***did not*** referentially incorporate the correspondence dated January 19, 2017 as part of its submissions in this phase of the Inquiry. Section 17 does not form part of the Public Body Initial Submission [2016]. The s. 17 exception is not an issue in this phase of the Inquiry as it has not been claimed for any of the pages of the June 10, 2016 Records at Issue. On comparing the original Index that accompanied the Public Body's access to information decisions with the Amended Index for the June 10, 2016, there is no example of a page of the records where the Public Body had relied on s. 17 but is now claiming s. 16. In fact, none of the original pages withheld in whole or in part under s. 17 form part of this phase of the Inquiry. Additionally, s. 17 has never been applied to any of the pages in the original or Amended June 10, 2016 Index of Records so the suggestion by the Public Body that where it has claimed s. 17, should it not apply, then I am to apply s. 16, is a non-issue during this phase of the Inquiry.]

11. In responding to the issue of s. 32 of the *FOIP Act,* the Public Body submits that rather than reading the words in isolation, all parts of it must be read in the context of the statute and the common law as a whole in a purposive manner. Thus, it submits, using the proper approach to statutory interpretation, it is clear that all parts of s. 32 only apply in emergent matters where delay would affect public health or safety, which is not the case here.

12. The Public Body submits, contrary to the First Applicant Initial Submission [2016], an applicant bears the burden of proof to establish the pre-conditions of s. 32 of the *FOIP Act* have been met, a burden that the First Applicant has not discharged.

13. The Public Body states that neither of the Applicants have provided any evidence that there is clearly a matter of public interest that would compel the Public Body to override its privacy rights and release the June 10, 2016 Records at Issue *"without delay."*
[**NOTE**: The Public Body does not make it clear what privacy rights it is referring to in this portion of its Reply Submission.]

E. PRIOR SUBMISSIONS OF THE PARTIES

[para 22] When this Inquiry began, prior to the First Applicant raising the PEO that resulted in an exchange of submissions about the PEO culminating in my previous Decision/Order, the parties had filed their respective Initial Submission [2014] with me. In their respective Initial Submission [2016] during this phase of the Inquiry, the Public Body and both Applicants referentially incorporated or referred to their prior submissions as follows:

1. First Applicant: Referentially incorporated July 9, 2014 and September 23, 2016.
2. Second Applicant: Made reference to his/her previous submissions without indicating specifically that it was his/her intention to incorporate them as part of his/her Initial Submission [2016]. I am treating his/her references to his/her past submissions, however, as part of his/her Initial Submission [2016] in this phase of the Inquiry.
3. Public Body: Referentially incorporated August 2, 2014, September 7, 2016, and September 19, 2016.

First Applicant

[para 23] In its Initial Submission [2016], the First Applicant referentially incorporated its Initial Submission [2014] dated July 9, 2014. I have re-examined the First Applicant's Initial Submission [2014] and its September 23, 2016 correspondence in relation to how these relate to the June 10, 2016 Records at Issue, a summary of which follows:

1. In its Initial Submission [2014], the First Applicant focussed the majority of its arguments on the Public Body's decision with respect to the CFA. While the pages reported by the Public Body to be the CFA are not part of this phase of the Inquiry, the First Applicant Initial Submission [2014] refers to the public discourse that ensued after the choice of counsel was made public. In this regard, paras. 29-51 are considered relevant. These have been considered in relation to the application of s. 32 of the *FOIP Act.* In addition, the evidence submitted by the First Applicant at para. 31 has been considered in relation to the application of the s. 16 exception. Also, the First Applicant's earlier submission with respect to the application of discretionary exceptions, legal privilege, public interest at paras. 29-51, 52-59, 68-71, 74, 83-87, 94-98, and 99-104 have been considered.

2. In its September 23, 2016 correspondence, the First Applicant reiterates its position *vis a vis* the Public Body unilaterally changing the scope of the access request. With respect to the latter, it provided direct evidence from a Public Body FOIP employee demonstrating that the CFA was included in the records at pages 551-564.

[**NOTE**: The submissions in this correspondence do not relate to the issues in this phase of the Inquiry and are therefore not relevant and will not be considered.]

To the extent the above are relevant to the Issues listed in para. 17 of this Order, these submissions have been considered and form part of this phase of the Inquiry.

Second Applicant

[para 24] In his/her Initial Submission [2016], the Second Applicant referred to some of his/her Initial Submission [2014], a summary of which follows:

1. The Second Applicant states that in his/her previous submission s/he acknowledged that the Public Body was not required to provide more detailed information with respect to privilege under the Adjudication Practice Note though it was recommended as best practice. This s/he submits changed under the recent Privilege Practice Note issued (by the Commissioner's Office) subsequent to the recent Supreme Court of Canada cases.
   [**NOTE**: The Adjudication Practice Note 1 provides guidance on preparing submissions, records and indexes for inquiries. The Privilege Practice Note, which replaced the Solicitor-Client Privilege Adjudication Protocol in December 2016, is for use in reviews and inquiries in which a public body has claimed solicitor-client privilege or litigation privilege to withhold information in records responsive to an access request. It is meant to ensure sufficient evidence is provided to support the claim of privilege especially in cases where the relevant records have not been provided to the Commissioner's Office as evidence.]

2. The Second Applicant states that in his/her previous submission s/he argued that the Public Body's Index of Records did not provide sufficient information for the Adjudicator to determine if legal privilege or any other exception cited has been properly applied.

3. The Second Applicant states that in his/her previous submission s/he pointed out that the Public Body chose to release a memorandum dated December 14, 2010 from the then Minister of Justice and Solicitor General while other documents with similar information were completely withheld by applying either solicitor-client or litigation privilege.

4. In his/her Initial Submission [2014], the Second Applicant provided submissions with respect to s. 32 and the extent to which the public would be clearly interested to know if the tobacco litigation was in its best interest, and, with respect to s. 16, the extent to which the government had already released economic information about a third party and the Public Body's failure to provide evidence of probable harm. Where the submissions relate to the CFA, these have not been considered.

To the extent the above are relevant to the Issues listed in para. 17 of this Order, these submissions have been considered and form part of this phase of the Inquiry.

Public Body

[para 25] In its Initial Submission [2016], the Public Body listed evidence it was relying on during this phase of the Inquiry that included its Initial Submission [2014] dated August 6, 2014 and correspondence dated September 7, 2016 and September 19, 2016. I have re-examined these in relation to how these relate to the June 10, 2016 Records at Issue, a summary of which follows:

1. In its Initial Submission [2014], the Public Body provided submissions on all the issues identified in the Notice of Inquiry sent to all parties in 2014. Some of these are not relevant in this phase of the Inquiry as they relate to exceptions which are not presently at issue. The Public Body has inter-woven reference to the CFA throughout these submissions, the pages for which are not at issue at this time. I am accepting that some of what is contained in the Initial Submission [2014] can be applied to the June 10, 2016 Records at Issue where they address the issues and

exceptions relevant to the pages in this phase of the Inquiry. On that basis, I have considered paras. 1-28 and 35-50. The following portions of the Public Body Initial Submission [2014] are not relevant at this phase and have not been considered: paras. 29-34 [waiver], paras. 51-55 [s. 25 exception], paras. 60-62 [s. 17 invasion of privacy], paras. 63-64 [inter-governmental relations]. If the arguments advanced in any of the paragraphs rely primarily on the CFA as their basis, I will, instead, rely on the Public Body Initial Submission [2016] as the CFA is not at issue at this time.

2. In its Initial Submission [2014], the Public Body produced two affidavits from FOIP officials within Alberta Justice and Solicitor General. The FOIP Advisor affiant states: *"I do verily believe that the Privileged Records involve the giving or seeking of legal advice."* S/he goes on to state: *"I am advised by …, legal counsel for the Public Body, and do verily believe that these records are subject to solicitor-client privilege and/or litigation privilege."*

3. The second affiant was the FOIP Director who again devotes most of his/her evidence to legal privilege and, after attesting to reviewing the responsive records, states: *"I found that the large majority are privileged"* listing some of the key indicators s/he considered, which s/he lists as follows:

   - *Records, e-mails or other correspondence to or from Alberta Health lawyers, and lawyers at Alberta Justice and Solicitor General;*
   - *Records are attached to correspondence to or from a lawyer;*
   - *The record is a communication between employees of a public body, quoting legal advice given by a lawyer;*
   - *The record is a note documenting legal advice given by lawyer; and*
   - *The information relates to an existing or contemplated lawsuit.*

   [**NOTE**: These categories of documents (more than "indicators") may apply to the Records at Issue in the main Inquiry, in other words, some of the responsive records at the time the affidavit was sworn in 2014. But in the case of the records being reviewed during this phase of the Inquiry, there is, in my opinion, only one possible match to the categories listed above in the information on the pages of the June 10, 2016 Records: *"the information relates to an existing or contemplated lawsuit."*]

4. The FOIP Director goes on to discuss the CFA over which s/he states the Public Body has not waived privilege; these pages are not presently at issue. There is one paragraph devoted to s. 24 in the affidavit but it simply recites the language of the statute.
   [**NOTE**: This affidavit evidence is of minimal use for two reasons: one, it relates to the whole of the Records at Issue (at that point a total of 564 pages) and two, it does not provide the kind of evidence that would typically be required to demonstrate how the exceptions apply specifically to the information in the June 10, 2016 Records at Issue. In my November 16, 2016 correspondence to the parties I specifically said the following to the Public Body: *"In the case of where the s. 27 legal privilege exception has been claimed over the June 10, 2016 Records at Issue, it will be necessary for the Public Body to provide, as part of its Initial Submissions [2016], an affidavit from the individual(s) with direct knowledge of the Records [the lawyer or lawyers who were involved] attesting to their personal knowledge that the s. 27 legal privilege exception applies."* The Public Body did not comply with this request.]

5. There was no effort on the part of the Public Body in its Initial Submission [2016] to correct this absence of evidence with respect to the specific 35 pages of the June 10, 2016 Records at Issue regarding the claimed exceptions: s. 16, s. 24, and s. 27, which are the only exceptions at issue during this phase of the Inquiry.

6. In its correspondence dated September 7, 2016, the Public Body repeats its position that the issue of the exclusion of drafts and the access request cut-off date are no longer at issue. The letter goes on to make submissions with respect to whether the Public Body has waived privilege; waiver is not at issue at this stage of the Inquiry. The final paragraph of the letter provides a submission with respect to the application of s. 32(1) of the *FOIP Act.* It submits that s. 32 deals with public health and safety and other emergencies, which the present situation does not involve. The Public Body submits that the Ministry's decision whether to waive solicitor-client or any other legal privilege necessarily takes into account the public interest; this case involves records about significant litigation and it is not in the public interest to do anything which might affect the litigation.

7. The Public Body lists its September 19, 2016 correspondence as containing submissions it wanted incorporated as part of its Initial Submission [2016] during this phase of the Inquiry. It is somewhat confusing as to why this letter has been included as it deals almost exclusively with questions I asked the Public Body to answer with respect to the exclusion of drafts and the limit it imposed on the time frame of the access requests, which issues the Public Body knows do not form part of this phase of the Inquiry and is aware are being dealt with in another forum. The Public Body cannot be confused as it is adamant in its Reply Submission [2016] that these issues are not within the scope of this phase of the Inquiry. The only portion of the September 19, 2016 letter that could be relevant at this phase can be found on page 5 of the letter referring to s. 32(1) of the *FOIP Act*. The Public Body admits, however, this is a reiteration of its earlier submission with respect to public interest contained in its September 7, 2016 letter discussed above. It is unnecessary and would be inappropriate for me to consider anything other than its reiteration with respect to public interest, which can be found in the Public Body's September 7, 2016 correspondence, during this phase of the Inquiry.

To the extent the above are relevant to the Issues listed in para. 17 of this Order, these submissions have been considered and form part of this phase of the Inquiry.

V. DISCUSSION OF ISSUES

ISSUE #1: Whether the Public Body properly relied on and applied the s. 27 exceptions, specifically s. 27(1)(a), s. 27(1)(b)(ii), and s. 27(1)(c)(ii) of the *FOIP Act,* to the information in the June 10, 2016 Records at Issue.

A. Section 27(1)(a)

[para 26] Section 27(1)(a) [legal privilege] has been claimed for 33 of the total 35 pages of the June 10, 2016 Records at Issue [98, 99-102, 103-107, 113-119, 129, 258-261, 262-264, 265-268 and 645-648]. Section 27(1)(a) has been claimed by the Public Body for all of the June 10, 2016 Records at Issue except 2 pages [210, 211]. Where the Public Body establishes that it has properly relied on and properly applied the legal privilege exception in s. 27(1)(a) applies to these 33 pages of the records and that it has properly exercised its discretion to refuse access, it would be unnecessary for me to go on to consider the other discretionary or mandatory exceptions claimed for 33 pages of the records, therefore, s. 27 will be dealt with first. Under s. 71(1) of the *FOIP Act,* the Public Body has the burden to prove the Applicants have no right of access to the information that it withheld under s. 27(1)(a).

[para 27] The exception in s. 27(1)(a) of the *FOIP Act* reads as follows:

> *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,*

[para 28] As I emphasized in my previous Decision/Order, there is no doubt that legal privilege is of fundamental importance to our justice system, a *"privilege (that) must be sedulously protected." [Alberta v. Suncor Inc., 2017 ABCA 221 [Suncor].*

> ***Solicitor-client privilege is fundamental to the proper functioning of our legal system.***
> *...*
> ***[S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance.*** *As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by case basis...It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised.* ***The privilege belongs to the client not the lawyer.*** *In Andrews v Law Society of British Columbia, [1989] 1 S.C.R. 143, at p. 188, McIntyre J. affirmed yet again that* ***the Court will not permit a solicitor to disclose a client's confidence.***
> *[Canada (Privacy Commissioner) v Blood Tribe Department of Health, [2008] 2 SCR 574, at para. 9 citing R. v McClure, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 35, quoted with approval in Lavallee, Rackel & Heintz v Canada (Attorney General), [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 36]*
> *[Decision/Order, at para. 77; See also Suncor, at para. 22]*
> *[Emphasis in original]*

[para 29] Distinguishing the nature of the solicitor-client exception from other exceptions available to public bodies under access to information legislation, the Supreme Court of Canada characterized it as close to absolute as possible when it stated:

> *We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in McClure, stressed the categorical nature of the privilege:*
>
> > *. . .* ***solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.***
> > *[Emphasis added; para. 35.]*
> > *(See also Goodis, at paras. 15-17 and Blood Tribe, at paras. 9-11.)*
>
> *Accordingly, we would uphold the Commissioner's decision on the s. 19 claim.*
> *[Ontario (Public Safety and Security), at para. 75; See also R. v. McClure, 2001 SCC 14, at para. 35]*
> *[Emphasis added]*

[para 30] Since my Decision/Order in 2014, the Supreme Court of Canada has had the opportunity to consider the issue of legal privilege in two instructive judgments that once again make the sanctity of legal privilege patently clear. The first of these cases dealt with solicitor-client privilege in which the Supreme Court of Canada stated:

> *The importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole. In R. v. Gruenke, [1991] 3 S.C.R. 263, Chief Justice Lamer described its rationale as follows:*
>
> > *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 ... [Emphasis added; p. 289.]*

[U of C, at para. 26]
[Emphasis underlining in original]

[para 31] The second recent decision by the Supreme Court of Canada lays out the characteristics and the importance of litigation privilege, also a part of the s. 27(1)(a) legal privilege exception, when it said the following:

> *Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts: J.-C. Royer and S. Lavallée, La preuve civile (4th ed. 2008), at pp. 1009-10.*
> *…*
> *However, since Blank was rendered in 2006, it has been settled law that solicitor-client privilege and litigation privilege are distinguishable. In Blank, the Court stated that "[t]hey often co-exist and [that] one is sometimes mistakenly called by the other's name, but [that] they are not coterminous in space, time or meaning" (para. 1). It identified the following differences between them:*
>
> - *The purpose of solicitor-client privilege is to protect a relationship, while that of litigation privilege is to ensure the efficacy of the adversarial process (para. 27);*
> - *Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends (paras. 34 and 36);*
> - *Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services (para. 32);*
> - *Litigation privilege applies to non-confidential documents (para. 28), quoting R. J. Sharpe, "Claiming Privilege in the Discovery Process", in Special Lectures in the Law Society of Upper Canada (1984), 163, at PP. 164-65);*
> - *Litigation privilege is not directed at communications between solicitors and clients as such (para. 27).*
>
> *The Court also stated that litigation privilege, "unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration" (Blank, at para. 37). Moreover, the Court confirmed that only those documents whose "dominant purpose" is litigation (and not those for which litigation is a "substantial purpose") are covered by the privilege (para. 60). It noted that the concept of "related litigation", which concerns different proceedings that are brought after the litigation that gave rise to the privilege, may extend the privilege's effect (paras. 38-41).*
>
> *While it is true that in Blank, the Court thus identified clear differences between litigation privilege and solicitor-client privilege, it also recognized that they have some characteristics in common. For instance, it noted that the two privileges "serve a common cause: The secure and effective administration of justice according to law" (para. 31). More specifically, litigation privilege serves that cause by "ensur[ing] the efficacy of the adversarial process" (para. 27) and maintaining a "protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (para. 40, quoting Sharpe, at p. 165).*
> *[Lizotte, at paras.19, 22-24; See also Blank, at paras. 27, 31, 37-41, 60].*

[para 32] I begin by looking at what evidence the Public Body has provided to support its reliance on s. 27. The Public Body has provided limited evidence to support its characterization of the information as falling within the meaning of legal privilege. The evidence relied upon, provided in August 2014, is from two affiants: FOIP employees neither of whom are identified as lawyers. In the case of the first

affiant, the FOIP Advisor, s/he attests to relying on legal advice from a staff lawyer that the information was privileged, when s/he states, *"I am advised by* [name]*, legal counsel for the Public Body, and do verily believe that these records are subject to solicitor-client privilege and/or litigation privilege."* The staff lawyer referred to in the affidavit is not identified as a party to or participant in or author of any of the information in the June 10, 2016 Records at Issue. Consequently, the evidence from the FOIP Advisor is of limited assistance as it amounts to hearsay.

[para 33] The second affiant, the FOIP Director, after listing his/her understanding of what constitutes litigation privilege, goes on to say, *"It is my understanding that litigation privilege applies where documents were created for the dominant purpose of furthering litigation, whether existing or contemplated. It was on this basis that I reviewed the Responsive Records. From my review of the Responsive Records, I found that the large majority are privileged."* The affiant lists key indicators that describe categories of documents. The FOIP Director also states what is his/her *"understanding"* of what legal privilege is and that from his/her review the privileged records were meant to be confidential.

> *Suncor* ***cannot, merely by having legal counsel declare that an investigation has commenced, throw a blanket over all materials "created and/or collected during the internal investigation" or "derived from" the internal investigation, and thereby extend solicitor-client privilege or litigation privilege over them.*** *This Court stated in ShawCor, at para 84, that "[b]ecause the question is the purpose for which the record was originally brought into existence, the mere fact that a lawyer became involved is not automatically controlling." And further, at para 87, the Court stated that "the purpose behind the creation of a record does not change simply because the record is forwarded to, or through, in-house counsel, or because in-house counsel directs that all further investigation records should come to him or her."*
> *[Suncor, at para. 34]*
> *[Emphasis added]*

[para 34] It is important to note that the FOIP Director refers to ***"Responsive Records"*** in his/her affidavit. This is important because 20 of the 35 pages in the June 10, 2016 Index were designated Non-Responsive when they were first provided by the Public Body [99-107, 113-119, 565, 645-648]. It was not until December 14, 2016 (part of the Public Body Initial Submission [2016]) that the Public Body provided the Amended Index showing it had relied on s. 27 for 20 of the newly added responsive pages of the June 10, 2016 Records at Issue. Also, the two affidavits were not specifically about the June 10, 2016 Records at Issue but were instead with respect to the complete responsive Records at Issue [564 pages] at the time they were sworn: FOIP Director July 31, 2014 and the FOIP Advisor April 16, 2013. Therefore, the FOIP Director's and the FOIP Advisor's affidavit evidence would not have included 20 of the 35 pages of the June 10, 2016 Records at Issue. Thus, because of all these limitations, the affidavits have little evidentiary value in this phase of the Inquiry as they were about the 564 pages of **"*Responsive Records"*** in the main Inquiry that did not include those designated Non-Responsive, which make up 20 of the 35 pages in the June 10, 2016 Records at Issue. There is no reference in either of the affidavits to specific pages of the June 10, 2016 Records at Issue and, of course, neither makes any reference to any of the Non-Responsive information or the Amended Index.

[para 35] To be fair to the affiants, both of these affidavits were provided as part of the Public Body Submission [2014] and were not prepared specifically in relation to the June 10, 2016 Records at Issue. In my November 16, 2016 correspondence to the parties providing instructions with respect to this phase of the Inquiry, I specifically asked the Public Body to provide an affidavit(s) from a lawyer(s) who was a party to the information to which the Public Body had applied the solicitor-client and/or litigation privilege exception in the June 10, 2016 Records at Issue, but this evidence was not provided as requested. What is the evidentiary burden on a public body to establish solicitor-client privilege? Former Commissioner Work answered that question as follows:

> *An illustration of the kind of information that will be satisfactory to establish a solicitor-client privilege claim is found in Ansell Canada Inc. v. Ions World Corp., [1998] O.J. No. 5034 (Ct. J.). In that case, the Court quoted prior cases asserting that* ***a party cannot avoid production by giving an "unadorned assertion that the documents are subject to solicitor and client***

> ***privilege". It said that the degree of detail required "should include the function, role and status of the receiver and sender of the documents in question and their relationship to the party to the action, the grounds for the claim of privilege, and a description of each document consistent with the law which renders it privileged"*** *(paras. 10, 19). See also the "Record Form" portion of the Protocol, and accompanying instructions.*
> *[Decision P2011-D-003, at para. 127]*
> *[Emphasis added]*

[para 36] Despite the sparse evidence, I will consider all of the submissions provided by the Public Body and review each piece of information on the pages of records withheld and consider whether the Public Body has established that the information severed falls under the s. 27(1)(a), s. 27(1)(b)(ii) and/or s. 27(1)(c)(ii) exceptions and/or whether or not the Records themselves reveal that they contain privileged information.

Solicitor-client Privilege

[para 37] Against the backdrop of recent jurisprudence on legal privilege, I turn to the first exception in Issue #1: Whether the Public Body properly relied on and applied s. 27(1)(a) of the *FOIP Act* to the information in the June 10, 2016 Records at Issue. With respect to this first issue, I begin by asking two questions. The first question is whether or not the Public Body has properly ***relied*** on the s. 27(1)(a) legal privilege exception. In other words, whether the information contained in the pages of the June 10, 2016 Records at Issue meets the definition of solicitor-client or litigation privilege. I begin with solicitor-client privilege.

> *As discussed above, the "head" making a decision under ss. 14 and 19 of the Act has a discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps.* ***First, the head must determine whether the exemption applies.*** *If it does, the head must go on to ask whether, having regard to all relevant interests,* ***including the public interest in disclosure****, disclosure should be made.*
> *[Ontario (Public Safety and Security), at para. 66]*
> *[Emphasis added]*

[para 38] As stated above, pursuant to s. 71(1) of the *FOIP Act,* the Public Body has the burden to prove the Applicants have no right of access to the information that it withheld under s. 27(1)(a). The burden rests with the Public Body, therefore, to demonstrate, on a balance of probabilities, one or both of the legal exceptions apply:

> *The Minister asserting the exemption has the burden of demonstrating that it applies. Any decision made by a Minister is subject to review by the Commissioner.*
> *[Ontario (Public Safety and Security), at para. 23]*

[para 39] In addressing the first question, I conducted a line-by-line review of the 33 pages of the June 10, 2016 Records at Issue where s. 27(1)(a) has been relied on, looking for any information that meets the definition of solicitor-client privilege.

> *However, for that information to fall within solicitor-client privilege, it still must meet the Solosky test. This is also consistent with a quote from Canada (National Revenue) v. Newport Pacific Financial Group SA, 2010 ABQB 568, cited by the Public Body:* ***"Solicitor client privilege must be a communication between a lawyer and his or her client, or part of the lawyer's work product <u>in the giving of legal advice</u>"*** *(my emphasis).*
> *[Order F2016-31, at para. 43]*
> *[Emphasis underlining in original; Other emphasis added]*

[para 40] In reviewing the 33 pages of records, I have relied on the *Solosky* test for making a determination about the applicability of solicitor-client privilege, as laid out by Justice Dickson (as he then was) in the Supreme Court of Canada:

> *...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.***
> *[Solosky v. The Queen, [1980] 1 SCR 821, at p. 837]*
> *[Emphasis added]*

[para 41] The question to be answered is: does some or all the information on the 33 pages of the June 10, 2016 Records at Issue meet all of the *Solosky* criteria? One of the three essential *Solosky* criteria is whether the pages of Records at Issue contain anything that falls within the definition of *"legal advice"* or is information that is part of a continuum of communicating for the purpose of obtaining legal advice.

> *As stated in Order F2009-018 (at paragraph 41):*
>
> > *Legal advice means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications (Order 96-017 at para. 23; Order F2007-013 at para. 73). The test for legal advice is satisfied where* ***the person seeking advice*** *has a reasonable concern that a particular decision or course of action may have legal implications,* ***and turns to his or her legal advisor to determine what those legal implications*** *might be; legal advice may be about what action to take in one's dealings with someone who is or may in future be on the other side of a legal dispute (Order F2004-003 at para. 30).*
> *[Order F2014-26, at para. 80]*
> *[Emphasis added]*

[para 42] The Applicants' requests to access information sought disclosure of records about requests for proposals, agreements, contingency contracts, the process to award a contract and all related information between the Alberta government and the lawyers retained or to be retained with respect to lawsuits or prosecutions against tobacco manufacturers for the recovery of tobacco related health care costs. The exchanges in some of the emails accompanied by drafts of documents appear to be authored by senior government employees or their staff within the Department of Justice and Solicitor General. The question is whether legal advice, as defined, is evident in any of these exchanges. In referring to a Federal Court of Appeal decision, Alberta Adjudicator Cunningham wrote:

> *In the foregoing excerpt, the Federal Court of Appeal proposes the following test to determine whether a* ***communication falls within the continuum of legal advice*** *so as to be subject to solicitor-client privilege:* ***Does the disclosure of the communication have the potential to undercut the purpose behind the privilege - namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them?***
> *[Order F2014-38, at para. 57; See also Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner), 2013 FCA 104]*
> *[Emphasis added]*

[para 43] Some of the pages in the June 10, 2016 Records at Issue reveal communications between senior government employees some of whom appear to be lawyers from a designation by their name [QC] though there is no indication or evidence that they are acting as an in-house government lawyer(s) for the Public Body or in a legal advisory capacity.

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

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

> *Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency: see R. v. Campbell, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, at para. 49. In Campbell, the appellant police officers sought access to the legal advice provided to the RCMP by the Department of Justice and on which the RCMP claimed to have placed good faith reliance. In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply. However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.*
>
> *Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose.* ***Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered: Campbell, supra, at para. 50.*** *[my emphasis]*

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

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

> *Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered […].*

From the foregoing authorities, I conclude that communications to and from a lawyer that are not made in the lawyer's capacity as a legal advisor, but in another capacity, are not protected by solicitor-client privilege. The Courts in Pritchard and in Campbell acknowledged that government lawyers may have functions other than providing legal advice, even when they draw on their legal expertise.
[Order F2016-35, at paras. 18-21; presently under Judicial Review]
[Emphasis underlining in original; Other emphasis added]

[para 44] In this case, some of the email exchanges have attachments and include draft documents, the author of which is not identified. The content of the communications do not reveal legal advice or any commentary about any legal advice given by anyone. The information contained in the records over which solicitor-client privilege has been claimed is information in the form of internal communications between employees that does not fit within the definition of legal advice or a continuum of communication between a solicitor and client within the framework of solicitor-client privilege.

> *The test for establishing the presence of solicitor-client privilege is not a narrow one. In Blood Tribe v. Canada (Attorney General), 2010 ABCA 112 the Alberta Court of Appeal determined that records need not contain legal advice to be subject to solicitor-client privilege. If the information has been communicated so that legal advice could be obtained or given, even though the information is not in itself legal advice, the information meets the requirements of "a communication made for the purpose of giving or seeking legal advice". The Court said:*
> *The appellant also argues that even if some of the documents contain legal advice and so are privileged, there is no evidence that all of the documents do so. For example, the appellant argues that minutes of meetings, emails and miscellaneous correspondence between Justice Canada lawyers and the Department of Indian and Northern Affairs may not contain any actual advice, or requests for advice, at all. The solicitor-client privilege is not, however, that narrow. As the court stated in Balabel v. Air India, [1988] Ch 317, [1988] 2 All E.R. 246 at p. 254 (C.A.):*
>
> > *Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages.* ***There will be a continuum of communication and meetings between the solicitor and client.*** *The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.*
>
> *The miscellaneous documents in question meet the test of documents which do not actually contain legal advice but which are made in confidence as part of the necessary exchange of information between the solicitor and client for the ultimate objective of the provision of legal advice.*
> *[Order F2017-54, at para. 67]*
> *[Emphasis added]*

[para 45] An essential *Solosky* criterion is that the information is *"a communication between a solicitor and client."* At the time the parameters of this phase of the Inquiry were set out, I specifically asked the Public Body to provide an affidavit from a lawyer(s) who could attest to their personal knowledge that legal privilege applied to the relevant 33 pages of the June 10, 2016 Records at Issue. Instead, the Public Body elected to rely on two previously submitted affidavits from Public Body employees charged with responsibility for FOIP that were provided with the Public Body Initial Submission [2014], as discussed above, not sworn during this phase of the Inquiry. I find this to be problematic for the following reasons: the affiants are not identified as lawyers, one affidavit is sworn on information and belief based on advice from a lawyer (not one of the affiants). One affiant swore the *large majority* are privileged referring to all of the Records at Issue (564 pages) not specifically the June 10, 2016 Records at Issue. Neither of the affidavits are specifically affirming the contents of the specific pages of the June 10, 2016 Records at Issue, particularly the new responsive pages, and yet the Public Body elected to rely on these affidavits rather than provide an affidavit(s) from a lawyer(s) as I requested. A recent court case in Saskatchewan faced the same evidentiary challenge:

> *[*KS*], an employee of the University, was charged with the responsibility of having the University comply with the requirements of the Act regarding disclosure. He provided an affidavit to the Commissioner's office which stated in part:*
>
> > *I am advised by [*RJA*], our legal counsel, and do verily believe it to be true that documents were withheld due to their impact on other legal matters involving [*DB*]. Specifically, [*RJA*] advised that* ***some of the documents are the subject of solicitor-client privilege****, and I do verily believe the same to be true.*
>
> *The Commissioner responded with various concerns: firstly, that the* ***affidavit was on information and belief and not taken by someone who was a lawyer. The Commissioner would have preferred an affidavit sworn by Mr. [A] that the documents were truly the subject of solicitor-client privilege. Secondly, the response indicated that <u>some</u> of the records were subject to solicitor-client privilege.*** *The Commissioner did not know which of those records were subject to the privilege … The Commissioner stated that* ***it could not tell if Mr [S] had reviewed any of the documents in question*** *that were being asserted were subject to the privilege.*
>
> *…*
>
> *Even in the University of Calgary case, relied on heavily by the University, that institution provided information consistent with the civil rules of court.* ***This University instead provided a response that led to ambiguity about whether there was any legitimate claim for seeking privilege resulting in a rejection by this Court of their entire position.***
>
> *[The Office of the Information and Privacy Commissioner, Saskatchewan v. The University of Saskatchewan, 2017 SKQB 140, at paras. 6-7, 39]*
>
> *[Emphasis underlining in original; Other emphasis added]*

[para 46] By the time I made the request to the Public Body for affidavit evidence from a lawyer(s) on November 16, 2016, the pages of the June 10, 2016 Records at Issue had been provided to me. Because the records themselves may or may not, on their face, reveal legally privileged information, I wanted to impress upon the Public Body the importance of providing affidavit evidence from a lawyer(s) who had knowledge about the information over which it was claiming legal privilege. This would have enabled me to measure if the communications met the criteria for the solicitor-client framework, as set out in the *Pritchard* and *Campbell* cases by the Supreme Court of Canada. That is, whether or not solicitor-client privilege can be applied is dependent on the Public Body providing evidence as to the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought or rendered. No such evidence has been provided. That is, the Public Body has failed to identify who is acting as a lawyer(s), who is the client, and what information is a privileged communication between them, including as part of a continuum of solicitor-client communications.

> *As set out in Campbell, supra, to establish that privilege applies to communications between itself and in-house counsel,* ***a public body must provide evidence as to the nature of the***

relationship between it and the lawyer, the subject matter of the advice, and the circumstances in which advice is sought and rendered. *As discussed by former Commissioner Work in Decision P2011-D-003, the evidence required to establish privilege "should include the function, role and status of the receiver and sender of the documents in question and their relationship to the party to the action, the grounds for the claim of privilege, and a description of each document consistent with the law which renders it privileged". [Order F2016-35, at para. 89; presently under Judicial Review; See also Order F2016-31, at para. 38; R. v. Campbell, [1991] 1 SCR 565]*
[Emphasis added]

[para 47] The final *Solosky* criterion is that the Public Body has provided evidence, or the records themselves reveal, the document or information was *"intended to be confidential by the parties."* One affiant attested that from his/her review s/he thought the records as of 2014 were meant to be confidential though no evidence is provided to support that statement. Also, here the affiant is only referring to the ***responsive*** records. I examined the June 10, 2016 Records at Issue line-by-line and page-by-page for evidence of an intention by the parties that the information be confidential. There is no privileged disclaimer at the foot of any of the emails and no emails have the Outlook sensitivity feature activated to tag the exchanges as privileged and confidential or private communication. On the documents marked draft there is no clear indication that the information was intended to be kept confidential or was considered privileged. Notably, in the information released to the Applicants (First Applicant: August 31, 2012 and Second Applicant: September 21, 2012), there are pages where the feature for *"Privileged and Confidential Communication"* has been activated (for examples, pages 4, 8, 10, and 11). The only email where a feature has been selected for the June 10, 2016 Records at Issue is page 120 that is marked "High Importance", which page was released to the Applicants during this phase of the Inquiry. The words "confidential", "private" or "privileged" do not appear anywhere on the remaining June 10, 2016 Records at Issue.

[para 48] Exercising caution not to reveal the contents of the June 10, 2016 Records at Issue, my observations with respect to **solicitor-client privilege** are as follows:

1. Above, I referred to the evidence from the Public Body as sparse. The reason is that the only evidence provided is in the form of affidavits from the FOIP Director and the FOIP Advisor that were part of the Public Body Initial Submission [2014]. The former affiant is not identified as a lawyer and attests that the large majority of responsive records are privileged. The affiant is referring to all the records in the main Inquiry (then 564 pages) and not specifically to the June 10, 2016 Records at Issue. The latter affiant is not identified as a lawyer and attests that (again with respect to all of the responsive records in the main Inquiry), s/he has been advised by a lawyer and does verily believe that the records are subject to both legal privileges. Both affidavits were sworn 2 years in advance of the 20 pages of the 35 total pages forming part of the records. This evidence is, therefore, of limited assistance and is not persuasive with respect to the June 10, 2016 Records at Issue.

2. The pages of records formerly designated as Non-Responsive would not have formed part of the Records at Issue about which the affiants swore their respective affidavits as no exceptions had been applied to those designated Non-Responsive. In addition, pages 645-648 [formerly 566-569] were not listed in the Index attached to the FOIP Director's affidavit or the FOIP Request List of Exemptions that accompanied the access to information decisions. This means that a total of 20 of the 33 pages where the legal exception under s. 27 has been applied were not pages of records over which the affiants swore their respective affidavits.

3. I attempted to address the sparcity of evidence during this phase of the Inquiry. Despite being requested to do so, the Public Body failed to provide any affidavit evidence from any of the government employees (who happen to be lawyers) or any lawyer(s) attesting to the fact that their exchanges involved solicitor-client or litigation privilege. In other words, the Public Body has failed to provide affidavit evidence from any lawyer(s) who authored or was the recipient of any of

the information in the records who could attest to the fact that the information is subject to solicitor-client privilege, contrary to my request for it to do so.

4. The records reveal there is no substantive legal advice sought or given between an identifiable solicitor ***and*** a client nor any commentary about legal advice. While some of the exchanges within the Records at Issue are between two senior employees of the Public Body and one from Alberta Health, at least two of whom are identified as lawyers [QC], they are neither communicating with a client nor are they exchanging information that falls within the meaning of legal advice. The information in the records reveals government employees, identified as lawyers [QC], engaging in what is more appropriately characterized as exchanges involving administrative decision-making; advice, recommendations, analyses, consultations, and/or deliberations. Alberta Health was never identified as *the client* in relation to its participation in the exchanges.

5. There is no direct evidence indicating the exchanges or the documents accompanying the emails were intended to be confidential as privileged communiques.

6. The information communicated between the senior government employees who happen to be lawyers does not fit within the solicitor-client framework as there is no exchange between a lawyer ***and*** a client. These individuals did not provide affidavits attesting to any role they had as a lawyer with respect to the information in the pages of records. The Public Body has failed to provide any evidence as to who the client is and who the lawyer is, who are engaged in a privileged communique, and failed to point to any information within the Records at Issue that is evidence of this relationship and exchange.

Litigation Privilege

[para 49] In addressing the first question of whether the Public Body has properly relied on the s. 27 exception, I conducted a line-by-line review of all 33 pages of the June 10, 2016 Records at Issue to identify any information meeting the definition of litigation privilege, as distinguishable from solicitor-client privilege. At paras. 13-14 of the Public Body Initial Submission [2016], it stated:

> *The 12 unreleased records are confidential communications between a solicitor and client in the context of obtaining legal advice,[3] and they all relate to the Government of Alberta's lawsuit against the tobacco companies pursuant to the Crown's Right of Recovery Act,[4] which remains ongoing to this day.*
>
> *Accordingly, the 12 unreleased records at issue in this phase of the inquiry are protected by both types of legal privilege.*

[para 50] While litigation privilege is clearly within the terms of the s. 27(1)(a) exception and together with solicitor-client privilege serves the common cause of a secure and effective administration of justice according to law, it is conceptually distinct from solicitor-client privilege. As the Supreme Court of Canada held in the *Blank* case:

> *This appeal requires the Court, for the first time, to distinguish between two related but conceptually distinct exemptions from compelled disclosure: the solicitor-client privilege and the litigation privilege. They often co-exist and one is sometimes mistakenly called by the other's name, but they are not coterminous in space, time or meaning.*
> *…*
> *Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in*

confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:

> ***It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two.*** *First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege.* ***This difference merits close attention.*** *The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.*
>
> *Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege.* ***Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).***
> *("Claiming Privilege in the Discovery Process", in Special Lectures of the Law Society of Upper Canada (1984), 163, at pp. 164-65)*

[Blank, at paras. 1, 26-28; See also Lizotte, at paras.19-25]
[Emphasis added]

[para 51] As I noted above in my summary of the Public Body Initial Submission [2016], the Public Body argued that *"all the exceptions"* claimed pursuant to s. 27 apply to all 12 records. Calculated another way, this means the Public Body has claimed that all the exceptions under s. 27 apply to all 35 pages of the records despite the fact that s. 27 has only been claimed for 33 pages of records. The affidavit of the FOIP Director at para. 13 does not offer any additional clarification when s/he states: *"I found that the large majority are privileged."* At para. 8 of its Initial Submissions [2016], the Public Body submits, "[l]*itigation privilege is now recognized as being a separate legal privilege from solicitor-client privilege"* yet claims multiple exceptions under s. 27, including both solicitor-client privilege and litigation privilege, apply to the same information in the records. The two privileges are intended to be distinct.

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.)*
>
> *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.***
>
> *Historically, it appears that the litigation privilege originated as an extension of the solicitor-client privilege. As described by Sopinka, Lederman, and Bryant in The Law of Evidence in Canada (Butterworths, 1992), at p. 653:*
>
> > *[solicitor-client privilege]…expanded beyond communications passing between the client and solicitor and their respective agents, to encompass communications between the client or his solicitor and third parties if made for the solicitor's information for the purpose of pending or contemplated litigation.*
>
> *Nevertheless, today the two types of privilege are based upon very different rationales. [Moseley v. Spray Lakes Sawmills (1980) Ltd., 1996 ABCA 141, at paras. 17-19] [Emphasis underlining in original; other emphasis added]*

[para 52] As referred to above, pursuant to s. 71(1) of the *FOIP Act*, the Public Body has the burden to prove the Applicants have no right of access to the information that it withheld under s. 27. To demonstrate that litigation privilege applies to any of the 33 pages of the Records at Issue where s. 27(1)(a) of the *FOIP Act* has been applied, it was necessary for the Public Body to meet a three-part test. In Order F2007-013, a former Commissioner provided the three-part test the Public Body must meet in order to demonstrate the litigation privilege had been correctly applied:

> *a. there is* ***a third party*** *communication, which may include*
>
> > *(i) communications between the client or the client's agents and third parties for the purpose of obtaining information to be given to the client's solicitors to obtain legal advice;*
> > *(ii) communications between the solicitor or the solicitor's agents and third parties to assist with the giving of legal advice; or*
> > *(iii) communications which are created at their inception by the client, including reports, schedules, briefs, documentation, etc.*
>
> *b. the maker of the document or the person under whose* ***authority*** *the document was made intended the document to be confidential; and*
>
> *c. the '****dominant purpose'*** *for which the documents were prepared was to submit them to a legal advisor and use in the litigation, whether existing or contemplated. The "dominant purpose" test consists of three requirements:*

(i) the document must have been produced with existing or contemplated litigation in mind,
(ii) the document must have been produced for the dominant purpose of existing or contemplated litigation, and
(iii) if litigation is contemplated, the prospect of litigation must be reasonable.
[Order F2007-013, at para. 78 citing Order 97-009; Dominant purpose remains the test for litigation privilege: See also Blank, at para. 60 and Suncor, at paras. 36-37.]
[Emphasis added]

[para 53] Has the Public Body met the three-part test to establish that it has properly relied on litigation privilege? While both privileges may apply to the same information, it is the Public Body that bears the onus to provide the evidentiary base to establish that each privilege applies independently.

Suncor asserted both solicitor-client and litigation privilege over nearly all of the documents it refused to produce. ***Although documents may frequently be subject to both forms of privilege, Suncor must independently distinguish whether solicitor-client or litigation privilege applies, in order to permit a meaningful assessment and review of each bundle of documents. Making a blanket assertion that both forms of privilege apply, in instances where one or the other is clearly unavailable, is a litigation tactic that ought to be discouraged.***

Parties must describe the documents in a way that indicates the basis for their claim: ShawCor at para 9. The grounds for claiming solicitor-client privilege and litigation privilege are distinct. A description that supports one class of privilege does not necessarily support the other.

To support a claim of solicitor-client privilege, Suncor must at least describe the documents in a manner that indicates communications between a client and a legal advisor related to seeking or receiving legal advice.

To support a claim of litigation privilege, Suncor must describe documents with enough particularity to indicate whether the dominant purpose for their creation was in contemplation of litigation.

In conclusion, we find that the chambers judge erred in finding that the documents were sufficiently described to allow an assessment of the privilege claims.
[Suncor, at paras. 45-48]
[Emphasis added]

[para 54] Further, exercising caution not to reveal the contents of the June 10, 2016 Records at Issue, my observations with respect to **litigation privilege** are as follows;

1. There is no evidence that any of the pages of records is an exchange of communications between a client and a third party. With respect to litigation privilege, the communications must be between clients or lawyers and third parties (witnesses, experts, etc) or created by a client and go beyond communications between lawyers and clients. The exchanges in the Records at Issue involve employees of the Public Body who are administrative staff and senior government employees who happen to be lawyers but are not acting as legal counsel nor communicating with a client or clients, their agents or third parties. There is no communication with a third party or with outside retained counsel.

2. At the time of the requests to access information and the Public Body's response to the access requests in 2012 and the 564 pages of records in the main Inquiry were compiled, the lawyers who were to act on behalf of the Province in lawsuits to recover tobacco related health care costs had been selected. As revealed in the Applicants' submissions, the litigation was reasonably foreseeable as the decision to proceed with litigation for the recovery of tobacco related health

care costs had been publicly announced and since the time of the access to information requests, the anticipated litigation has been commenced. There is no evidence before me that the litigation has concluded.

3. As noted in the observations with respect to solicitor-client privilege, the pages of records formerly designated as Non-Responsive would not have formed part of the records about which the affiants swore their respective affidavits as no exceptions had been applied to those Non-Responsive pages. In addition, pages 645-648 [formerly 566-569] were not listed in the exhibits attached to the FOIP Director's affidavit including an Index and the FOIP Request List of Exemptions that accompanied the access to information decisions. This means that a total of 20 of the 33 pages where the legal exceptions under s. 27 have been applied were not pages of records over which the affiants swore their affidavits.

4. While the information is about the selection of counsel for future litigation, in part the subject of the Applicants' access requests, I find it is not information that is protected from disclosure under the test for litigation privilege that was re-affirmed in *Lizotte,* at para. 60: maintaining a *"protected area to* ***facilitate investigation and preparation of a case for trial by the adversarial advocate.****" [my emphasis]* Said another way, there is no substantive content in the information in the records about facilitating the investigation and preparation for the anticipated litigation either with a client's agent or a third party and instead relates solely to the process of selection of counsel for planned future litigation.

5. There is no evidence that this document was created with the dominant purpose of receiving legal advice in preparation for, or as an aid to, the conduct of litigation. There is no information given to a legal advisor or third party for use in litigation.

6. Even giving the definition of litigation privilege its broadest interpretation, it is difficult, if not impossible, to conceptualize how information in emails and documents exchanged between employees of the Public Body about retaining lawyer(s) for the purpose of future litigation could fall within the meaning of litigation privilege as part of the exception in s. 27(1)(a) of the *FOIP Act*. The dominant purpose for which the documents were prepared was not to provide them to a legal advisor for use in the anticipated litigation.

7. As discussed at para. 47 above with respect to solicitor-client privilege (the same 33 pages to which litigation privilege has been applied), there is no evidence indicating the email exchanges or the documents accompanying the emails were intended to be confidential. For example, there is no privileged disclaimer at the foot of any of the emails and no emails have the Outlook sensitivity feature activated to tag the exchanges as privileged and confidential or private communications.

[para 55] The Public Body Initial Submission [2014] and Initial Submission [2016] were insufficient to demonstrate how the s.27(1)(a) exception applies to the 33 pages where it has been claimed. After a careful review of the June 10, 2016 Records at Issue and all of the submissions, I find the Public Body's response overall with respect to s. 27(1)(a) has led to ambiguity about any legitimate claim for seeking privilege for the 33 pages to which it has been applied. Therefore, I find the Public Body did not properly rely on the legal privilege exceptions in s. 27(1)(a) of the *FOIP Act*.

[para 56] It is only after the first question is answered in the affirmative, in other words, that the Public Body has demonstrated the exception has been properly relied on, that I would turn to the second question; whether or not the Public Body has properly exercised its discretion in withholding the Records at Issue under the s. 27(1)(a) exception. Because the legal privilege exceptions do not apply to the 33 pages of the Records at Issue over which it has been claimed, it is unnecessary to consider the Public Body's exercise of discretion under s. 27.

[para 57] I turn now to consider the other exceptions applied by the Public Body to the pages of the June 10, 2016 Records at Issue before considering whether or not to order the release of the pages for which the Public Body had claimed s. 27(1)(a).

[para 58] Before doing so, it is important to consider evidence of a report referred to by the parties. When it provided the June 10, 2016 Records at Issue to the Commissioner's Office, the Public Body's explanation for doing so made reference to the Ethics Commissioner's review. Counsel for the Public Body indicated s/he had received new instructions based on the Ministry's decision to provide new information to the Ethics Commissioner. This came as a result of the findings in the Iacobucci Review Report. Counsel for the Public Body explained this is what led to the June 10, 2016 partial release of Records at Issue to me as the External Adjudicator, the records which are the subject of this phase of the Inquiry. In my July 5, 2016 letter to the parties, I acknowledged that the Public Body's correspondence had pointed to the Iacobucci Review Report thereby signalling the report's relevance to this phase of the Inquiry. The Applicants made reference to the report in their submissions. At para. 103 of his Review Report, the Hon. Iacobucci wrote:

> *In this case certain relevant information was not available to the Ethics Commissioner because it was subject to claims of solicitor-client privilege. In making this observation I do not intend to question the decision by the Government to assert privilege. Legal privilege is foundational to our legal system; solicitor-client privilege in particular has been described as "fundamental to the justice system in Canada."*

[para 59] This observation is reproduced here to highlight the fact that the Hon. Iacobucci was clearly attuned, at the time of his Review Report being made public on March 30, 2016, to the possible sensitivity of the information before him, some of which the Public Body claimed was protected by solicitor-client privilege. The June 10, 2016 Index of Records had 6 clusters of Records for which no exceptions were listed but instead were designated Non-Responsive. As shown in Appendix A, it was not until December 14, 2016 when the Public Body provided its Initial Submission [2016] that the Public Body replaced the Non-Responsive designation for 20 of the pages of the June 10, 2016 Records at Issue with exceptions, including legal privilege, under s. 27 of the *FOIP Act.* The exceptions that were added to the December 14, 2016 Amended Index were not marked on the actual pages of records.

[para 60] It is of special interest, therefore, to point to the contents of many pages of the June 10, 2016 Records at Issue that are quoted or referred to by the Hon. Iacobucci in his Review Report.

[para 61] In order not to reveal the contents of the June 10, 2016 Records at Issue, I ***will not provide*** where in the Iacobucci Review Report the Records are quoted. I will, however, cite the pages of the Records that have been ***quoted in*** the Iacobucci Review Report for which the Public Body has applied the legal privilege pursuant to s. 27(1)(a) of the *FOIP Act*:

> Pages: 99, 100, 101, 114, 115, 129, 259, 266, 646 [formerly 567], 647 [formerly 568]
> [**NOTE**: For most of these pages of records, the Public Body initially designated them as Non-Responsive: 99, 100, 101, 114, 115, 646 [formerly 567], 647 [formerly 568.]

[para 62] I also cite the pages of records where the contents of the information contained in the records has been ***referred to in*** the Iacobucci Review Report, where the Public Body has applied the legal privilege exception in s. 27(1)(a) of the *FOIP Act*:

> Pages: 99-107, 113-119 [114 in particular], 645-648 [formerly 566-569]
> [**NOTE**: For all of these pages of records, the Public Body initially designated them as Non-Responsive.]

[para 63] As a result, I am confident in my finding that legal privilege does not apply to any of the pages over which it has been claimed, specifically, those pages referred to above because I consider it to be a reasonable conclusion that the Hon. Iacobucci would not have quoted or revealed the information in the documents referred to in his public report were any of it, in his judicious opinion, subject to solicitor-

client or litigation privilege. It is important to note that the Iacobucci Review Report was made public on March 30, 2016, two plus months in advance of the 20 pages of the June 10, 2016 Records at Issue being compiled and eight plus months in advance of the information previously designated Non-Responsive being processed and the exceptions applied. In other words, the information from the majority of pages that make up the June 10, 2016 Records at Issue were in the public domain well before they were provided me as the External Adjudicator. I turn now to the other exceptions claimed by the Public Body pursuant to s. 27.

B. Section 27(1)(b)(ii)

[para 64] Section 27(1)(b)(ii) [information prepared by or for an agent or lawyer of the Minister of Justice and Solicitor General] has been claimed for 33 of the total 35 pages of the Records at Issue [98, 99-102, 103-107, 113-119, 129, 258-261, 262-264, 265-268 and 645-648]. Under s. 71(1) of the *FOIP Act*, the Public Body has the burden to prove the Applicants have no right of access to the information that it withheld under s. 27(1)(b)(ii).

[para 65] The exception in s. 27(1)(b)(ii) of the *FOIP Act* reads as follows;

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *…*
>
> *(b) information prepared by or for*
>
> *…*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, …*
>
> *in relation to a matter involving the provision of legal services,*

[para 66] I turn to the second part of Issue #1: Whether the Public Body properly relied on and applied s. 27(1)(b)(ii) of the *FOIP Act* to the information in the June 10, 2016 Records at Issue. Relying on the *Ontario (Public Safety and Security)* case, I begin by asking the first of two questions: whether or not the Public Body has properly ***relied*** on s. 27(1)(b)(ii). In other words, do the Records at Issue over which this exception has been applied contain information prepared by or for a lawyer or agent of the Minister of Justice and Solicitor General in relation to a matter involving the provision of legal services?

[para 67] In order to determine if s. 27(1)(b)(ii) applies to the information over which it has been applied, it is necessary to examine the statutory language employed in the exception. First, what is meant by *"information prepared … in relation to a matter"*?

> *In the context of "information in relation to a matter involving the provision of legal services", I read "matter involving the provision of the legal services" such that the "matter" is constituted by, or consists of, the provision of legal services. The other potential interpretation of this part of the provision – that the phrase is met for any matter to which legal services have been provided at some time – is implausible. It would have the provision take into account a factor (that the matter happens to have involved the provision of legal services) that may be coincidental and have no relevance to the information that is being prepared and which requires the protection of the provision.* ***I interpret the phrase "information prepared in relation to" as referring to information compiled or created for the purpose of providing the services, in contrast to merely touching or commenting upon the provision of the services.*** *The use of the term "prepared" – which the Canadian Oxford Dictionary defines as "to make ready for use" - carries the suggestion that the information is necessary for the outcome that legal services be provided.*
>
> ***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.***

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.***
[Order F2008-021, at paras. 110-112]
[Emphasis added]

[para 68] Second, what is meant by *"prepared by or for"*?' The key is that the information in the record is for a lawyer or someone preparing the information under the direction of a lawyer.

For section 27(1)(b) to apply to information, ***the information in question must be prepared by the lawyer or someone acting under the direction of the lawyer for the purpose that a lawyer will use the information in order to provide legal services to a public body.***

In Order F2008-028, the Adjudicator held that the term "prepared" in section 27(1)(b) ***precludes information that is not substantive, such as dates, letterhead, and names and business contact information.*** *He said at paragraphs 156 – 158 of that order:*

> *I find that the substantive information on pages 305-311 was prepared for a lawyer of a public body in relation to a matter involving the provision of legal services, and therefore falls within section 27(1)(b)(iii). However, this is not because the information was sent to a solicitor, as the fact that information was destined to go to someone does not necessarily mean that it was prepared by or for that person. Under other sections of the Act,* ***it has been concluded that, for a record or information to be created "by or for" a person, the record or information must be created "by or on behalf of" that person*** *[Order 97-007 at para. 15, discussing what is now section 4(1)(q) of the Act; Order 2000-003 at para. 66, discussing what is now section 4(1)(j); Order 2008-008 at para. 41, discussing section 24(1)(a)]. Here, I find that the substantive content of pages 305-311 was prepared "for" the lawyer who received the information because the covering letter indicates that the sender of the information was specifically asked to provide input.*

[Order F2014-38, at paras. 84-85]
[Emphasis added]

[para 69] Third, the statute refers to *"agent or lawyer of the Minister of Justice and Solicitor General."* The information in the records does involve senior employees who appear to be lawyers [QC] but who are acting in a position other than as a *"lawyer of the Minister of Justice and Solicitor General."* An employee of the Public Body does not fall within the meaning of *"agent"* within the terms of s. 27(1)(c)(ii):

Even if the sender or recipient of correspondence is not a lawyer, section 27(1)(c) permits the withholding of information sent to or from an "agent". In my view, ***the reference to "agent" is not intended to include everyone employed by or otherwise acting on behalf of the Minister of Justice and Attorney General or another public body.*** *If that were the case, section 27(1)(c) would shield a great many records of a public body from disclosure under the Act, given that a great many records consist of correspondence from employees in relation to the advice or other services that they provide.* ***The Legislature may have cast a wide net in section 27(1)(c), but it could not have intended to cast such a wide net. If it had so intended, it would have used the word "employee" – as done elsewhere in the Act – rather than the word "agent".***

A basic rule of interpretation is that it is presumed that Parliament or a Legislature uses language carefully and consistently, and that within a statute, the same words are taken to have the same meaning and different words have different meanings [Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R 625 at para. 133, citing Ruth Sullivan, Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) at pp. 163 to 65]. Given this rule

of interpretation, the fact that the word "agent" is used in section 27(1)(c) – as well as 27(1)(b) – shows that the Legislature intended for the term "agent" to mean something different than the broader term "employee". ("Employee" is already defined in section 1(e) of the Act to include a person who performs a service for the public body under a contract or agency relationship, so use of the term "employee" would not have excluded outside legal and non-legal agents).
[Order F2008-028, at paras. 161-162]
[Emphasis added]

[para 70] Fourth, the reference in the statute is to *"the provision of legal services"* has been interpreted as follows:

In Order 96-017, the former Commissioner defined the term "legal services" to include any law-related service performed by a person licensed to practice law. In that Order, the former Commissioner also emphasized that this provision applies to information prepared in relation to a matter involving the provision of legal services.
[Order F2007-013, at para. 67]
[Emphasis underlining in original]

[para 71] Section 27(1)(b) clearly is meant to apply where *"information is* ***prepared by or for an agent or lawyer …*** *in relation to a* ***matter involving the provision of legal services."***

Applying the reasoning in Orders 99-022, F2008-021, and F2008-028, information "prepared for an agent or lawyer of a public body" is substantive 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 public body 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. The term "agent" does not refer to any employee of a public body, but to an individual who is acting as an agent of a public body under particular legislation or in the course of a specific matter or proceeding.*
[Order F2014-38, at para. 87; See also Order F2009-024, at paras. 74-75]
[Emphasis added]

[para 72] Adjudicators have consistently found that the information being *"prepared"* must have a substantive content with respect to the provision of legal services rather than communication that is simply administrative in nature. This would be consistent with where the s. 27(1)(b)(ii) exception is found in the statute; part of s. 27, the *"Privileged information"* exceptions.

However, to fall under section 27(1)(b), there must be "information prepared" as those words are commonly understood (Order 99-027 at para. 110). I therefore do not extend the application of section 27(1)(b) to the dates, letterhead, and names and business contact information of the sender and recipient of the information on pages 305-311. These are not items of information that were "prepared". In keeping with principles articulated in respect of sections 22 and 24 of the Act, section 27(1)(b) does not extend to non-substantive information, such as dates and identifying information about senders and recipients, unless this reveals the substantive content elsewhere. However, in the context of section 27(1)(b) - which applies more broadly to information that was prepared rather than substance of deliberations or advice under section 22 and 24 - I find that the heading on page 309 reveals the information that was prepared in the rest of the document.

Pages 351-352, 353 (lower two thirds), 355 (upper half) and 373 consist of e-mail exchanges. I find that the content of these e-mails may not be withheld under section 27(1)(b). With the exception of the last five lines of page 352 and the top half of page 351, I do not consider the information to be "prepared". ***In my view, the word "prepared" implies that there must be a***

> ***greater degree of substantive content, rather than simply a communication of an administrative nature (e.g., distributing documents, arranging meetings) or a communication referring to or briefly discussing information that has been prepared elsewhere.***
> *[Order F2008-028, at paras. 157-158]*
> *[Emphasis added]*

[para 73] The Public Body took issue with previous decisions from the Commissioner's Office that imposes the requirement that the information in the record must have substantive content in order to fall s. 27(1)(b). In that regard, the Public Body stated the following as part of its submissions:

> *Similarly, it is important to note that section 27(1)(b) does not refer to the substance of the legal services provided. To the extent that previous decisions of the Commissioner might have interpreted section 27(1)(b) as being restricted to information about the substance of the legal services provided, those decisions are incorrect in law. Further, if section 27(1)(b) were only to apply to information about the substance of the legal services provided, it would be unnecessary because information about the substance of the legal services provided would come under section 27(1)(a) - legal privilege. Because section 27(1)(b) is a separate provision in the Act indicates that the Legislature intended it to have a different meaning from section 27(1)(a).*
> *[Public Body Initial Submission [2014], at para. 11]*

[para 74] I am not persuaded by the Public Body's argument. Read as a whole the provision states: *"The head of a public body may refuse to disclose to an applicant information prepared by or for an agent or lawyer of the Minister of Justice and Solicitor General, … in relation to a matter involving the provision of legal services."* Based on the interpretations given to each of the language components in s. 27(1)(b)(ii), as above, and relying on the guidance provided by the heading of s. 27 (discussed in detail below), I conclude that the information in the records needs to have been prepared by or for an agent or lawyer and contain information in relation to the provision of legal services. I agree with the Public Body that the information protected from disclosure under s. 27(1)(b)(ii) will be distinct from information protected by legal privilege as that would fall under s. 27(1)(a). The information must, however, contain substantive content with respect to the provision of legal services that goes beyond non-substantive administrative information such as dates, names and references related to the administrative process of selection of outside counsel.

[para 75] Exercising caution not to reveal the contents of the June 10, 2016 Records at Issue, my observations with respect to s. 27(1)(b)(ii) of the *FOIP Act* are as follows:

1. The information in the 33 pages of Records was not information prepared by or for an agent or a lawyer of the Minister of Justice and Solicitor General. Rather it was information prepared by or for senior employees of the Public Body and another public body, Alberta Health, none of whom were acting in the capacity as a lawyer of the Minister of Justice and Solicitor General.

2. The information was not prepared by or for an agent or lawyer in relation to a matter involving the provision of legal services.

3. The information was prepared by, or for, an employee of the Public Body by or for another employee of the Public Body (or another public body) in relation to the process of selection of outside counsel with respect to the provision of future legal services.

4. The exchange was about the provision of legal services in the future by outside counsel, which lawyers are not a party to the exchanges documented in the information in the pages of the June 10, 2016 Records at Issue.

5. The requirement for there to be substantive information in the records about the provision of legal services by a lawyer or agent gives meaning to this exception. There is a difference between substantive information contained in a record that is **created for the purpose of providing a**

legal service and information that falls within the definition of solicitor-client or litigation privileged information.

6. As noted in the observations with respect to legal privilege, the 20 pages of records formerly designated as Non-Responsive would not have formed part of the records about which the affiants swore their respective affidavits as no exceptions had been applied and the pages did not form part of the Records at Issue at the time of being sworn. In addition, pages 645-648 (formerly 566-569) were not listed in the Index attached to the FOIP Director's affidavit or in the FOIP Request List of Exemptions that accompanied the access to information decisions. This means that a total of 20 of the 33 pages where the exceptions under s. 27(1) have been applied were not pages of records over which the affiants swore their affidavits.

[para 76] The Public Body Initial Submission [2014] and Initial Submission [2016] were insufficient to demonstrate how the s. 27(1)(b)(ii) exception applies to the 33 pages where it has been claimed. After a careful review of the June 10, 2016 Records at Issue and all of the submissions, I find the Public Body's response overall with respect to s. 27(1)(b)(ii) has led to ambiguity about any legitimate claim for seeking privilege for the 33 pages to which it has been applied. Therefore, I find the Public Body did not properly rely on the legal privilege exceptions in s. 27(1)(b)(ii) of the *FOIP Act*.

[para 77] Because this exception has not been properly relied on, it is unnecessary to consider the Public Body's exercise of discretion under s. 27(1)(b)(ii). Turning now to the final exception claimed under s. 27.

C. Section 27(1)(c)(ii)

[para 78] Section 27(1)(c)(ii) [information in correspondence between an agent or lawyer of the Minister of Justice and Solicitor General and any other person] has been claimed for a total of 2 pages of the Records [98, 129]. Under s. 71(1) of the *FOIP Act,* the Public Body has the burden to prove the Applicants have no right of access to the information that it withheld under s. 27(1)(c)(ii).

[para 79] The exception in s. 27(1)(c)(ii) of the *FOIP Act* reads as follows;

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *…*
>
> *(c) information in correspondence between*
>
> *…*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, …*
>
> *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 80] I turn to the third part of Issue #1: Whether the Public Body properly relied on and applied s. 27(1)(c)(ii) of the *FOIP Act* to the information in the June 10, 2016 Records at Issue. I begin by asking the first of two questions: whether or not the Public Body has properly ***relied*** on s. 27(1)(c)(ii). In other words, do the June 10, 2016 Records at Issue over which this exception has been applied contain information in correspondence between an agent or lawyer of the Minister of Justice and Solicitor General 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 81] The 2 pages to which the Public Body has applied this exception are described in the Amended Index as an 'Email' with dates on both records disclosed. Both of these pages of records involve an email exchange between senior employees within the Public Body and another employee from Alberta Health, at least two of whom are identified as lawyers [QC]. Those identified as lawyers are not, however, identified as a *"lawyer of the Minister of Justice and Solicitor General"* in the information in the records themselves or in any of the submissions provided by the Public Body. In other words, the information on these 2 pages of records does not reveal any person acting in the capacity of a lawyer or

legal counsel. The information in the emails is in relation to, and part of the process of, the selection of outside counsel to provide future legal services.

[para 82] McMahon, J., sitting as an External Adjudicator, had the following to say with respect to s. 27(1)(c):

> *As can be seen from the foregoing, the exemptions and exceptions are very wide and have the potential to sweep in a number of government documents. In addition, the head of a public body has a discretion in many cases to release documents or not. Despite the noble sentiments often expressed in support of this kind of legislation, the reality is that a government's desire for secrecy too often trumps the nominal objective of "freedom of information". When attempting to access information from Alberta Justice files in particular, one need only look to s. 27(1) to see the crafted impediments. Subsection 27(1)(b) permits the public body to refuse disclosure of information prepared by or for an agent or a lawyer of the public body that merely relates to a matter involving the provision of legal services. The information need not involve the provision of actual legal services. Even more sweeping is subsection 27(1)(c). It permits non-disclosure of information in any correspondence between a lawyer of a public body (which would include all Alberta Justice lawyers), or an agent of a public body (which would extend to the non-legal staff of Alberta Justice) on the one hand, and anyone else. **The information need merely relate to a matter involving the provision of any kind of advice or any kind of service by the agent or lawyer.***
>
> ***It would be difficult to draft a more general or exclusionary clause.** Despite the fact that it was public money facilitating Mr. Day's legal defence, only selective documents have been released to the public under the "public interest override" contained in s. 32 of the Act. These documents deal with, primarily, settlement costs. Thousands of records still remain hidden from public view. Vesting in the head of the public body, in this case the Minister of Justice, the discretion to disclose or not to disclose in the context of these broad provisions permits government to manipulate public knowledge by the selective release of documents, as occurred here. That process has however legislative sanction.*
> *[OIPC External Adjudicator Order #4 (October 3, 2003), at paras. 12-13]*
> *[Emphasis underlining in original; Other emphasis added]*

[para 83] Notwithstanding the breadth of s. 27(1)(c) of the *FOIP Act* referred to by Adjudicator McMahon, a more recent decision examined the language in s. 27(1)(c)(ii) to reveal what is required for a Public Body to deny access to records based on this exception. In that case, Adjudicator Cunningham said:

> ***As stated above, section 27(1)(c)(iii)*** [sic] ***contemplates information in correspondence between a public body's lawyer and any other person; the correspondence must be in relation to a matter in which involves the provision of advice or services by the lawyer.***
>
> *Here, the correspondence in question was between the Third Party and the Public Body's lawyer. The correspondence was in relation to a matter, and the matter, from the perspective of the Public Body, involved the provision of legal services to the Public Body.*
>
> *However, the correspondence was itself not in relation to the provision of advice or other services by the lawyer; the correspondence was in relation to the legal status of certain organizations and what the correspondent thought the significance of that status might be. **Nothing in the content of the emails suggests that the correspondence was prepared for the purpose of directing how the lawyer might use the information to provide advice to the public body, or that this was even contemplated. If there were a prior exchange of information which could lead me to conclude that the correspondence was prepared for this purpose, then this was not stated or explained to me.***

To put this another way, I believe that the understanding of both parties to the correspondence must be that there is a matter involving the provision of advice or other services by the lawyer, and the correspondence is intended, if not to advance the matter, then to relate to that matter. For example, if a party were to send an offer of settlement to the lawyer of a public body, then such correspondence would be "in relation to a matter involving the provision of advice or other services" by the public body's lawyer. However, if a third party sends correspondence to a public body's lawyer and the third party does not contemplate that there is a matter involving the provision of a lawyer's advice or services, then the correspondence cannot be said to be in relation to such a matter.

That is not to say that a lawyer cannot obtain information on a confidential basis from a third party that the lawyer requires in order to provide advice or services. (Such information is typically covered by litigation privilege when it is obtained for the dominant purpose of preparing for litigation.) Rather, I mean that section 27(1)(c) is intended to allow parties to correspond freely in relation to matters about which they need to speak in order to allow the lawyer's advice or services to be provided.

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 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".

***It also seems to me that section 27(1)(c) is intended to address correspondence in which at least one of the parties is in a position to require that the information in the correspondence be kept in confidence, or certainly, not to be entered into evidence in court. I say this because section 27(1)(c) would serve little purpose if the information in question (i.e. the information in the correspondence) is publicly available, or the sender has the power to disclose the information unilaterally and the fact that it was sent. The purpose of allowing a public body's lawyers or agents to correspond freely without fear of interference** (discussed above) would not be met if the sender could make the correspondence generally known. Again, here, there were no requests for, or assurances or expectations of confidentiality, or certainly, none that have been provided to me.*
[Order F2015-22, at paras. 115-121]
[Emphasis added]

[para 84] The question is whether the information contained in these 2 pages of correspondence falls within the terms of s. 27(1)(c)(ii). The heading of s. 27 of the *FOIP Act* is *"Privileged information"* and has been found to assist:

I also note that the heading of section 27, of which section 27(1)(c) is a provision, is "Privileged Information". Section 12(2)(c) of the Interpretation Act states that headings do not form part of the provision; however, jurisprudence establishes that headings can be evidence of legislative intent when a provision is ambiguous, despite provincial interpretation acts.

Pierre-André Côté notes the following on page 63 of his work, The Interpretation of Legislation in Canada:

> *It is accepted today that headings and subheadings are part of a statute and thus relevant to its construction.* ***Headings may help to situate a provision within the general structure of the statute: they indicate its framework, its anatomy. Headings may also be considered as preambles to the provisions they introduce. The heading is a key to the interpretation of the sections ranged under it.***
>
> *How much weight should headings be accorded? Some authorities maintain that headings may be looked at only where there is ambiguity in the enacting words. If these*

> *cases are meant to suggest that headings may be ignored, such a method of statutory interpretation is no longer followed. Because they are part of the statute, they must be taken into consideration as part of the context, even where the enactment itself is clear.*
>
> ***If one considers the context created by the heading of section 27, and also considers that sections 27(1)(a), 27(2), and 27(3) all address privileged information, it seems reasonably likely that sections 27(1)(b) and 27(1)(c) address similar kinds of information that are not necessarily caught by section 27(1)(a).***
> *[Order F2015-22, at paras. 122-124]*
> *[Emphasis added]*

[para 85] While the 2 pages of Records are clearly information in an email correspondence related to the choice of legal counsel to provide future legal services, the email is between employees of the Ministry of Justice and Solicitor General. There is no correspondence between an *"agent"* and *"any other person"* or correspondence between a lawyer of the Minister of Justice and Solicitor General and *"any other person"*:

> *Section 27(1)(b) refers to information prepared by an agent or lawyer of the Minister of Justice and Attorney General, or an agent or lawyer of a public body. "Agent" is a term with many meanings. In broad terms, an agent can be a representative or a person who acts on behalf of, or at the direction of, another. However, in the context of the FOIP Act, "**agent" cannot mean any representative of a public body, such as an employee. I say this because "employee" is defined in the FOIP Act** and the definition includes both employees and those acting under an agency relationship with a public body, which suggests that the FOIP Act does not consider employees and agents to be the same thing unless the term "employee" is used. If a broad definition of "agent" had been intended, the legislature could have incorporated the already defined term, "employee" into the provision to better serve this purpose. In the facts before me, neither the Public Body nor EPS has argued or provided evidence to suggest that the employees who created records 3 – 10 and 29 – 30 were acting under an agency relationship with a public body or as lawyers of a public body when the information was created.*
> *[Order F2008-021, at para. 109]*
> *[Emphasis added]*

[para 86] Similarly, in this case, no person who was a party to the communications was identified as an agent. Though the record reveals what position was held by the senders and the recipients within Alberta Justice and Solicitor General and, on one page, Alberta Health, no evidence was provided by the Public Body to establish any of the correspondents were acting as lawyers for the Minister of Justice and Solicitor General or any public body within the terms of s. 27(1)(c)(ii). As discussed above, at para. 43, in the *Pritchard* and *Campbell* cases from the Supreme Court of Canada, there was a recognition that not every communication by a government lawyer will attract legal privilege:

> *Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered: Campbell, supra, at para. 50.*
> *[Pritchard, at para. 20]*
> *[Emphasis underlining in original]*

[para 87] Similarly, not all work undertaken by a senior government employee who happens to be a lawyer will fall within the terms of s. 27(1)(b) or (c) of the *FOIP Act*. I think the *Pritchard* rationale about in-house government lawyers doing policy or other non-legal work applies equally to where a person who is a lawyer, though not identified as an in-house counsel or a government lawyer, is doing policy, administrative or other non-legal work. Each case must be evaluated on a case-by-case basis with the Public Body adducing some evidence that the information in the record was prepared by or for a person acting in his/her capacity as a lawyer for the Minister of Justice and Solicitor General regarding the

"provision of legal services" or *"in relation to a matter involving the provision of legal services"* or *"the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer."*

[para 88] Exercising caution not to reveal the contents of the June 10, 2016 Records at Issue, my observations with respect to s. 27(1)(c)(ii) of the *FOIP Act* are as follows:

1. The 2 pages of emails are the continuation of an exchange with respect to the process of selecting outside counsel to represent the Alberta government in the recovery of tobacco related health care costs litigation.

2. The 2 emails originated from within the Ministry of Justice and Solicitor General and were authored by, or prepared for, senior employees of the Public Body and/or another public body.

3. The information in this correspondence was not provided by either the person providing the legal service or a person who was preparing the information on behalf of or for the use of the provider of the legal services.

4. Both pages were authored by senior officials within the Public Body who happen to be lawyers [QC] but there is no evidence that either were acting in the capacity as a *"lawyer of the Minister of Justice and Solicitor General."*

5. As the two individuals are *"employees"* of the Public Body, as defined in the *FOIP Act*, it is not appropriate to refer to either of them as *"an agent"* or *"any other person."*

6. There is nothing in the content of the records indicating that either the author or recipient intended the information to be confidential.

7. The information in the correspondence has no substantive content with respect to legal advice or litigation, present or future, but is more appropriately characterized as principally administrative in nature relating to the selection process to prepare a recommendation for a Minister.

8. The information in the Records is in relation to a matter involving the selection of counsel and the provision of future legal services but it is not *"information in correspondence **between** an agent or lawyer of the Minister of Justice and Solicitor General and any other person in relation to a matter involving the provision of advice or other [legal] services."* It is information about the ***process*** of selecting outside legal counsel for the provision of future legal services, who are not a party to the correspondence.

[para 89] The Public Body Initial Submission [2014] and Initial Submission [2016] were insufficient to demonstrate how the s. 27(1)(c)(ii) exception applies to the 2 pages where it has been claimed. After a careful review of the June 10, 2016 Records at Issue and all of the submissions, I find the Public Body's response overall with respect to s. 27(1)(c)(ii) has led to ambiguity about any legitimate claim for seeking privilege for the 2 pages to which it has been applied. Therefore, I find the Public Body did not properly rely on the legal privilege exceptions in s. 27(1)(c)(ii) of the *FOIP Act*.

[para 90] It is only after the first question is answered in the affirmative, in other words, that the Public Body has demonstrated that it properly relied on s. 27(1)(c)(ii) that I would turn to the second question; whether or not the Public Body has properly exercised its discretion in withholding the Records at Issue under the s. 27(1)(c)(ii) exception. Because the Public Body has not demonstrated that it has properly relied on this exception for the 2 pages [98, 129] of the Records at Issue over which it has been claimed, it is unnecessary to consider the Public Body's exercise of discretion.

[para 91] The Public Body has failed to provide clear, convincing and cogent evidence to discharge its burden of proof with respect to its reliance on any of the exceptions under s. 27. Therefore, I move on to consider the other exceptions applied by the Public Body to the pages of the June 10, 2016 Records at

Issue before considering whether or not to order the release of the 33 pages for which the Public Body has not properly relied on s. 27.

ISSUE #2: Whether the Public Body properly relied on and applied the s. 24 exceptions, specifically s. 24(1)(a) and s. 24(1)(b)(i) of the *FOIP Act,* to the information in the June 10, 2016 Records at Issue.

A. Section 24(1)(a)

[para 92] Section 24(1)(a) [information containing advice developed by or for a public body] has been applied, or partially applied, to 18 of the total 35 pages of Records [98, 129, 210, 258-261, 262-264, 265-268, 645-648]. Under s. 71(1) of the *FOIP Act*, the Public Body has the burden to prove the Applicants have no right of access to the information that it withheld under s. 24.

[para 93] The exception in s. 24(1)(a) of the *FOIP Act* reads as follows:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> > *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*

[para 94] With respect to s. 24, there are two questions. The first question is whether or not the Public Body has properly ***relied*** on s. 24 and, if so, the second question is whether or not the Public Body has properly ***applied*** s. 24. In addressing the first question, I conducted a line-by-line review of all 18 pages where the Public Body has relied on s. 24(1)(a) with the following in mind:

> *In previous orders, the Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a), and consultations or deliberations under section 24(1)(b) should:*
>
> > ***1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,***
> > ***2. be directed toward taking an action,***
> > ***3. be made to someone who can take or implement the action.*** *(Order 96-006, at p.10)*
>
> *In Order F2013-13, the adjudicator stated that the third arm of the above test should be* ***restated as "created for the benefit of someone who can take or implement the action"*** *(at paragraph 123).*
>
> *The first step in determining whether section 24(1)(a) and/or (b) were properly applied is* ***to consider whether a record would reveal advice, proposals, recommendations,*** *analyses, or policy options (section 24(1)(a)),* ***or consultations or deliberations*** *between specified individuals (section 24(1)(b)). Neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at paras. 31 and 37).*
> *…*
> *Further, sections 24(1)(a) and (b) apply only to the records (or parts thereof) that* ***reveal substantive information about which advice was sought or consultations or deliberations*** *were being held. Information such as the individuals involved in the advice or consultations, dates, and information that reveals only the fact that advice is being sought or consultations held (and not the substance of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 89).*
> *[Order F2014-29, at paras. 72-74, 79]*
> *[Emphasis added]*

[para 95] In order to allow for substantive exchange within government, the s. 24 exception is intended to permit the Public Body to refuse access to information if the disclosure could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council.

> ***In my view, section 24(1) does not generally apply to records or parts of records that in themselves reveal <u>only</u> any of the following: that advice was sought or given, or that consultations or deliberations took place; that particular persons were involved in the seeking or giving of advice, or in consultations or deliberations; that advice was sought or given on a particular topic, or consultations or deliberations on a particular topic took place; that advice was sought or given or consultations or deliberations took place at a particular time.*** *There may be cases where some of the foregoing items reveal the content of the advice. However, that must be demonstrated for every case for which it is claimed.*
> *…*
> *I turn to the second of the Public Body's points (discussed at paragraph 69 above), that the names of public servants who participated in a discussion must be kept confidential to ensure they are not dissuaded from participating in certain kinds of discussions. I accept that the* ***policy behind the rules is to allow a free discussion. However, in my view the rule achieves this policy by shielding the substance of the discussions.*** *Sections* [sic] *24(1)(a) does not permit the withholding of who gave advice; it permits the withholding of advice. In my view the words "reveal advice" means 'reveal what the advice was',* [sic] *Similarly, with respect to section 24(1)(b), "reveal ... consultations or deliberations" means 'reveal what the consultations or deliberations were'.*
>
> *I acknowledge there may be circumstances where a public servant's participation in certain kinds of discussions may give rise to criticism. Despite this,* ***I do not accept that the words of section 24(1) are intended to shield from exposure the very fact that consultations or deliberations between particular officers or employees took place, or took place about a particular topic, on the basis that this may dissuade public servants from participating in discussions of particular subjects. Where a person consults or is consulted on a given subject as a function of their office, and the application of section 24 is claimed on the basis that they are officers or employees of a public body, the very fact they participated in the consultation cannot, in my view, be withheld under section 24*** *unless this fact also reveals the substance of the consultation.*[23] *If there is something in such a disclosure that could give rise to an unreasonable invasion of the personal privacy of such employees, that is a consideration to be addressed under section 17, not section 24.*[24] *I reject the Public Body's argument that sections 24(1)(a) and 24(1)(b) permit withholding of a document or a portion of a document that would reveal only that an individual participated in a discussion. This reasoning applies as well to the parts of the correspondence that contain non-substantive content (for example, cover documents that convey the advice, or parts of the bodies of e-mail exchanges indicating only that comments are being sought or provided).*
> *[Order F2004-026, at paras. 71, 75-76; See also Order F2008-028, at para.181 and Order F2014-R-01, at para. 82]*
> *[Emphasis underlining in original; Other emphasis added]*

[para 96] For a public body to be able to withhold information pursuant to s. 24(1)(a) of the *FOIP Act*, the following criteria must be met:

> *In order to refuse access to information under section 24(1)(a) of the Act, on the basis that it could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options – which I often shorten in this Order to "advice, etc." – the information must meet the following criteria:* ***(i) be sought or expected from, or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action*** *(Order 96-006 at p. 9 or para. 42; Order F2004-026 at para. 55).*

[Order F2008-028, at para. 176]
[Emphasis added]

[para 97] The Public Body's access to information decisions (First Applicant: August 31, 2012 and Second Applicant: September 21, 2012) did three things: reported the number of pages for the Records at Issue in the main Inquiry (then 564 pages), indicated it had severed the Non-Responsive information and referred to the exceptions that have been applied in severing the responsive record. Of course, these access to information decisions were about the Records at Issue in the main Inquiry (564 pages) not specifically in relation to the June 10, 2016 Records at Issue (35 pages). Indeed, at that point, 18 of the 38 pages of the June 10, 2016 Records at Issue were designated by the Public Body as Non-Responsive and 4 of the 35 pages were not listed in the FOIP Request List of Exemptions, which accompanied the access to information decision letters to the Applicants. As a result, therefore, the 2012 access to information decisions were only in relation to 16 pages of the June 10, 2016 Records at Issue still at issue. In its access to information decisions, the Public Body did cite the 6 exceptions (sections 16, 17, 21, 24, 25 and 27) that it relied on in making its decisions about these 16 pages but did not provide any particulars about which subsection of those exceptions it was relying on or any reasons as to how or why it had applied the specific exceptions to any of the pages of records.

[para 98] In an inquiry, the onus rests with a public body, pursuant to s. 71(1), to prove an applicant does not have the right of access to all or part of a record. The Public Body Initial Submission [2014] took a minimalist approach in explaining its reliance on s. 24 amounting to little more than a mere recitation of the wording of the exception. The evidence attached to those submissions includes affidavits from two FOIP employees whose depositions are largely restricted to the applicability of s. 27 legal privilege with one exception: the affidavit of the FOIP Director devotes one paragraph to s. 24 but again relies on a summation of the exception's statutory wording. Equally problematic is that some of the pages where s. 24(1)(a) has been claimed were not included in the FOIP Request List of Exemptions (as discussed above), which was attached to the affidavit of the FOIP Director. This means the affidavits were not sworn in relation to 20 of the 35 pages and leaves me with the task of trying to discern from the information in the records themselves whether s. 24(1)(a) comes within the terms of the exception.

[para 99] At para. 26 of its Initial Submission [2016], the Public Body stated the purpose of s. 24 is *"to allow persons having responsibility to make decisions to freely and frankly discuss the issues before them in order to arrive at well-reasoned decisions without fear of their discussions being made public."* The Public Body referred to Order F2015-34, which cited a former Commissioner who said:

> *When I look at section 23* [s. 24 was formerly s. 23] *as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions.* ***The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank deliberations were to be made public.*** *Again, this is consistent with Ontario and British Columbia. I therefore believe a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of the responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice.*
> *[Order 96-006, at p. 10; Order upheld on Judicial Review]*
> *[Emphasis added]*

[para 100] The following is my summary of the criteria historically applied to the information for both s. 24(1)a) and s. 24(1)(b):

1. either sought or expected from, or be part of the responsibility of a person from whom they are sought, by virtue of that person's position;

2. be sought for the purpose of doing something, directed toward taking an action or making a decision, and

3. **be made for or involve someone who can take or implement the action**.

[para 101] I begin with the third criterion, which is in bold. My emphasis is on the third criterion to highlight the fact that this issue was considered in the ruling in *Covenant Health v. Alberta (Information and Privacy Commissioner, 2014 ABQB 562 [Covenant Health].* The Court held that to insist on one of the persons authoring the information to have the authority to take or implement an action may be overly restrictive. In the *Covenant Health* decision, Justice Wakeling said the following in a footnote within his decision:

> *The Commissioner prefers a much narrower approach. Her preferred approach limits the scope of the undefined terms by these limitations: "To fall within section 24(1)(b) the consultations or deliberations must be (i) sought or expected to be part of the responsibility of a person, by virtue of that person's position, (ii) directed toward taking an action, and (iii) made to someone who can take or implement the action". Alberta Justice and Attorney General, Order F 2007-021, ¶67. This definition is too restrictive. It is not consistent with the rest of the paragraphs in s. 24(1) which are drawn in broad language. There is no basis to insist that one of the persons in the group has the authority to "take or implement an action".*
> *[Covenant Health, at footnote 87]*

[para 102] I agree. The more restrictive approach is unrealistic in terms of how decisions are formulated and reached within the senior echelons of government. Often those individuals preparing advice are the decision-makers themselves but not always, and it would be overly restrictive to require those preparing advice for a decision to also be the ones who necessarily take or implement action. Where the information records a person or persons who have the responsibility to provide advice, consult or participate in deliberations, as part of their position, and who can or may be able to take the requisite action or create the information for the benefit of someone who can take or implement the action, that should suffice. As the Adjudicator said in Order F2013-13, at para. 123, the third part of the test should be restated as *"created for the benefit of someone who can take or implement the action."*

[para 103] The Supreme Court of Canada has provided guidance as to the rationale underlying the 'advice and recommendations' exception in the Ontario analogous s. 13 exception to Alberta's s. 24 stressing the operational importance of information, which if disclosed, could have a disparate impact on government credibility and effectiveness, as follows:

> *In my opinion, Evans J. (as he then was) in Canadian Council of Christian Charities v. Canada (Minister of Finance), 1999 CanLII 8293 (FC), [1999] 4 F.C. 245, persuasively explained the rationale for the exemption for advice given by public servants. Although written about the equivalent federal exemption, the purpose and function of the federal and Ontario advice and recommendations exemptions are the same. I cannot improve upon the language of Evans J. and his explanation and I adopt them as my own:*
>
> > *To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies.*
> >
> > ***It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible***

> ***material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness.*** *[paras. 30-31]*
>
> *Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada (Osborne v. Canada (Treasury Board), 1991 CanLII 60 (SCC), [1991] 2 S.C.R. 69, at p. 86; OPSEU v. Ontario (Attorney General), 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at pp. 44-45). The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision-maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed.* ***Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.***
>
> *Interpreting "advice" in s. 13(1) as including opinions of a public servant as to the range of alternative policy options accords with the balance struck by the legislature between the goal of preserving an effective public service capable of producing full, free and frank advice and the goal of providing a meaningful right of access.*
> *[John Doe v. Ontario (Finance), 2014 SCC 36 [John Doe], at paras. 44-46]*
> *[Emphasis added]*

[para 104] Many previous decisions under s. 24 (and its comparable sections in other Canadian jurisdictions) have imposed the more restrictive requirement; that the Public Body produce evidence to show that the advice or recommendation had been communicated to the decision-maker. But the Supreme Court of Canada in the same case also had this to say about that requirement under Ontario's s. 13, the comparable 'advice from officials' exception:

> *No words in s. 13(1) express a requirement that the advice or recommendations be communicated in order to qualify for exemption from disclosure. A public servant may engage in writing any number of drafts before communicating part or all of their content to another person. The nature of the deliberative process is to draft and redraft advice or recommendations until the writer is sufficiently satisfied that he is prepared to communicate the results to someone else. All the information in those earlier drafts informs the end result even if the content of any one draft is not included in the final version.*
>
> ***Protection from disclosure would indeed be illusory if only a communicated document was protected and not prior drafts. It would also be illusory if drafts were only protected where there is evidence that they led to a final, communicated version.*** *In order to achieve the purpose of the exemption, to provide for the full, free and frank participation of public servants or consultants in the deliberative process, the applicability of s. 13(1) must be ascertainable as of the time the public servant or consultant prepares the advice or recommendations. At that point, there will not have been communication. Accordingly, evidence of actual communication cannot be a requirement for the invocation of s. 13(1). Further, it is implicit in the job of policy development, whether by a public servant or any other person employed in the service of an institution or a consultant retained by the institution,* ***that there is an intention to communicate any resulting advice or recommendations that may be produced. Accordingly, evidence of an intention to communicate is not required for s. 13(1) to apply as that intention is inherent to the job or retainer.***
> *[John Doe, at paras. 50-51]*
> *[Emphasis added]*

[para 105] This ruling has particular resonance in this Inquiry. Many of the pages of records where s. 24 has been relied upon are marked *draft* while others are not marked draft but are obviously, from reading them, not the final document. In addition, the information falling within the definitions of advice, proposals, recommendations, analyses or policy options is shared back and forth with modifications to the drafts between those responsible in preparation for making a *recommendation* to the decision-maker.

The information is not shared or communicated to the person who can implement the action with one record being the exception which constitutes the final version that was communicated (page 258).

[para 106] I turn now to the first two criteria for s. 24(1)(a). First, the content of some of the pages of the records where s. 24(1)(a) has been applied reveals that those individuals participating in the exchange of advice have the clear responsibility in their respective positions within government, to engage in this kind of exchange. In the case at hand, despite the scarcity of evidence and submissions from the Public Body, I consider the records reveal information generated by or for senior employees tasked with providing the type of advice exchanged for the purpose of making this kind of a recommendation to a Minister(s) of the Crown. Making that recommendation is the advice to be provided after their deliberations. The final decision to implement their recommendation is, as is common, left to a member of the Executive Council.

[para 107] Second, I find that for the purpose of the s. 24 criteria, the back and forth exchange between the named senior employees resulting in many drafts of a briefing note suffices as communication directed toward taking action, that action being to make a recommendation. In addition, in the case of one page of records (page 258), there is evidence that the recommendation has been communicated to the decision-maker and a decision made.

> *The intent of section 24(1)(a) is to ensure that internal advice and like information may be developed for the use of a decision maker without interference. So long as the information described in section 24(1)(a) is developed by a public body, or for the benefit or use of a public body or a member of the Executive* [Council]*, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a).*
>
> *A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision.* ***Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.***
> *[Order F2015-29, at paras. 33-34]*
> *[Emphasis added]*

[para 108] This analysis leads me to conclude that the Public Body has properly relied on s. 24(1)(a) for the pages to which it has been applied. Whether it has been properly applied will be dealt with in detail below with respect to the exercise of discretion. It is worth noting as cited in para. 95 of this Order, however, that the exception is intended to allow the Public Body to withhold the advice itself not the decision made or the fact it was sought or given or by whom.

[para 109] There are 2 pages [210, 211] in the Records at Issue where subsections of s. 24 are the only exceptions that have been applied to withhold the information for those 2 pages. These 2 pages are also an example where the Public Body has applied the exception to the records themselves, showing the exception claimed on the page and marking the portion of the information that has been redacted. For these 2 pages (where the s. 16 and s. 27 exceptions have never been claimed), the Public Body has severed some information pursuant to s. 24(1)(a) for page 210 and s. 24(1)(b)(i) for page 211 (one Index dated August 6, 2014 shows page 211 as partially released under s. 24(1)(a), which is being treated as another typographical error as s. 24(1)(b) is shown in all other indices). The 2 pages involve email exchanges between government employees regarding the preparation of documents regarding the selection of the tobacco litigation lawyers. In both instances, the pages have been appropriately redacted. That is, what has ***not*** been severed are names, positions, dates, and other administrative information.

[para 110] In the case of page 210, the information redacted falls clearly within the meaning of *"advice, proposals, recommendations, analyses or policy options developed by or for a public body"* coming squarely within the terms of s. 24(1)(a). I find that the Public Body has properly ***relied*** on s. 24(1)(a) for page 210. This finding only relates to page 210. Page 211 will be considered below under s. 24(1)(b)(i). The question of whether the Public Body has properly ***applied*** the exception will be considered below.

[para 111] The remaining pages where s. 24(1)(a) has been relied on are more problematic given the multiple reliance on other exceptions, in particular, s. 27, which, as discussed above, does not apply. It is difficult to understand how the Public Body exercised its discretion under s. 24 given the sparse evidence and submissions provided. In addition, for all of the pages previously designated Non-Responsive where s. 24 has now been applied, there is nothing on the records showing where s. 24 has been applied to the information on each page. As indicated above, the only way to discern where s. 24(1)(a) has been relied on and applied by the Public Body is to refer to the Amended Index [98, 129, 210, 258-261, 262-268, 645-648]. How the Public Body applied the exception will be discussed below under the section on the exercise of discretion.

[para 112] Given the Order for Reconsideration that follows, the Public Body will have the opportunity to make a new decision whether it is relying on and how it is applying s. 24(1)(a) to disclose or withhold some or all of the information on 18 pages of the June 10, 2016 Records at Issue. The Public Body will be required to conduct a line-by-line examination of the pages of records to properly redact the pages under s. 24(1)(a) if its decision is to withhold any of the information.

B. Section 24(1)(b)(i)

[para 113] Turning now to the second exception applied under s. 24. Section 24(1)(b)(i) [information if released could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body] has been applied, or partially applied, for 34 of the total 35 pages of Records [98, 99-102, 103-107, 113-119, 129, 211, 258-261, 262-264, 265-268, 645-648]. Under s. 71(1) of the *FOIP Act,* the Public Body has the burden to prove the Applicants have no right of access to the information that has been withheld under s. 24(1)(b)(i).

[para 114] The exception in s. 24(1)(b)(i) of the *FOIP Act* reads as follows:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *…*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body*

[para 115] *"Consultations"* and *"deliberations"* referred to in the exception are to be given their ordinary meaning.

> *Is the information captured in record 11 properly categorized as "consultations" or "deliberations" within the meaning of s. 24(1)(b)? Webster's Third New International Dictionary of the English Language Unabridged (1971) defines "consultation" as follows: "2: the act of consulting or conferring: a deliberation of two or more persons on some matter < the two firms were in ~ over the construction of the new airplane>". Another highly reputable source, The Oxford English Dictionary (2d. ed. 1989), favors a slightly more formal meaning: "1. a. The action of consulting or taking counsel together; deliberation, conference ... 2. (with a and pl. a). A conference in which the parties consult and deliberate; a meeting for deliberation or discussion". The American dictionary source defines "deliberation" this way: "2: a discussion and consideration by a number of persons of the reasons for and against a measure – often used in pl. <the house concluded its – and its members hurried home to mend political fences>". The Oxford English Dictionary (2d ed. 1989) definition of "deliberation" presents a comparable meaning: "1. The action of*

deliberating, or weighing a thing in the mind; careful consideration with a view to decision. ... 2. The consideration and discussion of the reasons for an [sic] *against a measure by a number of councillors."*

These dictionary meanings and the context of the enactment support the finding ***that a consultation or deliberation does not exist until two or more officers or employees of a public body discuss an issue which the public body may at some future time or must now resolve and the issue is one any or all of the officers or employees can reasonably be expected to discuss. The position the participants hold and other factors may be taken into account in the objective analysis.***
[Covenant Health, at paras. 142-143]
[Emphasis added]

[para 116] In order for a Public Body to properly withhold information pursuant to s. 24(1)(b)(i) of the *FOIP Act,* the following criteria must be met:

Section 24(1)(b) of the Act gives a public body the discretion to withhold information that could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body, a member of the Executive Council, or the staff of a member of the Executive Council – which I often shorten in this Order to "consultations/deliberations". ***A "consultation" occurs when the views of one or more of the persons described in section 24(1)(b) are sought as to the appropriateness of particular proposals or suggested actions; a "deliberation" is a discussion or consideration of the reasons for and/or against an action*** *(Order 96-006 at p. 10 or para. 48; Order 99-013 at para. 48).*

The test for information to fall under section 24(1)(b) is the same as under section 24(1)(a) in that the consultations or deliberations must (i) be sought or expected from, or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 99-013 at para. 48; Order F2004-026 at para. 57).

Part (2) of the test under both sections 24(1)(a) and (b) is that the information must be directed toward taking an action. The information must relate to a suggested course of action, which will ultimately be accepted or rejected by the recipient *(Order 96-006 at p. 8 or para. 39; Order 99-001 at para. 17; Order F2007-013 at para. 108). Taking an action includes making a decision (Order 96-019 at para. 120; Order F2002-028 at para. 29). However, sections 24(1)(a) and (b) of the Act do not protect a decision itself, as they are only intended to protect the path leading to the decision (Order F2005-004 at para. 22; Order F2007-013 at para. 109).*

Section 24(1)(a) does not apply to the bare recitation of facts or summaries of information; facts may only be withheld if they are sufficiently interwoven with other advice, proposals, recommendations, analyses or policy options so that they cannot reasonably be considered separate or distinct (Order 99-001 at paras. 17 and 18; Order F2007-013 at para. 108). These same principles apply in the context of consultations/deliberations under section 24(1)(b) (Order 96-006 at p. 10 or para. 50; Order F2004-026 at para. 78).
[Order F2008-028, at paras. 177-180]
[Emphasis added]

[para 117] The test to be met under s. 24(1)(b)(i) is similar in nature to s. 24(1)(a), the distinction being whether the disclosure of the record could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options within the terms of s. 24(1)(a) versus consultations or deliberations within the terms of s. 24(1)(b)(i).

The FOIP Guidelines and Practices 2009 (the FOIP Guidelines) offers the following definition of the terms included in s. 24(1)(a):

> *The exception provides specific coverage for advice, proposals, recommendations, analyses, and policy options developed by or for a member of the Executive Council.*
>
> *Advice includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts.*
>
> *Recommendations includes suggestions for a course of action as well as the rationale for a suggested course of action.*
>
> *Proposals and analyses or policy options are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.*

Under the above interpretation, advice, proposals, recommendations, analyses, and policy options are largely synonymous terms, and describe the information employees of a public body may provide to an individual or individuals empowered to make decisions on behalf of a public body, such as a member of the executive council, in order to assist that individual or individuals, to make decisions on behalf of a public body. The information in question will put forward a course of possible action or evaluate various courses of action, in relation to an area or issue where an individual or individuals responsible for making decisions on behalf of a public body, or a member of the executive council, is considering taking action, or could consider taking action. The interpretation put forward in the FOIP Guidelines is consistent with previous orders of this office, and recognizes the public interest that section 24(1)(a) is intended to protect.

In Order 96-006, former Commissioner Clark considered the meaning of "consultations and deliberations" within the terms of section 24(1)(b). He said:

> *When I look at section 23 as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank deliberations were to be made public. Again, this is consistent with Ontario and British Columbia. I therefore believe a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of the responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice.*

I agree with the interpretation Commissioner Clark assigned to the terms "consultation" and "deliberation" generally. However, in my view, section 24(1)(b) differs from the section 24(1)(a) in that section 24(1)(a) is intended to protect communications developed for a public body by an advisor, while section 24(1)(b) protects communications involving decision makers. That this is so is supported by the use of the word deliberation: only a person charged with making a decision can be said to deliberate that decision. Moreover, "consultation" typically refers to the act of seeking advice regarding an action one is considering taking, but not to giving advice in relation to it. Information that is the subject of section 24(1)(a) may be voluntarily or spontaneously provided to a decision maker for the decision maker's use because it is the responsibility of an employee to provide information of this kind; however, such information cannot be described as a "consultation" or a "deliberation". Put simply, section 24(1)(a) is concerned with the situation where advice is given, while section 24(1)(b) is concerned with the situation where advice is sought or considered.

A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

In my view, ***the test the former Commissioner developed to assist in determining whether advice, proposals, recommendations, analyses and policy options have been developed by or on behalf of a public body for the purposes of section 24(1)(a), is not useful in determining whether information is subject to section 24(1)(b). I say this because it does not make grammatical sense to suggest that a consultation or deliberation would be made to someone who can take an action, given that only the person charged with making a decision can consult or deliberate regarding it.*** *Moreover, I find that the test, as the Public Body has stated it, for determining whether section 24(1)(b) applies is arguably too narrow. There is no requirement in section 24(1)(b) that a decision maker consult with only those whose delineated responsibility or duty it is to provide advice to that decision maker. A consultation or deliberation falls under section 24(1)(b) so long as one of the individuals enumerated in section 24(1)(b) consults or deliberates. However, unsolicited views regarding a decision will not fall under section 24(1)(b).*

…

The first step in determining whether section 24(1)(a) or (b) applies is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options, in the case of section 24(1)(a), or consultations or deliberations involving specified individuals, in the case of section 24(1)(b).
[Order F2012-10, at paras. 33-38, 40]
[Emphasis added]

[para 118] Where it has decided to apply this exception and exercise its discretion to withhold pages of records under s. 24, the Public Body must consider and weigh the interests at stake in choosing to withhold or disclose the information, including public interest.

Applying the principles in Ontario (Public Safety and Security), ***a finding that section 24(1)(a) or (b) applies means that the public interest in ensuring that public bodies obtain candid advice may trump public or private interests in disclosing the information in question.*** *After determining that section 24(1)(a) or (b) applies, the head of a public body must then consider and weigh the public and private interests in disclosure and non-disclosure in making the decision to withhold or disclose the information.*

Section 72(2)(b) of Alberta's FOIP Act establishes that ***the Commissioner may require the head to reconsider a decision to refuse access*** *in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:*

> *72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*
>
> *…*
>
> *(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access…*

The disclosure analyst states that the following considerations were included in the decision to withhold information under sections 24(1)(a) and (b):

a) The impact the disclosure would reasonably be expected to have on the EPS's ability to carry out similar decision-making processes in the future;
b) That the release of the information could make consultations and deliberations between EPS members less candid, open and comprehensive in the future if members understood that such information would be made publicly available;
c) That the members of the EPS had a reasonable expectation that their deliberations, consultations, advice, analyses and recommendations 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.

The factors the Public Body states it considered when it made its decision to withhold information from records 149 – 150 and 1284 – 1285 are in keeping with factors that should be considered when making the decision to exercise discretion under section 24(1)(a) and (b). However, the third factor to which the Public Body refers, that regarding confidentiality, is not so much an interest that is to be weighed in exercising discretion, but a factor that must be present in order to support withholding information under section 24(1). If the information to which a provision of section 24 is being applied is not intended to be confidential, or has not been kept confidential, then the public interest recognized by section 24(1) would not necessarily be served by withholding the information.

…
I must therefore require the Public Body to reconsider its decision to withhold the information from records 149 – 150 and the first and second emails appearing on record 1225, by considering ***whether some of the information they contain may already be known to the public and to consider whether the purpose of sections 24(1)(a) or (b), is served by withholding it if that is so.*** *Although I have found that the provisions of section 24(1) do not apply to some of the records to which the Public Body applied this provision, I will not order disclosure of these records as the Public Body has withheld the information they contain under section 17. However, as with all records and information withheld under section 17, these records are subject to my order that the Public Body make a new decision regarding the application of section 17.*
[Order F2013-13, at paras. 178-181, 186]
[Emphasis added]

[para 119] The importance of the zone of candid advice and consultation cannot be overstated. I am including both the advice and the consultations provisions in s. 24(1)(a) and s. 24(1)(b), when I refer to this zone. The legitimacy and importance of this zone to the effective operations of government has been recognized by including this exception in the legislation notwithstanding the overall goal of giving citizens the right of access to promote transparency and accountability. (Refer to *John Doe*, at paras. 44-46)

[para 120] In the case of page 211, the information redacted falls clearly within the meaning of *"consultations or deliberations involving…employees of a public body"* coming squarely within the terms of s. 24(1)(b)(i). The information properly disclosed include dates, names, positions, and other administrative information. In the case of page 211, I find that the Public Body has properly relied on s. 24(1)(b)(i) as the information, if disclosed, would reveal consultations and deliberations involving employees of a public body. The issue of whether the Public Body has properly applied this exception will be discussed below under the exercise of discretion.

[para 121] A problem that arises in this case is that 20 of the 34 pages where s. 24(1)(b)(i) has been relied on are pages that were Non-Responsive Records when the access to information decisions were made. For 16 of the pages, the information was referred to as Non-Responsive in the Index and in the FOIP Request List of Exemptions that were attached to the FOIP Director's affidavit and 4 of the pages were not listed at all. In the June 10, 2016 Index of Records these 20 pages were all designated as Non-Responsive.

[para 122] The remaining 14 pages (none of which have ever been designated Non-Responsive) where s. 24(1)(b)(i) has been relied on and applied are equally problematic though the exception has been consistently applied by the Public Body since the access to information decision. The problem arises because of the multiple reliance on other exceptions, in particular, s. 27 exceptions, which as discussed above, do not apply, and, except for page 211, there is no clarity as to what information the Public Body intends to specifically redact under s. 24(1)(b)(i).

[para 123] Exercising caution not to reveal the contents of the June 10, 2016 Records at Issue, my observations with respect to s. 24(1)(a) and s. 24(1)(b)(i) of the *FOIP Act* are as follows:

1. Some of the information in the records over which the s. 24 exceptions have been applied were created by a person or persons who, as part of his/her/their position, had the responsibility for producing the information.

2. Some of the pages of the records were directed toward taking action: making a recommendation with respect to the choice of tobacco litigation lawyers to the decision-maker, a member of the Executive Council.

3. Some of the information where s. 24 has been applied was sent and/or received by individuals who could make a recommendation to a decision-maker.

4. Some of the pages of the records reveal information that consultations and deliberations took place and that advice was sought and given but only some of the pages of the records contain information that constitutes actual advice, proposals or recommendations or reveals the actual substance of the consultations or deliberations.

5. There is nothing in the content of the records indicating that either the author or recipient intended the information to be confidential.

6. The Public Body properly relied on s. 24(1)(a) on one page which it partially redacted [210], the disclosure of which could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body. The Public Body properly relied on s. 24(1)(b)(i) on one page which it partially redacted the page [211], the disclosure of which could reasonably be expected to reveal consultation or deliberations involving employees of the Public Body. The manner in which the Public Body redacted the records was compatible with the proper interpretation of s. 24, that is, the information released to the Applicants by the Public Body revealed that deliberations took place, when they took place and who was involved while the information severed contained the substantive part of the advice and consultations/deliberations. The question of whether or not the Public Body properly applied the exceptions will be dealt with below.

7. None of the redacted information on pages 210 and 211 was reproduced in the Iacobucci Review Report or in the media releases submitted in evidence.

8. Other than pages 210 and 211, all the other pages of records where s. 24 has been applied, no part of the information in the record was disclosed. That is explained because for these same pages the Public Body had also claimed the s. 27 legal privilege and/or the mandatory s. 16 exceptions for the entire page in each case.

9. The Public Body has provided no explanation as to how the s. 24 exception applied to the pages of records previously designated Non-Responsive as part of its preparation and processing of the pages of the June 10, 2016 Records at Issue in December 2016 when the exceptions were first applied.

[para 124] Given the Order for Reconsideration that follows, the Public Body will have the opportunity to make a new decision after reconsidering its reliance on, and application of, s. 24(1)(b)(i) for

34 pages. This will entail a line-by-line review as to how the pages ought to be redacted, where appropriate, and what information can be disclosed all in accordance with this Order. Before turning to the final mandatory exception applied by the Public Body, it is incumbent on me to address the issue of whether the Public Body properly exercised its discretion when it applied both of the s. 24 exceptions.

Exercise of Discretion under s. 24

[para 125] Where it is established that a public body has properly relied on a discretionary exception *["may"]*, as in this case, it is imperative for me, as the External Adjudicator, to consider whether the Public Body has properly ***applied*** the exception.

> *As discussed above, the "head" making a decision under ss. 14 and 19 of the Act has a discretion whether to order disclosure or not.* ***This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case.*** *The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests,* ***including the public interest in disclosure****, disclosure should be made.*
>
> *The head must consider individual parts of the record, and disclose as much of the information as possible. Section 10(2) provides that where an exemption is claimed, "the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions".*
>
> *(c) The Duty of the Reviewing Commissioner*
>
> *The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines* ***whether the head's exercise of discretion was reasonable****.*
> *[Ontario (Public Safety and Security), at paras. 66-68; See also Order F2010-036, at para. 99]*
> *[Emphasis added]*

[para 126] What is the test for the proper exercise of discretion by a Public Body in applying a discretionary exception? In my opinion, it is necessary that the Public Body's rationale for exercising its discretion to refuse access must be demonstrable and reasonable:

> *Section 40(1)(ee) of the Act gives a public body the discretion to disclose an individual's personal information.* ***A public body's rationale for exercising discretion in a particular way must be both demonstrable and reasonable, and it cannot abuse its discretion by making an arbitrary or irrational decision.*** *Previous Orders of this Office have set out* ***five types of abuse of discretion as follows: 1) where a delegate exercises his or her authority with an improper intention in mind, which includes acting for an unauthorized purpose, in bad faith, or on irrelevant considerations; 2) where a delegate acts on inadequate evidence or without considering relevant matters; 3) where the decision is unreasonable or discriminatory, creating an improper result; 4) where the delegate exercises his or her discretion on an erroneous view of the law; and 5) where a delegate fetters his or her discretion by rigidly adopting a policy which precludes a consideration of the individual merits of the case*** *(see, e.g., Order 2000-021 at para. 51).*
> *[Order F2012-01, at para. 62; Upheld on Judicial Review]*
> *[Emphasis added]*

[para 127] Adjudicators and public bodies have found assistance from the literature as how best to describe a proper exercise of discretion to make a decision.

> *In Hearings Before Administrative Tribunals, 2nd Edition[1], McCauley and Sprague describe how discretion is to be exercised when a statute confers discretion to make a decision. They state:*

> *When Parliament [the Legislature] gives a decision-maker the discretion to make a decision,* ***it expects the decision-maker to make each decision on the basis of the circumstances in each individual case.***
>
> *If the Legislature [or Parliament] did not want this to be so it would not have granted the decision-maker discretion in the first place. It would have set out the circumstances and the thing to be done or authorized that those specifications be set out in regulation. The fact that Parliament granted the power in terms of a grant of discretion means that Parliament wanted the discretion* ***to be exercised on a case-by-case basis.***
>
> *The underlying purpose in granting a decision-maker discretion is to guarantee flexibility and responsiveness in administrative decision-making. The decision-maker cannot frustrate this purpose by choosing to exercise that power on some other basis that the decision-maker feels is more efficient, effective or expeditious. The decision-maker must take its power as it gets it.* ***The decision-maker will err if, rather than considering the [...] decision on a case by case basis, it simply applies or follows earlier developed procedure or policy without considering whether that policy is appropriate to the particular case. This is known as fettering discretion.***
>
> *Having to decide a matter on a case-by-case basis means that the decision-maker must apply his or her mind to each matter, and all the components of that matter, and decide each of those components on the basis of their merit in those circumstances. This means that the decision-maker must keep an open-mind on all aspects of the matter – procedural just as much as substantive – and decide what to do with the merits of each case.*
>
> *[Order F2014-23, at para. 71 referring to Robert W. McCauley and James L.H. Sprague, Hearings Before Administrative Tribunals 2nd Edition (Toronto: Thomson Canada Ltd. 2002) pp. 5B-15 – 5B-16]*
> *[Emphasis added]*

[para 128] What has the Public Body submitted with respect to its access to information decisions and its exercise of discretion? The decision letters, issued to the Applicants in 2012 in response to the Applicants' access to information requests, provide no insight with respect to how the Public Body exercised its discretion under s. 24. The decision letters were identical and read as follows (for ease, I reproduce again):

> *564 pages of records were located in response to your request. Some of the records requested contain information that is exempted from disclosure under sections 16, 17, 21, 24, 25 and 27 of the Freedom of Information and Protection of Privacy Act or contain information non-responsive to your request. We have severed the exempted and non-responsive information so that we could disclose to you the remaining information in the records.*
> *[Decision/Order, at para. 11]*

[para 129] In my November 16, 2016 correspondence to the parties laying out the details regarding this phase of the Inquiry with respect to the June 10, 2016 Records at Issue, I said the following to the Public Body:

> *The Public Body has the burden of proof to demonstrate it properly relied on and applied the exceptions claimed to withhold the June 10, 2016 Records at Issue from the Applicants [s. 71 of the FOIP Act]. In addition to evidence for any other exceptions it claimed in lieu of 'non-responsive', the Public Body is required to produce evidence demonstrating how the exceptions in s. 16, s. 24 and s. 27 of the FOIP Act apply to the June 10, 2016 Records at Issue;*

[para 130] The Public Body's submissions were sparse with respect to s. 24. In its Initial Submission [2016] with respect to s. 24, the Public Body did state the purpose of the exception:

> *The purpose of section 24 is to allow persons having responsibility to make decisions to freely and frankly discuss the issues before them in order to arrive at well-reasoned decision without fear of their discussions being made public. [Order F2015-34, at para. 67]*
> *[Public Body Initial Submission [2016], at para. 26]*

[para 131] At paras. 27-28 of its Initial Submission [2016], the Public Body refers back to its Initial Submission [2014] where it quoted the text of s. 24, stating that the records described in the Amended Index includes information described in s. 24(1). There is no further explanation or any evidence as to how the Public Body exercised its discretion to withhold the information on these pages of records under s. 24(1)(a) and/or s. 24(1)(b)(i). The only submission that alluded to evidence was in relation to an exception ***not*** relied on by the Public Body. After quoting from (a) and (b) of s. 24(1) on which it had relied, the Public Body quoted a new exception under s. 24: s. 24(1)(c), which it cites and then adds two examples in parenthesis, which I have highlighted below:

> > *(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta, or considerations that relate to those negotiations* ***(which directly applies to the selection of external counsel and the negotiation of the Contingency Fee Agreement).***
>
> *The public body submits that it properly exercised its discretion to withhold information pursuant to s. 24.*
> *[Public Body Initial Submission [2016], at paras. 27-28]*
> *[Emphasis added]*

[para 132] The only exceptions claimed by the Public Body in the Amended Index for the June 10, 2016 Records at Issue under s. 24 are s. 24(1)(a) and s. 24(1)(b)(i). There is no reference in any of the indices for the June 10, 2016 Records at Issue where the Public Body has relied on or applied s. 24(1)(c). Also, once again the Public Body uses the CFA as part of its submission with respect to the newly referenced s. 24(1)(c), pages which are not at issue in this phase. The Public Body has not put anything before me to explain why s. 24(1)(c) has suddenly been added in its submissions as an exception in this phase of the Inquiry despite having not included the exception in any of the amended indices. It would be highly inappropriate for me to consider the applicability of s. 24(1)(c). In this phase of the Inquiry, the issue is whether the Public Body has properly applied s. 24(1)(a) and s. 24(1)(b)(i) by taking into account factors specific to these records in exercising its discretion to withhold.

> *I also note that the Court began its review of Order F2008-009 by stating that the Adjudicator's, "...„one answer fits all" approach is not reasonable." (at para 89). I take from this that the Court in the CPS decision would not approve of its own decision being understood as giving a set answer to matters involving access to police disciplinary records. Rather, it would see it as necessary that each request for police disciplinary records should take into account whatever factors particular to the case are relevant to whether the records or parts of them should be disclosed. Similarly, should a party ask to have a public body's response to these access requests reviewed by this Office, each review must be looked at on a case-by-case basis. Nothing in the CPS decision should be taken to fetter the discretion of either the head of a public body or this Office. I believe to interpret this decision otherwise would be to do exactly what the Court said the Adjudicator in Order F2008-009 was wrong to do.*
> *[Order F2013-01, at para. 44]*

[para 133] In addition, the Public Body did not address s. 24 in its Reply Submission [2016]. The kind of analysis that is required, by way of example, is outlined in a case decided by the Alberta Court of Queen's Bench:

> *Section 24 of the Freedom of Information Act unequivocally states that the head of a public body may decide to disclose advice developed for a public body or the deliberations of a public body. A determination that information is advice or part of deliberations does not preclude disclosure.*

Ontario v. Criminal Lawyers' Association, 2010 SCC 23 (CanLII), [2010] 1 S.C.R. 815, 838. In exercising a s. 24 discretion the head of a public body must consider relevant legal principles and facts. Ontario v. Criminal Lawyers' Association, [2010] 1 S.C.R. 815, 840-41 & 845-47.

Covenant Health's officer responsible for administering its obligations under the Health Information Act and the Freedom of Information Act explained the factors which prompted Covenant Health's decision not to disclose some of the information in its records on account of s. 24(1)(a) and (b):[90]

> *In exercising discretion pursuant to section 24(1)(a) and (b) of the FOIP Act, I considered the following:*
>
> > ***a) The impact the disclosure would reasonably be expected to have on Covenant Health's ability to carry out similar decision-making processes in the future;***
> > ***b) That the release of the information could make consultation and deliberations between members of staff less candid, open and comprehensive in the future if they understood that such information could be made publicly available;***
> > ***c) That the staff members had a reasonable expectation that their deliberations, consultations, advice, analyses and recommendations be kept confidential;***
> > ***d) The objectives and purposes of the Act, including the Applicant's right of access; and***
> > ***e) Whether the information to release some information to the Applicant would satisfy any need for public scrutiny.***

The fourth item – the applicant's right of access – indicates that Covenant Health understood that Ms. McHarg's interests were important. Given that Ms. McHarg has clearly stated in her October 11, 2011 letter why she wanted access, it is safe to assume that Covenant Health factored her interests into the final disclosure decision.

The Freedom of Information Act does not require the delegate of the head of a public body making a s. 24 discretion decision to provide a comprehensive account of her reasoning process. An officer meets legislative expectations if she considers relevant legal principles and facts before making her decision. The Act's goals are met if the head of a public body acts in good faith, demonstrates a solid grasp of the interests at stake and the relevant facts and makes a reasonable decision. The final decision, according to the Act, must be made by the public body. The adjudicator is not the ultimate decision maker.
[Covenant Health, at paras. 149-152]
[Emphasis added]

[para 134] Unlike the *Covenant Health* case cited above, the factors considered by the Public Body in exercising its discretion under s. 24 in this case are unknown. I have no affidavit evidence or substantive submissions as to how the Public Body has exercised its discretion to withhold records under s. 24. The Public Body did provide one paragraph, referred to in para. 130 above, regarding the purpose of s. 24 but not specifically in relation to the exercise of its discretion. The Federal Court of Appeal, acting in its role as a reviewer (when a Commissioner is based on an Ombuds-model that has recommendation power only), laid out what information a public body needs to provide in order to enable a reviewing decision-maker to assess how a public body has exercised its discretion.

> ***If the reasons for decision are non-existent, opaque or otherwise indiscernible, and if the record before the administrative decision-maker does not shed light on the reasons why the administrative decision-maker decided or could have decided in the way it did, the requirement that administrative decisions be transparent and intelligible is not met:*** *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),*

2011 SCC 62 (CanLII), [2011] 3 S.C.R. 708 at paragraphs 14 and 15 (adequacy of reasons is to be assessed as part of the process of substantive review and is to be conducted with due regard to the record; Public Service Alliance of Canada v. Canada Post Corp., 2011 SCC 57 (CanLII), [2011] 3 S.C.R. 572 and Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654 (within limits, the decision can be upheld on the basis of the reasons that could have been given).

…

Fourth, under the Act, the decision-maker must assess whether any of the exemptions to disclosure apply to the information sought. But that is not the end of the analysis. ***Even though an exemption applies, the decision-maker nevertheless can exercise his or her discretion to disclose the material****: Attaran v. Canada (Minister of Foreign Affairs), 2011 FCA 182 (CanLII), [2011] F.C.J. No. 750.*

At a minimum, the reasons or the record should show that the decision-maker was aware of this discretion to release exempted information and exercised that discretion one way or the other.

In this case, there is nothing in the reasons or the record on this point.
[Leahy v. Canada (Minister of Citizenship and Immigration), 2012 FCA 227, at paras. 121, 133-135]
[Emphasis added]

Relevant Factors to Consider in the Exercise of Discretion

[para 135] Given my finding that the s. 24 exceptions have properly been relied upon, the question is whether the Public Body has properly ***applied*** the exceptions. What are the factors to consider in deciding if a decision is reasonable?

In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

> *In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis added; p. 11.]*

…

The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: ***the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations*** *(see IPC Order PO-2369-F/February 22, 2005, at p. 17). [Ontario (Public Safety and Security), at paras. 69, 71; See also Order F2010-036, at para. 99]*
[Emphasis underlining in original; Other emphasis added]

[para 136] In its access to information decisions and in its submissions, the Public Body failed to reveal how it exercised its discretion under s. 24, what factors it considered including the objectives and purposes of the statute, or any other relevant interests and considerations including the public and private interests in disclosure and non-disclosure. The sole factor the Public Body addressed in its submissions, a general reference to the purpose of the exception, falls well short of the kind of criteria set out in *Leahy.* The Public Body appears to have focussed all of its attention on legal privilege and, in particular, the CFA (not at issue in this phase) to the exclusion of the other discretionary exceptions on which it was relying and the whole of the June 10, 2016 Records at Issue. There is no indication that these access requests

were considered on a case-by-case basis reviewing each line of the Record and how the two s. 24 exceptions applied to the information on each page of the records. Without reasons or evidence, it is impossible to determine if the Public Body considered all relevant considerations with respect to the exercise of its discretion under s. 24, contrary to what it is required to provide.

> *While the Public Body has provided an affidavit explaining the circumstances surrounding its decision to withhold the memorandum from the Applicant, as Order 98-016 indicates a public body should do, the affidavit does not establish that the Public Body considered relevant public and private interests weighing in favor of disclosure or nondisclosure when it made its decision to withhold the memorandum in its entirety. Moreover, the affidavit indicates that the refusal of Alberta Justice to give consent to disclosure, and the idea that there is no ability to access to Crown opinions, given that they are subject to exceptions under the FOIP Act, were determinative of the decision to deny access. However, as I have found above, these factors are not relevant to the exercise of discretion under section 27(1)(b). There is no indication that the arguments Alberta Justice made for the inquiry were ever made to the Public Body at the time when it was considering how to exercise its discretion, and the affidavit does not refer to these arguments. Moreover, Alberta Justice's arguments do not refer to the contents of the records.* ***Relying on a principle that it is always harmful to disclose Crown opinions, without regard to the content of the opinion or the circumstances under which an access request is made, does not give sufficient weight to section 20(6) of the FOIP Act and amounts to fettering discretion. I must therefore require the Public Body to reconsider its decision to withhold the memorandum from the Applicant and to consider only interests and factors that are established as relevant to the decision it must make.***
> *[Order F2014-22, at para. 47]*
> *[Emphasis added]*

[para 137] Turning to a possible factor that the Public Body should, in these circumstances, have considered in the exercise of its discretion: is the information already in the public domain? There is no evidence before me that at the time the Public Body made its access to information decisions in 2012, in response to the access to information requests, the information was in the public domain. However, since June 2016, the Public Body reconsidered its access to information decisions with respect to the pages of records in the June 10, 2016 Records at Issue (September 30, 2016 and December 14, 2016) but gave no indication that it had factored in the considerable amount of information from the June 10, 2016 Records at Issue that may now be in the public domain, details of which will be outlined below. The circumstances in which the June 10, 2016 Records at Issue were provided to me should be remembered: counsel for the Public Body advised me that s/he had new instructions from the Ministry to provide the Commissioner's Office with certain records that had been the subject of past access to information requests, which had recently been provided to the Ethics Commissioner (as a result of the publicly released Iacobucci Review Report about the Ethics Commissioner's investigation). It is difficult to imagine that the Public Body was unaware of the possibility that some of the information was not already in the public domain. The fact that information in a record has come into the public domain is a relevant factor in making a decision whether or not to disclose the information, though not necessarily determinative, as it will always depend on the circumstances in each case.

> *In Order F2007-003, in the context of determining whether the EPS properly refused to confirm or deny the existence of a record of the incident under section 12(2) of the Act, I addressed whether the fact information has been placed in the public domain was a relevant circumstance to be considered under section 17(5). I ordered the EPS to respond to the Applicant's request without relying on section 12(2)(b) of the Act, in part because at least some information that would be revealed by disclosing any records that existed would already be in the public domain.*
>
> *The EPS produced the Report for my review in this inquiry. In that Report there is additional personal information beyond that made public in 1983. However, the fact that some of the personal* ***information has come into the public domain is a relevant circumstance weighing in favour of disclosure of as much of the information in the Report as was formerly made***

public. (However, as will be seen in the concluding section below, this is not a determinative factor for disclosing that information in this case.)
[Order F2014-16, at paras. 55-56]
[Emphasis added]

[para 138] That the Public Body had to have made a decision after June 10, 2016 regarding the newly added exceptions applied to the newly included 20 pages of the June 10, 2016 Records at Issue is a fact as evidenced by the following: the Public Body disclosed 3 additional pages of records to the Applicants previously designated Non-Responsive [32, 120, 565], applied multiple exceptions to the remaining pages previously designated Non-Responsive for the first time, and amended the Index accordingly. This fact was confirmed by me in correspondence with the parties.

1. Letter dated March 8, 2017 to all parties, in which I said:

> *On January 19, 2017, the Public Body corresponded with me as the External Adjudicator with copies to the parties indicating that following the decision in the University of Calgary case,* ***it reviewed the Index of Records for this Inquiry****. As a result of that review, the Public Body* ***made a decision to provide an updated Index of Records and an additional portion of the Records at Issue.***

2. Letter dated March 23, 2017 to the First Applicant, copied to all parties, in which I said:

> *After the parties' Initial Submissions were complete, the Public Body, specifically on January 19, 2017, advised that as a result of two rulings on legal privilege being released by the Supreme Court of Canada [SCC], notably on November 25, 2016, it decided to review and again amend the Index of Records and provide another portion of the Records at Issue to me. No further explanation was provided by the Public Body for its decision in this regard. I have confirmed in writing with all parties that the release of these two parts of the Records at Issue are in partial compliance with Order F2014-50. As was the case for the June 10, 2016 portion of Records at Issue, pages 551-564 that the Public Body has attested to being the Contingency Fee Agreement [CFA] were not included in the January 19, 2017 portion of the Records at Issue provided to me.*

[para 139] On April 7, 2017, the Public Body sent a letter of explanation in response to questions I had raised about the integrity of the June 10, 2016 Records at Issue because of some of the changes to the indices. In that letter, the Public Body wrote:

> *In September 2016 the* ***Public Body agreed to expand the records <u>in the main inquiry</u> (not the phase relating to the June 2016 records)*** *to include drafts as well as records that went past December 2010. It did this by adding records ABJ000565 to ABJ002570 to the August 2014 Index in the main inquiry. This action is not connected in any way to changing the specific documents physically provided to you in June 2016, which are the issue in this phase of the inquiry. As described above,* ***the only significance of the decision to expand the records <u>in the main inquiry</u> was the renumbering*** *of what in June 2016 had been identified 566-569 to be numbered as records ABJ000645-648 in the September 2016 and subsequent Indexes. [at p. 9]*
> *[Emphasis underlining in original; Other emphasis added]*

[para 140] With all due respect, this statement by the Public Body is not accurate and is misleading. Contrary to what the Public Body states, there is a significance that is relevant to this phase of the Inquiry arising out of the change of status of many of the documents. It is not just a matter of renumbering. It must be emphasized that 20 of the 35 pages of the June 10, 2016 Records at Issue had been designated Non-Responsive in the original June 10, 2016 Index of Records. That meant that 20 pages of the June 10, 2016 Records at Issue were not, until December 2016, a responsive record when new pages were added and the designation of Non-Responsive was replaced with the exceptions being relied on by the Public Body. In my opinion, that is significant because, in fact, the change did expand what constituted a record in this phase of the Inquiry, not just in the main Inquiry. Discounting the 3 pages released to the

Applicants in September 2016 and June 2017, when Non-Responsive was removed and exceptions applied, this resulted in the June 10, 2016 Records at Issue increasing from 15 pages to 35 pages of responsive records.

[para 141] At the time the Public Body made its decision with respect to the newly added pages of records, did the Public Body consider the extent to which the information in the June 10, 2016 Records at Issue is already in public domain? There is no evidence before me that the Public Body gave any consideration to whether any of the information contained in the records was in the public domain. Even after the Applicants provided submissions in this regard, the Public Body failed to address it in its Reply Submission [2016].

> *I find that this is a factor that weighs heavily in favour of disclosing whether or not responsive records exist. The only factor weighing against confirming or denying the existence of records is section 17(4)(g). In my view, the personal information that would be disclosed if the Public Body confirms the existence of records (if any exist) is not sensitive information; it does not reveal anything definitive about Constable X, only a possible link between him and a book with which he has already been publicly linked.* ***I find that the fact that this information is in the public domain outweighs the factor against confirming the existence of responsive records (if any exist).*** *I therefore do not need to consider whether any other factors, such as section 17(5)(a), weigh in favour of confirming or denying the existence of records.*
> *[Order F2015-28, at para. 37]*
> *[Emphasis added]*

[para 142] In that regard, once again, I refer to the information contained in the June 10, 2016 Records at Issue that either has been directly quoted or referred to in the Iacobucci Review Report to which s. 24(1)(a) or s. 24(1)(b)(i) of the *FOIP Act* has been applied by the Public Body. In order not to reveal the contents of the June 10, 2016 Records at Issue I ***will not provide*** where in the Iacobucci Review Report the Records are quoted. I will, however, cite the pages of the Records:

> Section 24(1)(a)
> Quoted Pages: 129, 210, 259, 266, 646, 647
> Referenced Pages: 646, 647
>
> Section 24(1)(b)(i)
> Quoted Pages: 99, 100, 101, 114, 115, 129, 211, 259, 266, 646, 647
> Referenced Pages: 99-102, 103-107, 113-119

[para 143] In addition, the Second Applicant provided copies of pages of the Records that were made public by a media outlet as part of his/her submissions. In order not to reveal the contents of the June 10, 2016 Records at Issue, I ***will not provide*** a corresponding date of the press article for each of the pages. The pages of Records that were published in the media the year ***before*** the June 10, 2016 Records at Issue were included as part of the Second Applicant Initial Submission [2016], are as follows:

> Pages 100, 113, 114, 129, 258, 260, 265, 267, 646

[para 144] This analysis of evidence has been provided to underscore the extent to which the information that has been withheld may already be known to the public either through the media in 2015 or since the release of the Iacobucci Review Report on March 30, 2016. Both of these ***pre-date*** the Public Body's decision to release the June 10, 2016 Records at Issue to the External Adjudicator and its production of the June 10, 2016 Amended Index of Records on December 14, 2016 to show its reliance on exceptions to replace the designation of Non-Responsive.

[para 145] Counting only the pages of Records where information from the pages is reproduced (not just referenced) in media reports and is quoted in the Iacobucci Review Report for pages for where the s. 24 exceptions have been relied on, the number of pages containing information that was in the public domain before June 10, 2016 is 17 of the total 35 pages are as follows:

Pages 99, 100, 101, 113, 114, 115, 129, 210, 211, 258, 259, 260, 265, 266, 267, 646, 647

[para 146] Turning to the next factor to consider in the exercise of discretion in this case: public interest. In this case, the Public Body submitted it considered public interest in relation to exercising its discretion to withhold records pursuant to s. 27 but there is no evidence or submission that it did so in relation to s. 24. In providing guidance with respect to the requirement for a public body to weigh the public and private interests as relevant considerations in the exercise of its discretion in making a decision, the Supreme Court of Canada has stated the following:

> *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.***
> *[Ontario (Public Safety and Security), at para. 48]*
> *[Emphasis added]*

[para 147] The Second Applicant pointed to a Supreme Court of Canada decision that weighed in on when it was appropriate for the head of a public body to consider a compelling public interest in disclosure when it is applying a discretionary exception, without the need to consider the public interest override (s. 23 comparable section in Ontario).

> ***The public interest override in s. 23 would add little to this process.*** *Section 23 simply provides that exemptions from disclosure do not apply "where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption".* ***But a proper interpretation of s. 14(1) requires that the head consider whether a compelling public interest in disclosure outweighs the purpose of the exemption, to prevent interference with law enforcement. If the head, acting judicially, were to find that such an interest exists, the head would exercise the discretion conferred by the word "may" and order disclosure of the document.***
>
> *The same rationale applies to the other exemptions under s. 14(1) as well as to those under s. 14(2). Section 14(2)(a) is particularly relevant in the case at bar. It provides that a head "may refuse to disclose a record . . . that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law".* ***The main purpose of this section is to protect the public interest in getting full and frank disclosure in the course of investigating and reporting on matters involving the administration of justice; an expectation of confidentiality may further the goal of getting at the truth of what really happened. At the same time, the discretion conferred by the word "may" recognizes that there may be other interests, whether public or private, that outweigh this public interest in confidentiality.*** *Again, an additional review under s. 23 would add little, if anything, to this process.*
> *[Ontario (Public Safety and Security), at paras. 49-50]*
> *[Emphasis added]*

[para 148] Had s. 27 applied to any of the pages of records, the Public Body would have been correct when it argued that the public interest in solicitor-client privilege trumps the public interest with respect to the right to access information. But there is no evidence the Public Body gave public interest any consideration in exercising its discretion under s. 24.

[para 149] With the Order for Reconsideration comes the opportunity for the Public Body to exercise its discretion properly, in accordance with this Order. Because of its all pervasive reliance on s. 27, the Public Body supplied little evidence attesting to how the Public Body exercised its discretion under s. 24 of the *FOIP Act.* Some specifics in this regard may prove useful:

1. For the pages designated Non-Responsive in the June 10, 2016 Index that have not been released [99-107, 113-119, 645-648], when the Public Body added the s. 24 exceptions to the Amended Index replacing the designation of Non-Responsive, nothing was added to or marked on the pages of Records. There are no redactions or exceptions noted on the pages. The only marking on each page is a diagonal line across the page with a handwritten Non-Responsive.

2. When pages 645-648 were renumbered from 566-569 and the description changed from Non-Responsive to multiple exceptions under s. 16, s. 24 and s. 27, no redaction boxes or specific exception numbers were added to the pages of records.

3. For 2 pages [210, 211], the Public Body has consistently relied on s. 24. These pages have never been designated Non-Responsive. On these 2 pages, there is a rectangular box around the redacted text and the exceptions under s. 24 handwritten in the top right hand corner of the page.

4. For the remaining pages that have never been designated as Non-Responsive, there is a blue box drawn over the entire page including the page number with the exceptions handwritten in the top right corner. The exceptions handwritten in the top corner are consistent with the exceptions for the respective pages of records in the Amended Index but there is no evidence of what exceptions have been applied to what information.

[para 150] This makes it impossible to see how the s. 24 exceptions have been applied to the information on the pages. For the pages of records where the s. 24 exceptions have been consistently claimed, there is still no evidence as to how the exceptions have been applied. The Public Body's sparse submissions with respect to how it exercised its discretion for all 35 pages where the s. 24 exceptions have been claimed, including pages 210 and 211, are deficient resulting in me being unable to assess whether it has exercised its discretion properly. This lack of evidence as to how the Public Body exercised its discretion leads to a conclusion that the Public Body fettered its discretion by adopting a blanket assertion as to the application of the s. 24 exceptions (Refer to para. 33 above citing *Suncor* at para. 34).

> *In Order 96-017, the former Commissioner reviewed the law regarding a Commissioner's authority to review the head of a public body's exercise of discretion and concluded that section 72(2)(b), (then section 68(2)(b)), was the source of that authority. He commented on appropriate applications of discretion and described the evidence necessary to establish that discretion has been applied appropriately.*
>
> > *A discretionary decision must be exercised for a reason rationally connected to the purpose for which it's granted. The court in Rubin stated that "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act…"*
> >
> > ***The court rejected the notion that if a record falls squarely within an exception to access, the applicant's right to disclosure becomes solely subject to the public body's discretion to disclose it. The court stated that such a conclusion fails to have regard to the objects and purposes of the legislation: (i) that government information should be available to the public, and (ii) that exceptions to the right of access should be limited and specific.***
> >
> > *In the court's view, the discretion given by the legislation to a public body is not unfettered, but must be exercised in a manner that conforms with the principles*

mentioned above. The court concluded that a public body exercises its discretion properly when its decision promotes the policy and objects of the legislation.

The Information and Privacy Commissioners in both British Columbia and Ontario have also considered the issue of a public body's proper exercise of discretion, both in the context of the solicitor-client exception and otherwise. In British Columbia, the Commissioner has stated that the ***fundamental goal of the information and privacy legislation, which is to promote the accountability of public bodies to the public by creating a more open society, should be supported whenever possible, especially if the head is applying a discretionary exception*** *(see Order No. 5-1994, [1994] B.C.I.P.C.D. No. 5)...*

...

In Ontario Order 58, [1989] O.I.P.C. No. 22, the Commissioner stated that a head's exercise of discretion must be made in full appreciation of the facts of the case and upon proper application of the applicable principles of law. In Ontario Order P-344, [1992] O.I.P.C. No. 109, the Assistant Commissioner has further stated that a "blanket" approach to the application of an exception in all cases involving a particular type of record would represent an improper exercise of discretion.

I have considered all the foregoing cases which discuss the limits on how a public body may exercise its discretion. In this case, ***I accept that a public body must consider the objects and purposes of the Act when exercising its discretion to refuse disclosure of information. It follows that a public body must provide evidence about what it considered.***

In that case, the Commissioner found that the Public Body had not made any representations or provided any evidence in relation to its exercise of discretion. Further, he determined that the head must consider the purpose of the exception in the context of the public interest in disclosing information when exercising discretion. As the head of the Public Body had not provided any explanation for withholding information, the Commissioner ordered the head to reconsider its exercise of discretion to withhold information under a discretionary exception.

Similarly, in Order F2004-026, the Commissioner said;

> ***In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case.*** *I find support for this position in orders of the British Columbia Information and Privacy Commissioner. Orders 325-1999 and 02-38 include a list of factors relevant to the exercise of discretion by a public body. In addition to "the general purposes of the legislation (of making information available to the public) the list includes "the wording of the discretionary exception and the interests which the section attempts to balance". It strikes me as a sound approach that the public body must have regard to why the exception was included, and whether withholding the information in a given case would meet that goal.*

In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in Ontario (Public Safety and Security).
[Order F2010-036, at paras. 102-104; See also [Ontario (Public Safety and Security), at paras. 68-69; Order F2013-01, at para. 44]
[Emphasis added]

[para 151] On a review of all the Public Body's submissions with respect to its exercise of discretion under s. 24 of the *FOIP Act,* I make the following observations:

1. In correspondence on November 16, 2016 in which I laid out the Inquiry process for this phase, I specifically asked the Public Body to provide evidence regarding reliance and application of the newly applied exceptions to previously labelled Non-Responsive pages of records. Despite this fact, the Public Body has failed to provide the evidence or submissions to enable me to discern or measure whether or how it exercised its discretion under s. 24.

2. A total of 20 pages of the June 10, 2016 Records at Issue were originally designated Non-Responsive. When the Amended Index was produced by the Public Body with its Initial Submission [2016], s. 24 was added along with other exceptions to 20 of the total 35 pages. No new evidence or submissions were produced when this change was made, despite my request for the Public Body to provide me with evidence. The affidavits that formed part of the Public Body Initial Submission [2014] were evidence about the whole of the Records at Issue in the main Inquiry and not specifically in relation to the June 10, 2016 Records at Issue. It is critical to point out that the only evidence before me, the affidavits of the FOIP Director and FOIP Advisor provided as part of the Public Body Initial Submission [2014], would have been sworn in relation to a record that did not include these 20 pages as they had been deemed Non-Responsive. By designating them Non-Responsive at the time of the access to information decisions, the Public Body put them outside the scope of the Records at Issue in the Inquiry. The fact the Public Body did this is not at issue in this phase of the Inquiry as the matter has been referred to another forum. What is relevant during this phase of the Inquiry is that the Public Body has failed to provide evidence or submissions when it made a decision with respect to the exceptions it was relying on with respect to the previously designated Non-Responsive pages of records.

3. The pages deemed Non-Responsive or that were not listed in FOIP Request List of Exemptions attached to the Public Body's decision did not form part of the Records at Issue at the time the access to information decisions were made. All of the pages that were designated Non-Responsive, including the new pages added in June 2016 [565, 566-569 renumbered to 645-648], did not form part of the June 10, 2016 Records at Issue. When the Public Body provided the June 10, 2016 Records at Issue to me, they added in the new pages [645-648] and continued to use the designation of Non-Responsive. By the time it provided its Initial Submission [2016] on December 14, 2016, the Public Body *had* to have made a decision: a decision with respect to those pages that had not up until then formed part of the Records at Issue. In the Index at Tab 1 of its Initial Submission [2016], the Public Body listed the exceptions it was relying on for those pages previously designated Non-Responsive that it was withholding and indicated that it had disclosed 3 pages [32, 120, 565] to the Applicants. In doing so, however, the Public Body did not provide any new evidence or submissions about these newly added pages of Records as to how the s. 24 exceptions applied. In my opinion, this amounts to the Public Body fettering its discretion by applying a blanket refusal to release any records without actually providing any evidence to support its decision with respect to how the specific s. 24 exceptions claimed support its decision to refuse to disclose these newly added pages of records.

4. It is impossible to know if the Public Body's exercise of discretion has been reasonable and demonstrable. Because of the lack of care taken with the Records as to how the exceptions have been applied to the information on the pages of Records and the sparcity of submissions and evidence, the Public Body has not demonstrated how it exercised its discretion over the information and has not provided submissions to demonstrate whether its exercise of discretion was reasonable.

5. With the exceptions noted below, the Public Body has failed to make it clear on the face of the pages of records where it has applied s. 24, what information it would withhold and what it would release because it did not meet the test: information that would reveal the substance of the advice or consultations: such as information that evidenced advice was sought or given or consultations took place, who was involved, the topic of the advice or consultation or when it took place.

6. The only exception where the Public Body has redacted the pages under the s. 24 exceptions are pages 210 and 211 where it withheld the substance of the advice and consultations while releasing the administrative information. The dearth of evidence or submissions make it impossible, even in the case of pages 210 and 211, to measure whether the Public Body's exercise of discretion is reasonable because it is not discernible, apparent or demonstrable from what the Public Body has submitted.

7. The Public Body made no reference to the objectives and purposes of the *FOIP Act* in its submissions, evidence or decision letters, including the right to access. While it did not put this into the context of how it exercised its discretion, the Public Body made a general reference to the purpose of one exception: s. 24 of the *FOIP Act.*

8. The Public Body did not properly apply either of the s. 24 exceptions. In exercising its discretion, I find the Public Body failed to take into account relevant considerations. There is no evidence the Public Body considered the following relevant factors with respect to the exercise of its discretion under s. 24, some of which, in these circumstances, could have included:

    1. The objectives and purposes of the *FOIP Act* and the objectives of s. 24;
    2. The amount of the information in the pages or records already in the public domain (media reports and Iacobucci Review Report) in June 2016;
    3. Whether the employees of the Public Body had a reasonable expectation their consultations and deliberations would be confidential;
    4. The need to demonstrate how it made a decision with respect to the 20 pages of the June 10, 2016 Records at Issue, which were previously designated Non-Responsive and, therefore, were not responsive records when the access to information decisions were made;
    5. The rationale for withholding the advice and consultations, not just in principle under s. 24, but in these specific circumstances; and
    6. Public interest as a factor in exercising discretion in providing access to information as a consideration under s. 24. This factor is not in relation to the s. 32 override. That is, on the one hand, the need to balance the public interest in public bodies having the opportunity to obtain candid advice and undertake consultations in the zone, which may trump public or private interests in disclosing the information, or, on the other hand, the public interest in disclosing the information, which may trump the government interest to withhold.

[para 152] It is not my role as an External Adjudicator to replace my exercise of discretion for that of the Public Body. Before turning to the terms of the Order for Reconsideration, I turn now to consider Issue #3 with respect to the s. 16 mandatory (non-discretionary) exception.

ISSUE #3: Whether the Public Body properly relied on and applied s. 16(1)(a)(ii), s. 16(1)(b), and s. 16(1)(c)(i) of the *FOIP Act,* to the information in the June 10, 2016 Records at Issue.

[para 153] Section 16(1)(a)(ii), s. 16(1)(b), and s. 16(1)(c)(i) [must refuse release of information, supplied explicitly or implicitly in confidence, that would disclose business interests of a third party, the disclosure of which would cause significant harm] has been claimed for 31 of the total 35 pages of Records [99-102, 103-107, 113-119, 258-261, 262-264, 265-268, 645-648]. Under s. 71(1) of the *FOIP Act*, the Public Body has the burden to prove the Applicants have no right of access to the information that it withheld under s. 16. Once it establishes s. 16 applies, the Public Body must refuse to disclose the information as s. 16 is a mandatory exception. If the Public Body fails to establish that the exception applies, because the exception is mandatory, it is essential that the External Adjudicator apply the exception where the records themselves demonstrate that s. 16 applies if an Order to release records is being considered. If its application is unclear or ambiguous, before making a disclosure Order providing access to the information by the Applicants, the External Adjudicator must Order the Public Body to give Notice to the third party(ies) to seek their consent to the release of the information, or if they object and

make a Request for Review, the External Adjudicator must give the third party(ies) the opportunity to provide submissions in the Inquiry as to how s. 16 applies to their information.

[para 154] The mandatory exception in s. 16(1) of the *FOIP Act* as relied on by the Public Body reads as follows:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal …*
>
> *…*
>
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party,*
>
> *…*
>
> *(b) that is supplied, explicitly or implicitly, in confidence, and*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party, …*

[para 155] In order for the s. 16 (formerly s. 15) exception to apply, two pre-conditions must be met:

> *Section 15(1)* ***requires that there be a "third party".*** *Under section 1(1)(r)* [now s. 1(r)] *of the Act, "third party" is defined to mean a person, a group of persons or an organization other than an applicant or a public body. The Applicant cannot therefore be a third party for the purposes of section 15(1).*
>
> *Furthermore, Section 15(1) of the Act appears in Part 1 of the Act, which deals with access to information. Section 15(1) presumes that an applicant has made a request for access to a third party's* ***"confidential business information"****. As there has been no application for access to a third party's "confidential business information" in this case, section 15(1) is not applicable. [Order 97-004, at para. 32-33]*
> *[Emphasis added]*

[para 156] Are the pre-conditions satisfied in this case? The language in both of the Applicants' access to information requests, with respect to the complete Records at Issue, is broad enough to encompass what may be third party business information, some of which may be considered confidential. In regard to the June 10, 2016 Records at Issue, a review of the 31 pages where s. 16 has been applied reveals some references to a third party(ies). There are no third party(ies) in this phase of the Inquiry. The third party(ies) did not receive notice from the Public Body as it had no intention to release the pages where s. 16 has been relied upon. The *prima facie* pre-conditions met, I go on to decide if the Public Body has satisfied the requisite parts of the three-part test set out in s. 16. It is well established law that the criteria set out in s. 16 is conjunctive; that is, one must meet one part of s. 16(1), meet s. 16(1)(b) and meet one of the criteria set out in s. 16(1)(c). An Adjudicator in a recent Alberta Order restates the appropriate analysis to be undertaken under s. 16:

> *Order F2004-013 held that to qualify for the exception in section 16(1), a record must satisfy the following three-part test:*
>
> *Part 1: Would disclosure of the information reveal trade secrets of a third party* ***or*** *commercial, financial, labour relations, scientific or technical information of a third party?*
> *Part 2: Was the information supplied, explicitly or implicitly, in confidence?*
> *Part 3: Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in s. 16(1)(c)?*
> *[Order F2016-65, at para. 24 referring to Order F2005-011]*

[para 157] One point of clarification should be made. The Public Body has specifically claimed s. 16(1)(c)(i) in most of the indices, though not for all pages in the Amended Index where s. 16 is listed. I will, therefore, consider s. 16(1)(c)(i) as the third criteria under the s. 16 analysis: could disclosure of the information reasonably be expected to bring about the outcome set out in s. 16(1)(c)(i). That is, reasonably expect to harm significantly the competitive position or interfere significantly with the negotiating position of the third party. The rationale behind the mandatory exception to disclosure is well understood:

> *The purpose of mandatory exceptions to disclosure for the commercial information of third parties in access to information legislation is set out in Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy at page 313:*
>
> > *The accepted basis for an exemption relating to commercial activity is that **business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons.** First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information.*
>
> *This statement of the purpose of section 16 has been adopted in Orders F2009-028, F2010-036, F2011-001, and F2011-002 and found to be the rationale behind the mandatory exception to disclosure created by section 16 of the FOIP Act. In these orders, **it was determined that section 16 is intended to protect specific types of proprietary information or "informational assets" of third parties from disclosure, so that businesses may be confident that they can continue to invest in this kind of information, and to encourage businesses to provide this kind of information to government when required.***
> *[Order F2012-06, at para. 48; See also Order F2014-44, at para. 20]*
> *[Emphasis added]*

[para 158] The purpose behind protecting the informational assets of businesses has been recognized by the Supreme Court of Canada:

> *The exception in s. 16 attempts to draw a line between <u>public</u> information in the hands of public bodies that presumptively must be disclosed, and information of <u>private</u> bodies that comes into the hands of public bodies and may be entitled to protection from disclosure. As pointed out in Merck Frosst at para. 1 the FOIPP Act supports democratic values:*
>
> > *Broad rights of access to government information serve important public purposes. They help to ensure accountability and ultimately, it is hoped, to strengthen democracy. "Sunlight", as Louis Brandeis put it so well, "is said to be the best of disinfectants" ("What Publicity Can Do", Harper's Weekly, December 20, 1913, p. 10).*
>
> *However, Merck Frosst observes that exceptions like s. 16 involve a balancing of other interests:*
>
> > *Providing access to government information, however, also engages other public and private interests. Government, for example, collects information from third parties for regulatory purposes, information which may include trade secrets and other confidential commercial matters. Such information may be valuable to competitors and disclosing it may cause financial or other harm to the third party who had to provide it. Routine disclosure of such information might even ultimately discourage research and innovation. Thus, too single-minded a commitment to access to this sort of government information risks ignoring these interests and has the potential to inflict a lot of collateral damage. There must, therefore, be a balance between granting access to information and protecting these other interests in relation to some types of third party information...*

> *Nonetheless, when the information at stake is third party, confidential commercial and related information, the important goal of broad disclosure must be balanced with the legitimate private interests of third parties and the public interest in promoting innovation and development. The Act strikes this balance between the demands of openness and commercial confidentiality in two main ways. First, it affords substantive protection of the information by specifying that certain categories of third party information are exempt from disclosure. Second, it provides procedural protection. The third party whose information is being sought has the opportunity, before disclosure, to persuade the institution that exemptions to disclosure apply and to seek judicial review of the institution's decision to release information which the third party thinks falls within the protected sphere...*
>
> *An important part of the Commissioner's mandate is to balance these interests, and his decisions in that respect are entitled to deference if they are reasonable. The Commissioner's reasons, unfortunately, never explicitly refer to the balancing called for.*
> *[Imperial Oil Limited v. Alberta (Information and Privacy Commissioner, 2014 ABCA 231, at para. 67]*
> *[Emphasis underlining in original]*

[para 159] The Public Body Initial Submission [2016] and Initial Submission [2014] with respect to how the records include information described in s. 16 are as follows:

1. *The example relied on by the Public Body is the CFA, which it states "directly affects the financial interests of the other party to it - the Province's lawyers in the tobacco recovery litigation. The applicants refer to these lawyers being the successful group in obtaining the retainer from the Province to prosecute the tobacco recovery litigation."*

2. *The Public Body states "[t]he financial interests and competitive position of the Province's chosen lawyers would be directly affected by the disclosure of the* ***Contingency Fee Agreement****."*

3. *The Public Body goes on to state that "[s]ome of the June 10, 2016 records contain information provided by other prospective law firms, and disclosure of that information could reasonably be expected to* ***affect*** *their financial interests and competitive position."*

4. *The Public Body takes the position that if there is any doubt about whether s. 16 applies, all of the outside lawyers should be given notice of the Inquiry and the opportunity to make submissions whether s. 16 applies to information relating to them.*

[Emphasis added]

[para 160] If the Public Body, as here, had no intention of disclosing the pages because it argued the records were subject to legal privilege, it did not need to give notice to the third party(ies) under s. 16. In other words, where the Public Body has made a decision not to give the Applicants access to all or part of a record containing information about a third party, s. 71(3)(b) does not apply. Instead under s. 71(1) the Public Body bears the burden to prove the Applicants are not entitled to access. In order to satisfy the requirements under s. 16, the Public Body may, however, be required to solicit evidence from the third party(ies) to assist it in meeting the three-part test about the nature of the evidence [s. 16(1)(a)(ii)], the confidentiality requirement [s. 16(1)(b)] and the reasonable expectation of significant harm [s. 16(1)(c)(i)] unless this information is already known to the Public Body. There is no evidence that the latter is the case as the Public Body's submissions do not specifically address the criteria as set out in s. 16. This evidence is necessary in order to enable the Commissioner or her delegate to discharge her duty of balancing the competing public interest in disclosure and the legitimate private interests of third party(ies).

> *In my view, the Privacy Commissioner's requirement for an evidentiary foundation withstands a somewhat probing examination. As discussed, the scope and intention of FOIPP presumes*

access to information, subject only to limited exceptions, and the responsibility for establishing an exception rests with the party resisting access to the information.

The requirement of some cogent evidence permits the Privacy Commissioner to discharge his duty of balancing competing interests and policy considerations by rationally assessing the likelihood of reasonable expectations of harm. *To suggest that requiring some evidence is unreasonable means that access to information could be denied based solely on hypothetical possibilities, and that only the most preposterous theoretical risks could be rejected by the Commissioner.*
[Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner), 2006 ABQB 515, at paras. 59-60]
[Emphasis added]

[para 161] I was concerned that the example relied on by the Public Body was the CFA, given it is not part of the June 10, 2016 Records at Issue, and given the s. 16 exception ***has not been relied on*** or applied by the Public Body to the pages designated as the CFA in the main Inquiry. As a result, I communicated with the Public Body, as stated above at para. 18, point 15, reproduced here for convenience:

Given the Public Body's reference in its Initial Submission [2016] to the CFA, by letters dated March 6, 2017 and March 23, 2017, I gave the Public Body the opportunity to provide these pages to me, along with a request to provide a further explanation about other pages that had been renumbered. The response from the Public Body was delayed due to unforeseen and unavoidable circumstances. An explanation of the renumbering was provided by the Public Body on April 7, 2017 attributing it to the addition of records, but it declined my suggestion to provide the pages of records 551-564, which it confirmed are the CFA. This is despite its reference to the CFA in its submissions with respect to s. 16 in this segment of the Inquiry. The Public Body failed to provide another example from the June 10, 2016 Records at Issue with respect to s. 16 when this was pointed out.

[para 162] In its submissions, the Public Body has stated only that disclosure could reasonably be expected to affect the prospective law firms' financial interests and competitive position when what is required is evidence of significant harm or significant interference. It is conceivable that this submission was intended to relate to the CFA and not specifically the pages of records presently at issue. The benefit of contacting the third party(ies) to secure the evidentiary base of harm or interference with its competitive position is one or all of the third party(ies) may have consented to the disclosure of the information. Thereafter, it would be unnecessary for the Public Body to meet the requirements of s. 16(1) because of the consent *proviso* in s. 16(3)(a) of the *FOIP Act*, which reads as follows:

16(3) Subsections (1) and (2) do not apply if

(a) the third party consents to the disclosure,

[para 163] In this regard, one evidentiary submission from the First Applicant in its Initial Submission [2014], stated, at para. 31:

On December 3, 2012, [name]*, then Managing Partner of* [name of law firm], *advised a local newspaper* [*s/he*] *had no formal objection to public release of the firm's contract with the Government of Alberta.*
[Evidence of Calgary Herald article report attached to First Applicant Initial Submission [2014] at Tab 15]

[para 164] The reference in the First Applicant Initial Submission [2014] is with respect to the CFA, which document is *not* part of this phase of the Inquiry. It is cited here as this ***may*** be indicative that at least one of the third party(ies) would provide its consent to the release of its information.

[para 165] In correspondence dated April 7, 2017, the Public Body stated the following:

> *The Ministry would be pleased to provide further in-camera written submissions to you with respect to the applicability of s. 16 to the June 2016 records at issue. However, any such submissions would only relate to the June 2016 records themselves, and would not relate to the CFA (which is not one of the June 2016 records).*
> *[Public Body letter dated April 7, 2017, at p. 10]*

[para 166] Given the paucity of submissions from the Public Body as to how s. 16 applies to the 31 of the 35 pages and given that s. 16 is a mandatory exception, part of my Order for Reconsideration will be an Order for the Public Body to reconsider its application of s. 16. I have provided the discussion below to assist the Public Body in that task. Should the Public Body decide to obtain evidence from the third party(ies) in order to show s. 16 has been properly applied (where the third party(ies) do not provide their consent) thereafter, if it considers the evidence should be provided to me i*n camera*, the Public Body can make an application to me under the applicable *in camera* procedure.

Part 1: Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

[para 167] In order to fulfill s. 16(1)(a), three conditions must be met:

> 1. *the records must contain trade secrets, or commercial, financial, labour relations, scientific or technical information;*
>
> 2. *the fact the disclosure must reveal this type of information means that the severed information must not already be in the public domain; and*
>
> 3. *the records must contain information that is "of a Third Party" (Order F2004-013, at para. 11, quoting Order 99-008)*
>
> *[Order F2014-49, at para. 32]*

[para 168] Because of the sparse submissions provided by the Public Body and the absence of the specific application of the exceptions to the pages of records, I find it difficult to identify what parts of the information on the 31 pages may fit within the language of s. 16(1)(a). It is incumbent on me, however, to look at the aggregate of the June 10, 2016 Records at Issue to determine if they contain information that amount to commercial, financial, labour relations, scientific or technical information. A review of all of the 31 pages for which s. 16 has been applied, however, the only possible categories that may apply are *"financial"* and/or *"commercial."* It is important to remain cognizant of the fact that the June 10, 2016 Records at Issue are a very small portion of the total records in the main Inquiry and may not be a snapshot of all that is contained in the complete and now expanded Records at Issue.

[para 169] How have *"financial"* and *"commercial"* information' been interpreted? Financial information is information belonging to a third party that is about its monetary resources: what are the third party's monetary resources (assets and liabilities), and how are these monetary resources used and distributed.

> *The Adjudicator in Order F2009-028, after reviewing orders from both this office and the Office of the Information and Privacy Commissioner of Ontario, stated:*
>
> > *In Order 96-018, the former Commissioner adopted the following definition of "financial information" and determined that information is not the financial information of a third party for the purposes of section 16(1)(a) if the information does not allow an applicant to draw an accurate inference about a third party's assets or liabilities, past or present:*
> >
> > > *In keeping with my decision in Order 96-013, I attribute ordinary meaning to the word "financial". I also reiterate that careful consideration must be given to the*

content of the document in determining whether or not the information falls within this section. Financial information, in my opinion, is information regarding the monetary resources of the third party and is not limited to information relating to financial transactions in which the third party is involved.

As such, the information in the record is not of a "financial" nature because it reveals nothing of the third party's financial capabilities beyond its commitment to raise the dollar amount specified. Similarly, I find that the record reveals nothing of the third party's assets or liabilities, either past or present.

In Order MO-2496, an order of the Office of the Information and Privacy of Commissioner of Ontario, the Adjudicator considered the meaning of "commercial" and "financial" information as they appear in Ontario's equivalent of the FOIP Act's section 16. The Adjudicator stated:

These terms have been defined in previous orders of this office as follows:

...

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

In my view, Orders 96-013 and 96-018 of this office, and Order MO-2496 of the Office of the Information and Privacy Commissioner of Ontario, are essentially stating the same thing. "Commercial information" is information belonging to a third party about its buying, selling or exchange of merchandise or services. "Financial information" is information belonging to a third party about its monetary resources and use and distribution of its monetary resources.
[Order F2014-49, at para. 34]
[Emphasis added]

[para 170] The Public Body references *"financial"* as the business-related information in the pages of records. Section 16 is intended to protect information that ***belongs*** to businesses often referred to as 'informational assets'; it is not meant to simply shelter information ***about*** a business.

Orders of this office have taken the position that section 16 is intended to protect the informational assets, or proprietary information, of third parties that might be exploited by competitors in the marketplace if disclosed. *In Order F2009-015, the Director of Adjudication made this point at paragraphs 46 – 47. Similarly, Orders F2009-007, F2009-028, F2010-036, F2011-002, F2011-011, F2012-06, F2012-17, F2013-17, F2013-37, F2013-47, and F2013-48 also adopt the position that section 16 applies* ***to protect the informational assets of third parties in situations where those assets have been supplied to government in confidence, and that harm could result from the disclosure of these informational assets.***
[Order F2014-44, at para. 19; See also Order F2015-22, at para. 36; Order F2016-65, at para. 34]
[Emphasis added]

[para 171] Information about third parties deduced from proposals to provide legal services do not become commercial or financial information for the purposes of s. 16 until it has been accepted by the Public Body, for example, by becoming incorporated into the terms of an agreement.

> *With regard to the proposed services and proposed fees, the information does not describe how Aon conducts commercial activities, such that it could be said to be commercial information belonging to it or an informational asset; rather the information is about the services Aon proposes to provide to the Public Body in the future and the price it is seeking, should the proposal it submitted be accepted. Once the terms of the proposal were accepted, and the Public Body and Aon negotiated a contract, the information about how it actually supplies the proposed services and fees to the Public Body could possibly be said to reveal something about Aon's commercial activities; however, at the time Aon submitted the proposal, the services in question were a proposal only, rather than information about Aon's actual commercial activities. Under section 16, information must meet the requirements of section 16(1)(a) when it is supplied by the Third Party within the terms of section 16(1)(b). As stated in Order F2010-36:*
>
> > ***Proposed terms, such as those in bids, tenders, and proposals, do not become the commercial information of an organization until a public body elects to accept them.*** *Moreover, accepting proposed terms amounts to a form of negotiation, given that once a public body accepts the terms, the terms reflect what both parties have agreed to. [at para. 46]*
>
> *[Order F2014-44, at para. 29]*
> *[Emphasis added]*

[para 172] Despite the shortcomings of the Public Body's preparation of the records to show the exceptions it has applied and how, I am able to identify business information about third party(ies) on some pages, details of which are outlined below. The pages where there is a reference to a company or members of that company, most of the information is demographic, such as the name of individuals working for the company (s. 17 has not been claimed for any of the June 10, 2016 Records at Issue). With respect to whether demographic business information is 'commercial', Adjudicator Cunningham stated:

> *As was the case in Order F2010-036, I am unable to accept that the names of employees, their titles, and their business contact information constitute "commercial information" of a third party. [Order F2014-44, at para. 28]*

[para 173] On some of the pages where the Amended Index indicates s. 16 has been relied upon by the Public Body, the only information about a third party is the name of the business or corporate name. It is important to note the fact that the names of the law firms involved in the selection process were made public in the Iacobucci Review Report released on March 30, 2016 prior to the June 10, 2016 Records at Issue being provided to me. Regardless company names without any other information is not commercial or financial information within the terms of s. 16(1)(a).

> *Having reviewed all the information severed under section 15(1)(a)(ii), I find that the severed information on all the foregoing pages, except page 30-3, meets the test for commercial or financial information of a third party. The severed information on page 30-3 is merely company names. I fail to see how company names, without anything more, would be commercial or financial information.*
> *[Order 96-012, at para. 10]*

[para 174] The Public Body's submissions lack specificity as to what it identified as third party financial information contained in the June 10, 2016 Records at Issue that should be withheld. What I have been able to identify is as follows:

> Pages of records where s. 16 has been applied where there is a reference to a law firm or firms by name or acronym:

99, 100, 101, 103, 106, 113, 114, 115, 117, 118, 119, 210, 259, 260, 262, 263, 264, 266, 267, 646, 647

Pages of records where s. 16 has been applied with information that includes the name or acronym of a lawyer or lawyers:

103, 106, 107, 117, 118, 119, 259, 260, 262, 263, 264, 266, 267, 646, 647

Pages of records where s. 16 has been applied with information describing the strengths and weaknesses or factors of each of the prospective law firms [throughout the Records often referred to as "Appendix A: Differences and Pros/Cons" have had s. 16 applied]:

100, 101, 103, 104, 105, 106, 115, 117, 118, 119, 259, 260, 262, 263, 264, 266, 267, 646, 647

The Public Body has relied on s. 16 on the following pages where there is no reference to a business or its information, where there is no law firm name or name of lawyers and/or there is no information from the Appendix A: Differences and Pros/Cons analysis and/or no information that would amount to an informational asset:

102, 116, 261, 265, 268, 645, 648

Pages of records where s. 16 has been applied where there is a reference to a law firm or firms by name but which pages do not include the name of a lawyer or lawyers or information from Appendix A: Differences and Pros/Cons:

99, 258

Page 32 of the Records was included with the package of June 10, 2016 Records at Issue when it was first provided to me but has, during this phase of the Inquiry, been released to the Applicants. This is an example of where the Public Body has not been consistent in its application of the *mandatory* exception s. 16. When page 32 was released to the Applicants, the name of a law firm was not redacted. Also, of interest, on page 210 there is the name of a law firm, which the Public Body has redacted under s. 24, not under s. 16. Notably, though not part of the Records at Issue in this phase of the Inquiry, in the information released to the Applicants in response to their access to information requests and in the release on September 30, 2016, there are pages where the name of a lawyer or a law firm have not been redacted (for example, page 1734).

Part 2: Was the information supplied, explicitly or implicitly, in confidence?

[para 175] The information of a third party over which s. 16(1)(b) has been applied must have been supplied in confidence either explicitly or implicitly.

In order for information to be implicitly supplied in confidence under section 16(1)(b), ***a third party must, from an objective point of view, have a reasonable expectation of confidentiality in regard to the information supplied.*** *Furthermore, it is necessary to consider all the circumstances of the case including whether the information was:*

i) communicated to the public body on the basis that it was confidential and that it was kept confidential;
ii) treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body;
iii) not otherwise disclosed or available from sources to which the public has access; or
iv) prepared for a purpose which would not entail disclosure (Orders 99-018, 2000-010)

After a review of the submissions of the parties, I find that these four criteria are fulfilled. I find that the information that the Third Parties supplied to the Public Body was supplied in confidence and, for reasons previously discussed in this order, by extension, I find that the information that the Public Body created from this information regarding the Third Parties' eligibility and the amount of the financial aid also fulfills these four criteria.
[Order F2010-030, at para. 35-36]
[Emphasis added]

[para 176] This approach to determining whether the information has been supplied with an expectation of confidentiality has been found to be reasonable by the Alberta courts:

Relying on BC Privacy Commissioner's Order No. 01-36 (adopted in Alberta Privacy Commissioner's Order 99-018), the Adjudicator stated that in order to establish that information was supplied to a public body in confidence, the factors to be considered include whether the information was:

1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
3. not otherwise disclosed or available from sources to which the public has access;
4. prepared for a purpose which would not entail disclosure. *(para 79)*

The Adjudicator also observed that the test requires an ***"an objectively reasonable expectation of confidentiality",*** *which can be based either on express communication or other objective criteria that ground the expectation (para 85).*
[Edmonton Police Service v. Alberta (Information and Privacy Commissioner), 2012 ABQB 595, at paras. 32-33]
[Emphasis added]

[para 177] The Supreme Court of Canada has provided the appropriate analysis of what constitutes information supplied by a third party.

What, then, are the governing legal principles?

The first is that a third party claiming the s. 20(1)(b) exemption must show that the information was supplied to a government institution by the third party.

A second principle is that where government officials collect information by their own observation, as in the case of an inspection for instance, the information they obtain in that way will not be considered as having been supplied by the third party. As MacKay J. said in Air Atonabee, at p. 275:

> *In my view, where the record consists of the comments or observations of public inspectors based on their review of the records maintained by the third party at least in part for inspection purposes, the principle established by Can. Packers Inc., supra, applies and the information is not to be considered as provided by the third party.*

See also Canada Packers, at pp. 54-55; Les viandes du Breton Inc. v. Canada (Canadian Food Inspection Agency), 2006 FC 335 (CanLII), at paras. 44-49.

A third principle is that whether or not information was supplied by a third party will often be primarily a question of fact. For example, if government officials correspond with a third party regarding certain information, it is possible that the officials have prior knowledge of the information gained by their own observation or other sources. But it is also possible that they are

> *aware of this information because it was communicated to them beforehand by the third party. The mere fact that the document in issue originates from a government official is not sufficient to bar the claim for exemption. But, in each case, the third party objecting to disclosure on judicial review will have to prove that the information originated with it and that it is confidential.*
>
> ***To summarize, whether confidential information has been "supplied to a government institution by a third party" is a question of fact. The content rather than the form of the information must be considered: the mere fact that the information appears in a government document does not, on its own, resolve the issue. The exemption must be applied to information that reveals the confidential information supplied by the third party, as well as to that information itself. Judgments or conclusions expressed by officials based on their own observations generally cannot be said to be information supplied by a third party.***
> *[Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, at paras. 154-158]*
> *[Emphasis added]*

[para 178] Some of the information in the Records involves a documented analysis of third party(ies) information contained in Appendix A: Differences and Pros/Cons between prospective law firms. There is no evidence or record that reveals what information the third party(ies) actually supplied and whether or not it was provided on a confidential basis. The author of the Appendix A: Differences and Pros/Cons documentation is not identified but one can assume it was an analysis prepared by an employee of the Public Body for the senior employees involved in the selection process or the senior employees themselves. Either way the table could not have been prepared without information being provided by the third party(ies). The key is whether the information was ***provided by a third party or is inextricably linked to information provided by the third party.***

> *In Order 99-040, the former Commissioner held that* ***if information at issue would not have been created without information supplied by a third party, the information must be treated as having been supplied by the third party.*** *The information that was created would be considered to be "inextricably linked" with the information provided by the third party.*
> *[Order F2010-030, at para. 33; Judicial Review dismissed: See also ABC Benefits Corporation v. Alberta (Information and Privacy Commissioner), 2015 ABQB 662, at paras. 65-75; Imperial Oil Ltd v. Calgary (City),* 2014 ABCA 231 (CanLII)*, at para. 83]*
> *[Emphasis added]*

[para 179] The Public Body did not, in any of its submissions, make representations on the second part of the s. 16 test: confidentiality. None of the pages in the June 10, 2016 Records at Issue are stamped confidential, private, or have any wording that could lead one to conclude that the commercial information was supplied explicitly or implicitly in confidence by a third party. Looking at the records themselves, in those cases where the record is an email, the feature of the Outlook email system used by the Alberta Government, to earmark emails within a certain category such as Privileged and Confidential, Private, High Importance, has not been activated to mark any of the information to indicate it was provided or to be held on a confidential basis. As noted above in para. 47 of this Order, in the information released to the Applicants (First Applicant: August 31, 2012 and Second Applicant: September 21, 2012), there are pages where the feature for *"Privileged and Confidential Communication"* has been activated (for examples, pages 4, 8, 10, and 11).

[para 180] Pages 103-107 have Non-Responsive handwritten on the page with no exceptions noted (attached to Briefing Notes dated December 6, 2010). The Amended Index shows s. 16 applied to some of these pages (see above at para. 174). The information about the law firms includes: basis of experience, firm depth, estimated disbursements, other jurisdictional engagement, fees for steps, potential conflicts of interest. A review of the June 10, 2016 Records at Issue where s. 16 has been claimed does not reveal any of the actual information that the third party(ies) provided to the Public Body to enable it to prepare Appendix A: Differences and Pros/Cons. Notwithstanding these facts, particularly the lack of evidence demonstrating a concern on the part of the Public Body to protect the information as

confidential, given the nature of the process undertaken to receive proposals from prospective law firms, it is reasonable to conclude that the third party(ies) ***supplied their information with an implied expectation that the information would be held in confidence during the competitive selection process of which they were a part***: the information would not be otherwise disclosed or available from sources to which the public has access or was prepared and provided for a purpose which would not entail disclosure.

[para 181] The second requirement in s. 16(1)(b) has been met for a select and limited number of the pages of records to which it has been applied. Because s. 16 is conjunctive, I turn to the final requirement in s. 16(1)(c)(i).

Part 3: Could disclosure of the information reasonably be expected to bring about the outcome set out in s. 16(1)(c)(i)?

[para 182] An essential requirement under s. 16(1)(c)(i) is evidence that disclosure could reasonably be expected to significantly harm a third party's competitive position or interfere significantly with its negotiating position. The question becomes: has the Public Body produced evidence to support the contention that significant harm could reasonably be expected if specific information is disclosed?

> *In Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner), 2006 ABQB 515, the Court upheld a decision of the Commissioner requiring evidence to support the contention that there was risk of harm if information were to be disclosed.*
>
> > *The Commissioner's decision did not prospectively require evidence of actual harm; the Commissioner required some evidence to support the contention that there was a risk of harm. At no point in his reasons does he suggest that evidence of actual harm is necessary.*
> >
> > *The evidentiary standard that the Commissioner applied was appropriate.* ***The legislation requires that there be a "reasonable expectation of harm." Bare arguments or submissions cannot establish a "reasonable expectation of harm." When interpreting similar legislation, courts in Ontario and Nova Scotia have held that there is an evidentiary burden on the party opposing disclosure based on expectation of harm:*** *Chesal v. Nova Scotia (Attorney General) 43, at para. 56 Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner) 44 at para. 26.*
>
> *[Order F2014-44, at para. 62]*
> *[Emphasis added]*

[para 183] The evidence does not need to establish actual harm but rather *"a reasonable expectation of probable harm."*

> *This Court in Merck Frosst adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in Merck Frosst emphasized,* ***the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard*** *will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": Merck Frosst, at para. 94, citing F.H. v. McDougall, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.*
> *…*
> *In sum, the Commissioner's decision reasonably applied the appropriate evidentiary standard. The Commissioner took into account the fact that the Registry's efficiency is based on its confidentiality. However, she had to balance this concern with the public's interest in having*

> *transparent and open governmental institutions. In striking a balance between those two competing interests, the Commissioner decided that the risks suggested by the Ministry were too remote and not supported by the evidence to ground* ***a reasonable expectation of probable harm.*** *This finding was reasonable.*
> *[Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31, at paras. 54, 66]*
> *[Emphasis added]*

[para 184] It is unnecessary to further explore the question of harm. It is incumbent on whatever party seeks to withhold information to submit or adduce evidence that will ground a reasonable expectation of probable harm. I am unable to identify anything in any of the submissions of the Public Body that referred to reasonable expectation of probable harm that would result from the disclosure of the business related information in the records.

[para 185] In relation to the information in the records regarding the successful law firm, the Public Body Initial Submission [2014] and Initial Submission [2016] focus almost entirely on the CFA; pages 551-564 that are not part of the June 10, 2016 Records at Issue. In fact, in the Public Body Initial Submission [2016] the example given in relation to s. 16 is the CFA where it states: *"For example, the Contingency Fee Agreement directly affects the financial interests of the other party to it - the Province's lawyers in the tobacco recovery litigation"* even though those pages do not form part of this phase of the Inquiry. Indeed, in its Reply Submission [2016], the Public Body states: *"The CFA is not found within the June 10, 2016 Records at Issue, and is thus not at issue in this Inquiry."* Because the CFA was the only example relied on by the Public Body with respect to s. 16, I was concerned. My concern was heightened by the fact that at no time has the Public Body relied on and applied s. 16 to the CFA pages in this phase or in the main Inquiry (refer to all other indices provided by the Public Body during this phase for pages 551-564). As a result, on March 3, 2017, I corresponded with the Public Body (copied to the Applicants) regarding its reference to the CFA:

> *One observation that may convince the Public Body to respond positively to my request [at p. 4 of my March 1, 2017 letter] for the pages of Records that have been consistently reported by the Public Body [see copy of voice mail transcription enclosed] as containing the Contingency Fee Agreement (CFA) [pages 551-564] is because during this part of the Inquiry, the Public Body in its Initial Submissions [2016] at para. 22 refers to the information in the CFA to demonstrate that Records in the Amended Index for the June 10, 2016 Records at Issue include information described in s. 16 of the FOIP Act. Your Initial Submissions [2016] appear to assume that the Records related to the CFA were provided as part of the June 10, 2016 package to me, which they were not. Without the opportunity to review these pages of Records, it will be difficult to make a determination with respect to your submissions regarding the application of the mandatory s. 16 exception.*

[para 186] The Public Body declined my offer to add the CFA pages in the June 10, 2016 Records at Issue package. When its reliance on the CFA was pointed out, the Public Body did not provide any additional submissions in relation to s. 16. At para. 23 of its Initial Submission [2016], the Public Body states: *"Some of the June 2016 records contain information* ***provided by*** *other prospective law firms, and disclosure of that information* ***could reasonably be expected to affect their financial interests and competitive position."*** *[my emphasis]* The Public Body's submissions, reproduced above, are mere assertions and constitute little else than a recitation of the test set out in s. 16 of the *FOIP Act*, which is important to do but not sufficient. The Public Body makes no reference to significant harm. I am unable, on what is before me, to find any evidence as to how the test that disclosure of information could reasonably be expected to ***harm significantly*** the competitive position or interfere significantly with the negotiating position of the third party within the terms of s. 16(1)(c) has been met.

[para 187] Exercising caution not to reveal the contents of the June 10, 2016 Records at Issue, my observations with respect to s. 16 of the *FOIP Act* are as follows:

1. The Public Body has not made any submission or provided any evidence as to what or how information in the records would reveal any commercial or financial information of a third party(ies).

2. On a review of the records themselves, some of the pages contain information that can be characterized as commercial or financial information of a third party(ies). Some of the pages of records include an analysis of information in the form of Appendix A: Differences and Pros/Cons about the third party(ies) which constitutes information that is inextricably linked to information one can reasonably assume was supplied by a third party(ies).

3. The Public Body neither makes any submission nor provides evidence with respect to the information being supplied in confidence, explicitly or implicitly. On a review of the records to which the Public Body has applied s. 16, there is no explicit indication on the pages that any of the contents were provided by a third party(ies) in confidence or that the Public Body consistently treated the information in a manner that indicated a concern for its protection from disclosure.

4. Notwithstanding the lack of evidence demonstrating a concern on the part of the Public Body to protect the information as confidential, given the nature of the process undertaken to receive proposals from prospective law firms, it is reasonable to conclude that the third party(ies) supplied their information with an implied expectation that the information would be held in confidence during the competitive selection process of which they were a part: the information would not be otherwise disclosed or available from sources to which the public has access or was prepared and provided for a purpose which would not entail disclosure.

5. The Public Body has not made any substantive submission or provided any evidence with respect to the significant harm that could reasonably be expected to result from the Public Body's disclosure of a third party(ies)' information. Rather the Public Body simply asserts that disclosure could ***affect*** their financial and/or competitive interests.

6. The Public Body submits in its Reply Submission [2016] in response to the First Applicant's Initial Submission [2016] that *"*[i]*t does not matter whether section 16 was previously referred to; it is for the External Adjudicator to determine whether section 16 applies."* This was in response to the First Applicant taking issue with the Public Body using the CFA as its only example under s. 16, what it refers to as the Public Body *"bootstrapping"*, because s. 16 had not previously been claimed for the pages designated as the CFA. While the pages of the Records at Issue containing the CFA do not form part of this phase of the Inquiry, I reference this because of the inadequate submission from the Public Body with respect to what the s. 16 exception requires and its reference to handing off the decision to me.

[para 188] The contents of the records do not reveal any information that would meet the third requirement in the three-part test laid out in s. 16. Because s. 16 is a mandatory exception, caution should be exercised. A third party(ies) ought not to be disadvantaged because of the failure of the Public Body to provide sufficient submissions and evidence. The issue of next steps with respect to s. 16 will be dealt with in the Order for Reconsideration below. I turn now to the final issue, whether the public interest override applies.

ISSUE #4: Whether the s. 32 public interest override applies to any of the information in the June 10, 2016 Records at Issue and, if so, who has the onus of proof and what is the test for disclosure of information when the override applies?

[para 189] The Applicants have raised the issue of the public interest override found in s. 32 of the *FOIP Act,* which reads as follows:

> *32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant*

*(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, **or***
(b) information the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.
[Emphasis added]

[para 190] A rebuttable presumption in favour of granting access has been recognized in the Supreme Court of Canada:

> *Section 1 sets forth the purpose of the FIPPA. Reflecting the public interest in access to information, it establishes a presumption in favour of granting access. Chief Justice McLachlin and Justice Abella explain in Ontario v. CLA:*
>
> > ***Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society.***
> >
> > *...Open government requires that the citizenry be granted access to government records **when it is necessary to meaningful public debate on the conduct of government institutions.** [Emphasis added; paras. 1 and 37.]*
>
> *However, s. 1 also recognizes that **the presumption must be rebuttable in a limited number of specific circumstances** according to the mandatory or optional exemptions provided for in the Act.*
>
> *The scheme of the Act reflects its purpose. The head of the institution that controls or has custody of the requested records, and who has knowledge of their content and the impact of their release, has the primary responsibility for determining whether one of the exemptions applies to the requested records. **In the case of a discretionary exemption, he also has the responsibility of determining whether that exemption should be invoked.** However, the Act gives the ultimate power over releasing the information to the IPC, subject to judicial review.*
> *[John Doe, at paras. 41-42]*
> *[Emphasis underlining in original; Other emphasis added]]*

[para 191] The Applicants assert s. 32 and they, therefore, carry the burden to demonstrate that the public interest override applies in these particular circumstances. In that regard, in a case dealing with s. 32 (formerly s. 31), former Commissioner Clark stated:

> *In the Bosch decision,11 Mr. Justice Cairns (appointed as an adjudicator in my place because I was unable to act in that particular case) stated that the applicant has the onus of proof in a section 31 review. **The applicant must therefore demonstrate that the information fits within the pre-conditions set out in section 31 of the Act; the head of the public body does not have to prove that the information does not fit within one of these pre-conditions.***
> *[Order 96-011, at pg. 17]*
> *[Emphasis added]*

[para 192] The burden on the Applicants will not be easily met. Former Commissioner Work, in considering Order 96-011, stated:

> *Order 96-011 established that an applicant has the burden of proof to show that a public body is required to disclose information under section 32. Due to section 32 overriding the Act, section 32 is interpreted narrowly and the burden of proof is difficult to meet. An applicant must show that*

the information concerns ***matters of compelling public interest*** *and that there are "emergency-like" circumstances compelling disclosure. An applicant must show that a matter is "clearly in the public interest" as opposed to a matter that may be of interest to the public: see Orders 96-011, 2000-005 and 2000.*
[Order F2004-024, at para. 57]
[Emphasis added]

[para 193] The First Applicant was mistaken in asserting that the Public Body should carry the burden to show public interest did not apply as it was best positioned to do so, in these circumstances. The onus only shifts to the Public Body after the Applicant successfully meets its burden (See the test of 'rationally defensible' in Order F2012-14, at para. 155). It is for the Applicant(s) asserting reliance on s. 32 to show the information meets one of three pre-conditions:

Once the pre-conditions set out in section 31 [now s. 32] *are met, a statutory obligation arises for the head of a public body to release information, notwithstanding that other sections of the Act protecting individual privacy may have to be over-ridden in releasing that information. The Act cannot be taken to lightly impose this statutory duty on the head of a public body, or to lightly allow an over-riding of individual privacy rights. Thus, in any review of a section 31 decision, I must first consider whether one of the pre-conditions set out in section 31 has occurred.* ***The applicant has the burden of proof at this part of the investigation and it is not a burden that will be easily met.*** *These pre-conditions are:*

- *risk of significant harm to the environment*
- *risk of significant harm to the health or safety of the public*
- *release is clearly in the public interest.*

The latter of these pre-conditions was considered by Mr. Justice Cairns in Bosch. In the portion of the Bosch decision dealing with section 31(1)(b), Mr. Justice Cairns considered what type of information might be "clearly in the public interest". He made an important distinction between information that "may well be of interest to the public" and information that is "a matter of public interest." I agree with this point. ***I cannot conclude that the Legislature intended for section 31 to operate simply because a member of the public asserts "interest" in the information. The pre-condition that the information must be "clearly a matter of public interest" must refer to a matter of compelling public interest.***
[Order 96-011, at pages 17-18; See also Order F2014-29, at para. 20; Order 98-013, at paras. 38-39]
[Emphasis added]

[para 194] Only one of the three pre-conditions set out in s. 32 is relevant to this Inquiry: disclosure is clearly in the public interest. Raising the issue of public interest, particularly given the wording of s. 32(1)(a) suggests urgency, ought to be done at the time of an access request or as soon as practicable once it is known if the matter is compelling public interest. While that may be best practice, it remains open for public interest to be raised for the first time at an Inquiry (Refer to Order F2008-020, at para. 120 and Order F2014-25, at para. 97). One of the Applicants requested a fee waiver at the time of making his/her access request: *"Since this matter is in the public interest, I am requesting a waiver of all fees save the application fee."* The Applicant conceded that s/he did this with every FOIP request s/he made. I make a distinction between the reference to public interest as a justification for a fee waiver and a claim for disclosure of information pursuant to the s. 32 public interest override. In this case, the outcome with respect to s. 32 should not be prejudiced by the timing of when it was raised by the Applicants.

[para 195] Turning first to the submissions from the Applicants with respect to s. 32. To put their access to information requests into context, a few background facts. Following the announcement by the Minister of Justice and Attorney General on October 25, 2010 of the government's intention to commence litigation to recover health care costs associated with tobacco and by the time the Applicants made their respective access to information requests in 2012, the issue with respect to the tobacco litigation to recover health care costs had gained, and continued to attract, considerable public attention (Refer to the

Second Applicant Initial Submission [2014], at Tabs B and C). The First Applicant, in its Initial Submission [2014], provided evidence with respect to the public discourse concerning the retainer of external counsel for the purpose of the tobacco related litigation (Refer to First Applicant Initial Submission [2014], paras. 29-36). The public attention continued with respect to the issues raised by these access to information requests, throughout an investigation by the Ethics Commissioner (Refer to Second Applicant Initial Submission [2014], at Tab D) and with the subsequent release of the Iacobucci Review Report (Refer to First Applicant's correspondence dated August 3, 2016, at pages 1-3). The Applicants provided substantial proof of the apparent public interest in this issue evidenced by the attention given to it by the media (Refer to First Applicant Initial Submission [2014], at Tabs 12-15, 18-19; Second Applicant Initial Submission [2014], at Tabs B-C) and others, including being discussed in the Alberta Legislative Assembly (Refer to First Applicant Initial Submission [2014], at Tab 16). But does the interest evidenced by the attention given constitute compelling public interest within the terms of s. 32?

[para 196] The First Applicant argued that given the overarching purpose of access to information legislation is to facilitate democracy by fostering open and transparent government, citizens must have access to this kind of information in order to achieve that purpose.

> ***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.*
>
> *See also: Canadian Bar Association, Freedom of Information in Canada: A Model Bill (1979), at p. 6.*
>
> *Access laws operate on the premise that politically relevant information should be distributed as widely as reasonably possible. Political philosopher John Plamenatz explains in Democracy and Illusion (1973), at pp. 178-79:*
>
> > *There are not two stores of politically relevant information, a larger one shared by the professionals, the whole-time leaders and persuaders, and a much smaller one shared by ordinary citizens. No leader or persuader possesses more than a small part of the information that must be available in the community if government is to be effective and responsible; and the same is true of the ordinary citizen. What matters, if there is to be responsible government, is that this mass of information should be so distributed among professionals and ordinary citizens that competitors for power, influence and popular support are exposed to relevant and searching criticism. [Emphasis in original.]*
>
> ***Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable.*** *Consequently, while the Access to Information Act recognizes a broad right of access to "any record under the control of a government institution" (s. 4(1)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted.*
> *[Dagg v. Canada (Minister of Finance), [1997] 2 SCR 403, at paras. 61-63]*
> *[Emphasis added]*

[para 197] I turn to the Public Body's submissions with respect to s. 32. The Public Body's interpretation of s. 32 of the *FOIP Act* appears to ignore the *"or"* between s. 32(1)(a) and s. 32(1)(b) and states that s. 32 *"deals with situations where there is an urgent need to disclose information about an*

emergency involving a risk of significant harm to the environment or health and safety of the public." As the First Applicant put it in its Initial Submission [2016] at para.15, the Public Body's submission *"deprives subsection 32(1)(b) of any meaning whatsoever."* The Public Body's interpretation would restrict the scope of s. 32 of the *FOIP Act* to environment and health and safety matters that are dealt with in s. 32(1)(a) of the *FOIP Act*. Accordingly, I accept and agree with the First Applicant's reliance on the *Proulx* decision in the Supreme Court of Canada, which held:

> *Despite the similarities between the provisions and the fact that the penalty for breach of probation is potentially more severe than for breach of a conditional sentence, there are strong indications that Parliament intended the conditional sentence to be more punitive than probation.* ***It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.*** *It would be absurd if Parliament intended conditional sentences to amount merely to probation under a different name. While this argument is clearly not dispositive, it suggests that Parliament intended there to be a meaningful distinction between the two sanctions.*
> *[Proulx, at para. 28]*
> *[Emphasis added]*

[para 198] Section 32 is to be given a disjunctive reading [*"or"*] and, therefore, the Public Body's suggestion that s. 32 only applies to situations envisioned by s. 32(1)(a) is not consistent with the statutory language. Section 32(1) has two distinct provisions with respect to where the head of a public body is under a duty to disclose information in the public interest, which are contained in 32(1)(a) and s. 32(1)(b) respectively.

[para 199] The Public Body submits it automatically took public interest into account in exercising its discretion under s. 27 (no reference regarding public interest with respect to the other discretionary exceptions). In other words, in deciding whether the public interest to withhold trumps the public interest to disclose information, the Public Body submits that as this case involved records about significant litigation, it would not be in the public interest to do anything which might affect the legal proceedings. Had I found the s. 27 legal privilege exception did apply to any of the pages of records, it is important to recognize that the public interest override would not apply to exempt any information protected by solicitor-client privilege (notwithstanding the language of s. 32(2)). This may be very important as the main Inquiry moves forward as the Public Body has claimed legal privilege over the majority of the approximately 2,570 pages of Records at Issue in the main Inquiry. Because the Records at Issue in the main Inquiry (save and except the 35 pages in this phase) are not at issue, the exact number of pages is yet to be determined as some of the 2,570 pages listed in the latest Index are shown as released. This will be dealt with as the main Inquiry continues.

> ***The s. 23 public interest override does not apply to documents exempted from disclosure for*** *law enforcement (s. 14) and* ***solicitor-client privilege*** *(s. 19). The main issue in this case, as it was argued before us, is whether this renders s. 23 unconstitutional.*
> *…*
> *The common law privileges, like solicitor-client privilege, generally represent situations where the public interest in confidentiality outweighs the interests served by disclosure.*
> *…*
> *Law enforcement privilege and* ***solicitor-client privilege already take public interest considerations into account and, moreover, confer a discretion to disclose the information on the Minister. For the reasons that follow, we conclude that the public interest override contained in s. 23 would add little to what is already provided for in ss. 14 and 19 of the Act.***
> *[Ontario (Public Safety and Security), at paras. 24, 39, 43]*
> *[Emphasis added]*

[para 200] The Public Body submits there is no information in the June 10, 2016 Records at Issue that meet the requirements of s. 32. It goes on to state:

The fact that one of the Applicants is a member of the media, and therefore seeks information about which [s/he] has an interest or in which [s/he] thinks the public might have an interest, does not mean that the information sought is a matter of compelling interest.[10] *Similarly, the fact that the other Applicant is a law firm does not make the matter of compelling public interest."*
[Public Body Initial Submission [2016], at para. 35]

[para 201] The Public Body is no doubt cognizant of the fact that who an applicant is or what s/he intends to do with the information to which s/he seeks access is not a relevant consideration in rendering an access to information decision. This Public Body submission in this regard carries no weight. Indeed, it was unnecessary as the Applicants did not argue public interest on the basis of their respective professional positions. Their submissions were focussed on whether disclosure of the information in the records met the test of compelling public interest to release the information to further promote the goals of transparency and accountability. Regardless, the fact that an applicant may be a member of the media does not automatically meet the public interest test for it to be compelling (Refer to Order F2014-25, at para. 97).

[para 202] I am loathe to shut the door on giving the Applicants the opportunity to continue to demonstrate there is a compelling public interest as the main Inquiry moves forward in the context of the bulk of the Records at Issue. The Applicants have already provided evidence of the considerable attention given to the events surrounding the creation of these records and have argued:

The public body has effectively decided the Commissioner and her staff are not to be trusted. If the public body believes it is above an officer of the Legislature, who then can hold it to account on behalf of the public? The arbitrary refusal of the public body to allow review of the records by the Commissioner undermines an independent officer of the Legislature; it should not be allowed, and the public body should be publicly censured.
…
The public body's arbitrary actions speak also to its attitude, and interpretation - or lack thereof - of Section 32 of the FOIP Act.
…
The purpose of FOIP in a democracy is to hold governments accountable and facilitate democracy.
[Second Applicant Initial Submission [2014], at pgs. 1-2]

[para 203] It is clear to me that in the circumstances surrounding this information, which has given rise to a complaint to the Ethics Commissioner, the Iacobucci Review Report and robust media attention (all in evidence before me), the Applicants may potentially be able to meet their burden to show there is a compelling public interest, which the Public Body should have the opportunity to rebut with submissions that address s. 32(1)(b). At this point, the Public Body's burden to countervail the Applicants' arguments are sparse and to some extent irrelevant. A great deal of the interest is rooted in matters related to the CFA, which Records are not at issue at this time, but which are of importance to the Applicants. I have decided, therefore, to postpone making a determination with respect to Issue #4, the public interest override, until the main Inquiry.

[para 204] The reason for not making a decision with respect to public interest, during this phase of the Inquiry, is for the reasons that follow. I consider that to make a finding would be premature because the public interest override is a matter that should more properly be considered in the context of the main Inquiry that will adjudicate on the remaining and majority of the pages of the Records at Issue.

[para 205] Comparing the small sample being considered at this phase to the count for the pages of Records at Issue, the Non-Responsive pages and the other pages added over the course of the Inquiry to date makes the point. In 2012, at the time of the access to information decisions, the Public Body advised the Applicants there were 564 pages, which page count included pages that had been designated as Non-Responsive, therefore were not records, and did not include the pages from another access to information request later added. The Index produced in August 2014 by the Public Body with its Initial Submission [2014] showed a count of pages 1-564 but did not make reference to or list any of

the 23 pages later listed in the June 10, 2016 Records at Issue as Non-Responsive. The Index for the June 10, 2016 Records at Issue was initially made up of 38 pages, 23 of which were added and listed as Non-Responsive pages including 4 pages from another access to information request [2012-G-0102]. Three of these Non-Responsive pages were released in September 2016 and June 2017 by the Public Body leaving a total of 35 pages of June 10, 2016 Records at Issue. The pages designated and confirmed by the Public Body to be the CFA are not amongst this small sample of the Records at Issue. In the most recent indices produced by the Public Body dated September 30, 2016, January 19, 2017 and April 7, 2017, which laid out the Records at Issue in the main Inquiry, which include the June 10, 2016 Records at Issue, showed a total of approximately 2,570 pages in the main Inquiry (as explained above, a count that includes some released or partially released records and some pages still designated Non-Responsive). The size of the sample of the June 10, 2016 Records at Issue when compared to the present total pages in the main Inquiry leads me to conclude my decision with respect to the issue regarding the public interest override should be deferred.

[para 206] Exercising caution not to reveal the contents of the June 10, 2016 Records at Issue, my observations with respect to s. 32 of the *FOIP Act* are as follows:

1. Section 32 is to be given a disjunctive reading [*"or"*] and, therefore, the Public Body's suggestion that s. 32 only applies to situations envisioned by s. 32(1)(a) is not consistent with the statutory provision. Section 32(1) has two distinct provisions, s. 32(1)(a) and s. 32(1)(b), with respect to where the head of a public body is under a duty to disclose information in the public interest.

2. The Public Body is correct in its assertion that in this case the Applicants carry the burden of proof to establish that s. 32 applies. This is distinct from a case under s. 32 where it is the Public Body making a decision to disclose information to the public unprompted by an application to do so. In that case, which is not the case here, the Public Body would bear the burden to prove the release of information met the statutory test.

3. In this case, without the complete compliment of the Records at Issue in the main Inquiry, it is impossible to make a decision whether the Applicants have met their burden to demonstrate that the disclosure of the pages of records in the June 10, 2016 Records at Issue is clearly a matter of compelling public interest. There is little doubt the media attention devoted to the choice of counsel and the terms of their engagement in the tobacco litigation showed a keen interest on the part of the public in the matter. As the Second Applicant put it at p. 5 of its Initial Submission [2014], *"How are we to trust that the consortium did offer the lowest cost, that it is in the best interest of Albertans and that it will cost Alberta taxpayers nothing unless we are given access to the documents?"* But the question to be answered in the main Inquiry with respect to the complete set of Records at Issue is whether the information is not just of interest to the public but is clearly a matter of compelling public interest.

4. Making a determination with respect to public interest in this phase of the Inquiry would only apply to the 35 pages at issue (which count does not include the CFA) and would, in my opinion, be premature. A more appropriate way to proceed is to make the decision regarding the s. 32 public interest override during the main Inquiry, if the Applicants elect to argue s. 32 of the *FOIP Act* applies to the whole of the approximately 2,570 pages of the Record at Issue. Therefore, I decline to make a decision with respect to Issue #4 in this phase of the Inquiry. Reviewing the complete Records at Issue and receiving submissions from the parties in the main Inquiry will enable me to decide whether the Applicants have satisfied their burden to demonstrate that the s. 32 override applies because the test of compelling public interest in full disclosure has been met and has not been sufficiently refuted by the Public Body.

VI. Notice to Third Party(ies)

[para 207] I now turn to the matter of notice to third party(ies), which requires a brief explanation. The Public Body has applied s. 16, s. 24 and s. 27 for the large majority of the pages of records, including

numerous exceptions within these sections of the *FOIP Act.* In fact, there are only 4 pages of records in the June 10, 2016 Records at Issue where subsections of all three sections of the *FOIP Act* have not been claimed [98, 129, 210, 211]. Section 16 has not been claimed for these 4 pages.

[para 208] On my review of the June 10, 2016 Records at Issue, I have found that the Public Body has not properly relied on the legal privilege exceptions in s. 27(1)(a), s. 27(1)(b)(ii) or s. 27(1)(c)(ii) to any of the 33 pages where it has been claimed.

[para 209] For all the same 33 pages plus 2 more pages [210, 211], s. 24 has properly been relied upon and may apply, but the Public Body has failed to provide sufficient evidence to demonstrate how it exercised its discretion. In addition, because it has applied the multiple exceptions as blanket exceptions [210 and 211 the only exceptions], the records do not show how the exceptions have been applied, line-by-line, exception-by-exception. The only pages where two exceptions under s. 24 (and no other exceptions) have been relied on and the records redacted are pages 210 and 211.

[para 210] Because there is insufficient evidence to allow me to ascertain how the Public Body exercised its discretion under s. 24, the Public Body will be ordered to reconsider the exercise of its discretion for all 35 pages where the Public Body has relied on and applied s. 24 of the *FOIP Act*.

[para 211] Once the Public Body has made a decision properly applying s. 24, it may decide to release all or part of the June 10, 2016 Records at Issue. Because the Public Body has claimed s. 16, a mandatory exception, over all the same pages as s. 24, a further step may be necessary. The point at which it decides to disclose information under s. 24 but claims s. 16 still applies, the Public Body will be required to comply with s. 30 of the *FOIP Act,* which reads, in part, as follows:

> *30 When the head of a public body is considering giving access to a record that may contain information*
>
> *(a) that affects the interests of a third party under section 16,*
>
> *…*
> *the head* ***must****, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (4).*
> *[Emphasis added]*

[para 212] The Public Body has not given notice to any third party(ies) as it had made a decision not to release any of the 35 pages of the June 10, 2016 Records at Issue. The Public Body's decision to exercise its discretion under s. 30 not to give notice until it is considering disclosing third party information, is a decision in line with what the Alberta Court of Queen's Bench has said.

> *Neither the s. 30 nor s. 67 obligations to notify are unconditional. The legislation does not provide an absolute right to a third party or affected person to immediately receive, in full, all relevant materials and submissions. The s. 30(1) obligation on the public body is to notify "where practicable and as soon as practicable", while the s. 30(3) obligation is permissive; i****f a public body refuses disclosure on the basis of ss. 16-17 then the public body appears to have discretion to notify or not notify any third party.*** *The Privacy Commissioner may only notify an affected party "as soon as practicable", and the information provided by the Commissioner may be severed "as the Commissioner considers appropriate." Logically, the Commissioner would be guided in severing information per s. 67(2) by its s. 59(3) obligation to not unnecessarily disclosure* [sic] *any government-held information.*
> *[Alberta (Employment and Immigration) v. Alberta Federation of Labour, 2009 ABQB 344 [Alberta (Employment and Immigration)], at para. 34; Appeal dismissed 2010 ABCA 304]*

[para 213] Recognizing the importance of the caution in s. 59(3) of the *FOIP Act* prohibiting the Commissioner or her delegate from disclosing any information in the records which a public body would be required or authorized to refuse disclosure of, the sequence of when the Commissioner or her

delegate requires a public body to give notice is important. In that regard, Justice Verville of the Alberta Court of Queen's Bench said:

> *Further, were third party notification automatic and mandatory, a FOIPPA information request might allow a person to intentionally probe confidential information held by a public body. For example, an organized criminal or terrorist group might instruct a lawyer to make a FOIPPA information request to disclose government information on the known membership of that group. Even though that FOIPPA information request would undoubtedly be rejected by the public body under the s. 20 investigation and security non-disclosure rationale, the request would also involve s. 17 privacy interests. Following the Privacy Commissioner's argument, were denial of the information request challenged then those affected third parties would necessarily be notified by the Commissioner. Clearly, this outcome is absurd, contrary to the intent of the legislature, and defeats one of the basic objectives of the legislation. Notification of affected third parties cannot be an automatic consequence where an affected third party's ss. 16 or 17 interests are involved.*
>
> *The Public Body suggests, and I would agree, that* ***any deleterious effect of third party or affected person notification may be avoided by the sequence in which the Adjudicator evaluates rationales for non-disclosure, and where at least one alleged reason for non-disclosure involved privacy of third party information (ss. 16-17) and a second reason flows from non-disclosure for proper government operation (ss. 22-28).***
>
> *In those instances, where the public body requests that an affected person not be informed of the FOIPPA information request, it is my view that the Privacy Commissioner should first hear submissions and determine the validity of non-disclosure where that non-disclosure was based on ss. 22-28. If the Commissioner concludes non-disclosure was appropriate, the matter ends, and the third party will not have any private or economic information disclosed. Phrased differently, while the third party has not had the opportunity required by procedural fairness to argue that non-disclosure is appropriate, that third party cannot yet have experienced any harm that may result from the disclosure of potentially damaging and confidential information.*
>
> ***If all ss. 22-28 non-disclosure rationales are rejected, then the affected third party is notified, and invited to make submissions in reference to privacy and business interests (ss. 16-17).*** *The affected party would have been notified "as soon as practicable" (s. 67(1)), and whatever information was provided to the affected third party would still be subject to "appropriate" severance (s. 67(3)) so that the notice would only disclose whatever information is "necessary" (s. 59(1)), taking:*
>
> > *59(3) ... every reasonable precaution to avoid disclosing and must not disclose*
> >
> > > *a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 7(1), or*
> > >
> > > *(b) whether information exists, if the head of a public body in refusing to provide access does not indicate whether the information exists.*
>
> *Again, phrased differently, for the Privacy Commissioner* ***to notify an affected third party so as to defeat a legitimate basis for a public body to refuse disclosure of requested information*** *would mean the Commissioner had not taken "every reasonable precaution" to avoid disclosure. In my view this would be an unreasonable procedural choice.*
>
> *The Privacy Commissioner has argued that FOIPPA's operation and purpose ought to be evaluated strictly or principally from the context of granting or denying access by the applicant to information. I do not agree. The prohibitions against disclosure stated in ss. 16-29 do relate to applicant information requests. However that is logical as the FOIPPA process is initiated by an application to disclose information, and, procedurally, that information request may then result in*

an obligation on the public body and Commissioner to not disclose information to affected third parties. ***The basic non-disclosure obligations are the same, other than a public body and the Commissioner have no obligation to avoid disclosing information to a third party where that third party itself was the source of that information.***

The affected third party would therefore only be notified where the public body or Commissioner had determined that all ss. 18-28 government operation non-disclosure considerations were invalid. *At that point no legitimate arguments would remain for not disclosing the relevant information to an affected third party. Both obligations to hold information private would be fully evaluated and discharged.*
[Alberta (Employment and Immigration), at paras. 47-53]
[Emphasis added]

[para 214] Based on this reasoning, I find the Public Body was correct in not giving notice prematurely to any third party(ies) whose business information may fall within s. 16. The sequence of when notice is given to a third party(ies) is critical to avoid prematurely and unnecessarily alerting a third party and second, to respect the requirement pursuant to s. 59(3) to avoid disclosure of information which the Public Body has the right to withhold. It is incumbent on me, therefore, to Order the Public Body to comply with s. 30 only after a decision to release all or part of the June 10, 2016 Records has been made by the Public Body. Thereafter, the Public Body will be required to comply with s. 30(1) and s. 30(4) of the *FOIP Act,* that is, to give notice to the third party(ies) identified in the records, seeking their consent to disclosure (particularly as the First Applicant provided some evidence consent may be forthcoming from at least one third party) and, if consent is not given, to advise the third party(ies) of their right to Request a Review as to why business information about them should not be disclosed by the Public Body.

It is plain that s. 30 uses the word "access" as opposed to the word "disclosure," found in s. 17 and 20. It seems to me that one cannot have access without disclosure. In any event, in my view, the purpose of s. 30 is to allow a potentially affected third party a say in what personal information gets published. That is a fundamental tenet of the Act. Therefore, whenever the personal information of a third party may be disclosed, even if that is not the public body's intent, the procedure in s. 30(4) must be followed. It may be that the public body does not intend to disclose, either because the information is beyond the scope of the request or the provisions of s. 7 [sic] *or s. 20 preclude disclosure. If it is the latter, the input of the potentially affected party is necessary as the OIPC may disagree with the public body's decision. If that happens, requiring the OIPC to direct the public body to then notify the potentially affected third party becomes cumbersome and unnecessarily delays the process. Therefore, in my view, despite the permissive language in Section 30(3), the public body ought to conduct itself in accordance with s. 30(4), when deciding whether to disclose in scope information.*
…
Given my interpretation of s. 30 of the Act, had the matter been properly brought to the Commissioner's attention, the only rational conclusion that the Commissioner could have come to is that the EPC violated the Act and must be directed to proceed in accordance with the Act, specifically s. 30.
[Edmonton Police Commissioner v. Alberta (Information and Privacy Commissioner), 2011 ABQB 291, at paras. 13, 15]
[Emphasis added]

[para 215] In September 2016, as discussed above (See Issue #3 in relation to s. 16, beginning at para. 153), the Public Body intended to release 3 pages of the June 10, 2016 Records at Issue to the Applicants, page 32 being one of those which was released. Page 32, has the name of a law firm, which on other pages for which the Public Body has claimed s. 16, the name of a business is all the information there is that relates to a third party. The Public Body did not give notice to any third party(ies) when it made that decision to release page 32 of the Records. As I said above, at para. 174:

Page 32 of the Records was included with the package of June 10, 2016 Records at Issue when it was first provided to me but has, during this phase of the Inquiry, been released to the

Applicants. This is an example of where the Public Body has not been consistent in its application of the mandatory exception s. 16. When page 32 was released to the Applicants, the name of a law firm was not redacted. Also, of interest, on page 210 there is the name of a law firm, which the Public Body has redacted under s. 24, not under s. 16. ***Notably, though not part of the records at issue in this phase of the Inquiry, in the information released to the Applicants in response to their access to information requests and in the release on September 30, 2016, there are pages where the name of a lawyer or a law firm have not been redacted*** *(for example, page 1734).*
[Emphasis added]

[para 216] As discussed above, the First Applicant Initial Submission [2014] provided evidence that potentially one third party may be prepared to consent (refer to para. 163 above) to the release of its information. The Public Body is now aware there may be a third party who has no objection to the release of its business information. It is, therefore, incumbent on the Public Body, should it make a decision under the Order for Reconsideration to release all or parts of the pages of the June 10, 2016 Records at Issue, to give notice to a third party(ies) in accordance with s. 30 to make a determination with respect to s. 16.

This matter is closely tied with the duty of public bodies under section 30 of the Act, to give notice to third parties if it is considering disclosing their personal information. If there appears from the face of the records ***or other information in the possession of the public body the distinct possibility that an individual would consent to disclosure of their personal information if consulted, and the public body fails to determine whether this is so, it is failing to properly make the determination under section 30 of whether to "consider giving access",*** *with its associated duty to notify third parties and obtain their views. A recent Supreme Court of Canada decision supports this conclusion. In Merck Frosst Canada Ltd. v. Canada (Health) [2012] S.C.J. No. 3, the Court made the following comments about a public body's duty to give notice under the parallel provision of the federal Access to Information Act:*

(i) With respect to third party information, the institutional head has equally important duties to disclose and not to disclose and must take both duties equally seriously

(ii) The institutional head:
…
- *should refuse to disclose third party information without notice where the information is clearly exempt, that is, where there is no reason to believe that the information is subject to disclosure.*

(iii) The institutional head must give notice if he or she:

- *is in doubt about whether the information is exempt, in other words if the case does not fall under the situations set out in point (ii); …*

While this obligation has not always been enforced in previous orders of this office, I believe the Supreme Court of Canada's directive in the Merck Frosst case must be adopted and observed going forward.
[Order F2013-51, at paras. 115-116]
[Emphasis added]

[para 217] Section 16 will be dealt with as part of the Order for Reconsideration that follows. In the course of complying with the Order for Reconsideration should the Public Body decide to consider granting access and continues to be of the opinion that s. 16 applies to information on some or all of the 31 pages where s. 16 has been relied upon may contain information affecting the interests of a third party(ies), the Public Body must give notice to any affected third party(ies), pursuant to s. 30 of the *FOIP Act.* In providing notice to the affected third party(ies), the Public Body will take the necessary precautions not to disclose the contents of the Records. In that regard, the Public Body should consider

the alternative of providing a description or summary of the contents of the Records pertaining to each of the third party(ies), pursuant to s. 30(4)(b). If consent is not forthcoming from the third party(ies), once the Public Body receives third party representations, should any be provided, it can make a determination with respect to the applicability of s. 16.

> *Section 30 of the FOIP Act, like section 27 of the federal Access to Information Act, contains a "low threshold" for providing notice to a third party. Under section 30 of the FOIP Act, the head need only form the opinion that a record he or she is considering disclosing may contain information affecting a third party's interests under section 16 before the duties under this provision are engaged.* ***There is no requirement in this provision that the head must form the opinion that the requirements of section 16 are actually met before providing notice.*** *There is nothing in section 30 to suggest that the requirements of section 16 are met if the head of a public body elects to provide notice to an affected party under its authority.* ***Moreover, the notice requirements in section 30 are engaged only when the head is considering granting access and the head forms the opinion that the records may contain information affecting interests under section 16 or 17 of the FOIP Act.***
> *[Order F2012-17, at para. 136]*
> *[Emphasis added]*

[para 218] Where the Commissioner or her delegate determines that the head of a public body is required to refuse access, in this case, s. 16, it is incumbent on the Commissioner or her delegate to require the head of a public body to refuse access to all or part of the record. In the case where a mandatory exception such as s. 16 applies, it is essential for me as an External Adjudicator to ensure the Public Body refuses access to all or part of the record.

VII. ORDER

[para 219] Where the head of a public body is authorized to refuse access to information under any one of the discretionary exceptions and the Commissioner or her delegate determines that a public body has failed to properly apply the exception, the Commissioner or her delegate can require the head of the public body to reconsider its decision. The rationale underlying this requirement is, in my opinion, correct as it places the responsibility and authority to decide whether or not to release information under a discretionary statutory provision where it properly rests; with a public body. To provide otherwise, in other words, to enable the Commissioner or her/his delegate to replace the exercise of a public body's discretion with her/his own, would undermine the principles of accountability and transparency in the administration of government, the very objectives and purposes the *FOIP Act* are intended to protect and promote. The requirements for both mandatory and discretionary exceptions are laid out in s. 72 of the *FOIP Act*, which reads, in part, as follows:

> *72(1) On completing an inquiry under section 69, the Commissioner must dispose of the issues by making an order under this section.*
>
> *(2)* ***If the inquiry relates to a decision to give or to refuse to give access to all or part of a record****, the Commissioner may, by order, do the following:*
>
> *(a) require the head to give the applicant access to all or part of the record, if the Commissioner determines that the head is not authorized or required to refuse access;*
>
> ***(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access;***
>
> ***(c) require the head to refuse access to all or part of the record, if the Commissioner determines that the head is required to refuse access.***
>
> ***…***

> ***(4) The Commissioner may specify any terms or conditions in an order made under this section.***
> *[Emphasis added]*

[para 220] I make this Order under s. 72(2)(b), s. 72(2)(c) and s. 72(4) of the *FOIP Act*. The Public Body provided 2 unredacted copies of all 38 pages of the June 10, 2016 Records at Issue to me, as the External Adjudicator. This Order is only with respect to the June 10, 2016 Records at Issue, which is made up of a total of 35 pages. .

Section 27

[para 221] I find the Public Body did not properly rely on s. 27 of the *FOIP Act* for any of the 33 pages of the June 10, 2016 Records at Issue [98, 99-102, 103-107, 113-119, 129, 258-261, 262-264, 265-268, 645-648] over which it claimed one or more of the s. 27 exceptions, specifically s. 27(1)(a), s. 27(1)(b)(ii), and/or s. 27(1)(c)(ii). The Public Body submitted that all of the pages in the June 10, 2016 Records at Issue were protected by legal privilege, including both solicitor-client and litigation privilege (making no reference to the 2 pages where s. 27 was not relied on). I find that none of the information on the 33 pages of records fits within the legal test of either solicitor-client privilege or litigation privilege under s. 27(1)(a) or within the terms of either s. 27(1)(b)(ii) and/or s. 27(1)(c)(ii).

[para 222] Because s. 27 does not apply to the June 10, 2016 Records at Issue, it is unnecessary to consider whether or not the Public Body properly exercised its discretion in applying the exceptions under s. 27. I, therefore, quash the decisions made by the Public Body on August 31, 2012 (First Applicant) and September 21, 2012 (Second Applicant) with respect to its reliance on s. 27 of the *FOIP Act.*

[para 223] Because other exceptions have been claimed for all 35 pages of the June 10, 2016 Records at Issue, 33 pages of which s. 27 was claimed but does not apply, I go on to consider the other discretionary and mandatory exceptions relied on by the Public Body.

Section 24

[para 224] I find the Public Body properly relied on but did not properly apply s. 24 of the *FOIP Act* for the total 35 pages of the June 10, 2016 Records at Issue [98, 99-102, 103-107, 113-119, 129, 210, 211, 258-261, 262-264, 265-268, 645-648] over which it claimed one or both of the s. 24 exceptions, specifically s. 24(1)(a) and/or s. 24(1)(b)(i). In that regard, I find the Public Body failed to demonstrate that it properly exercised its discretion under s. 24 and that its decision to refuse access was not reasonable because it failed to take all relevant factors and considerations into account based on the facts and circumstances of this particular case.

[para 225] Pursuant to s. 72(2)(b), I order the Public Body to Reconsider its application of s. 24 to all 35 pages of the June 10, 2016 Records at Issue under s. 24 of the *FOIP Act*, specifically under s. 24(1)(a): 98, 129, 210, 258-261, 262-264, 265-268, 645-648 and under s. 24(1)(b)(i): 98, 99-102, 103-107, 113-119, 129, 211, 258-261, 262-264, 265-268, 645-648. In that regard, I order the Public Body to make a new decision under s. 24 that considers and weighs all relevant factors and circumstances based on the facts and circumstances of this particular case in exercising its discretion to allow or to deny access, with respect to the June 10, 2016 Records at Issue.

Section 16

[para 226] The Public Body relied on s. 16 for 31 pages of the total 35 pages of the June 10, 2016 Records at Issue. I find that the Public Body did not properly rely on s. 16 of the *FOIP Act* to the information on the following 9 pages of the June 10, 2016 Records at Issue:

> The Public Body has relied on s. 16 on the following pages where there is no reference to a business or its information, where there is no law firm name or name of lawyers and/or there is no

information from the Appendix A: Differences and Pros/Cons analysis and/or no information that would amount to an informational asset:

102, 116, 261, 265, 268, 645, 648

Pages of records where s. 16 has been applied where there is a reference to a law firm or firms by name but which pages do not include the name of a lawyer or lawyers or information referred to in Appendix A: Differences and Pros/Cons:

99, 258

[para 227] For the remaining 22 pages of the June 10, 2016 Records at Issue [100, 101, 103, 104, 105, 106, 107, 113, 114, 115, 117, 118, 119, 259, 260, 262, 263, 264, 266, 267, 646, 647] where s. 16 of the *FOIP Act* has been relied on, I find that the Public Body did not properly apply s.16 to the information in the June 10, 2016 Records at Issue as it did not satisfy all three criteria required under s. 16, specifically, because it did not provide evidence that the disclosure of the information could reasonably be expected to significantly harm the competitive position or significantly interfere with the negotiating position of a third party. With respect to these 22 pages to which the Public Body applied s. 16, I make the following findings:

1. I find the first part of the test in s. 16(1)(a)(ii) is met for some of the pages to which it has been applied because the contents of those pages of records reveal some financial information that has been supplied by a third party(ies) and is, therefore, information that is inextricably linked to a third party(ies).

2. Despite the fact that the Public Body has failed to address the second part of the test, found in s. 16(1)(b), in its submissions, has not provided any evidence to support that the information was provided in confidence, and the fact that the records themselves have no notations or indicators to indicate the information was provided in confidence, I find that, in considering the circumstances of this case objectively, there would be a reasonable expectation of confidentiality on the part of the third party(ies) who supplied the information.

3. The Public Body has failed to address the issue of harm or to provide any evidence demonstrating the significant harm that could reasonably be expected to result from the disclosure of the third party(ies)' information and, therefore, the Public Body has not met the third part of the conjunctive test in s. 16, specifically provision in s. 16(1)(c)(i).

[para 228] As part of this Order for Reconsideration, I order the Public Body to reconsider its application of s. 16 of the *FOIP Act* to 22 pages of the records [100, 101, 103, 104, 105, 106, 107, 113, 114, 115, 117, 118, 119, 259, 260, 262, 263, 264, 266, 267, 646, 647] and make a new decision if it can establish that significant harm could reasonably be expected to result from the disclosure of the third party(ies)' information. There are no pages in the June 10, 2016 Records at Issue where s. 16 has been relied on and applied in the absence of other exceptions. Because s. 16 is a mandatory exception, before disclosing any information under its new decision pursuant to this Order for Reconsideration, the Public Body must, pursuant to s. 72(2)(c), refuse access to all or part of the 22 pages of the June 10, 2016 Records at Issue where it decides s. 16 has been properly applied by meeting the third part of the test in s. 16, specifically under s. 16(1)(c)(i).

Notice to Third Party(ies)

[para 229] If its new decision includes the disclosure of some or all of the June 10, 2016 Records at Issue and if the Public Body continues to assert s. 16 over any of those same pages, before making its final decision to disclose, I order the Public Body to comply with s. 30(4) of the *FOIP Act*, by giving notice to all affected third party(ies) whose business information has been identified by the Public Body in the pages of the June 10, 2016 Records at Issue where it decides, pursuant to this Order for Reconsideration, that s. 16 has been properly applied.

[para 230] In doing so, the Public Body's notice to the affected third party(ies) must indicate that the third party(ies) have 20 days of being given the notice to provide their consent or to make representations to the Public Body explaining why the information should not be disclosed in accordance with s. 31. If an affected third party(ies) elects not to consent or to make a representation, the Public Body must inform itself sufficiently with the information obtained from the affected third party(ies) as to how s. 16 applies to the information in the records where the Public Body continues to maintain s. 16 applies to any of the remaining 22 pages where it has been applied and include that information in its new decision. The Public Body must do so in order to comply with s. 72(2)(c) of the *FOIP Act.*

Retaining Jurisdiction

[para 231] There has been considerable delay surrounding this Inquiry, highlights of which include the following:

- The access to information requests were made in 2012 (5 years ago) resulting in decisions by the Public Body with respect to 564 Records at Issue in the main Inquiry.

- I issued the Notice of Inquiry to the parties on June 6, 2014 in the main Inquiry.

- During the initial months of the Inquiry a preliminary evidentiary objection (referred to above as the PEO) was raised by an Applicant, which the other Applicant agreed with, that resulted in my Decision/Order dated December 31, 2014. A Judicial Review was filed by the Public Body with respect to that Decision/Order that has been adjourned *sine die*.

- Unexpectedly, the Public Body released a batch of records on June 10, 2016 to the Commissioner's Office (in partial compliance with my Decision/Order), delivered to me as the External Adjudicator, giving rise to this phase of the Inquiry.

- During the initial months of this phase of the Inquiry, another matter arose about which the parties had the opportunity to make submissions and which subsequently was referred to another forum.

- Thereafter, this phase of the Inquiry continued solely with respect to the June 10, 2016 bundle of records (initially 38 pages, now 35 pages). The present number of Records at Issue is 35 pages because during this phase of the Inquiry the Public Body released 3 additional pages of records to the Applicants (2 pages [32, 565] on September 30, 2016 and 1 page [120] on June 15, 2017).

- As outlined throughout this Order, the majority of pages of the June 10, 2016 Records at Issue did not form part of the *responsive* records until the Public Body removed Non-Responsive and added new pages to which it applied exceptions on December 14, 2016 and released 3 pages to the Applicants on September 30, 2016 [32, 565] and June 15, 2017 [120]. At the times these steps were taken and decisions made, a large part of the information in the records was in the public domain, as detailed above.

- The Public Body has produced many indices documenting changes and reconciling discrepancies for the June 10, 2016 Records at Issue with respect to the exceptions being relied on and the numbering for the pages (refer to Table in Appendix A).

- The Records at Issue in the main Inquiry, which except for those that make up the June 10, 2016 Records at Issue bundle, are not at issue during this phase and have not been reviewed. But with respect to my retaining jurisdiction over all matters related to this Inquiry, it is important to note that the original record count of 564 pages presently tallies in at 2,570 pages (less the pages that have been disclosed in whole or in part) according to the January 19, 2017 Index and the April 7, 2017 Amended Index of Records.

- I have notified the parties that after this phase of the Inquiry is completed, the main Inquiry will continue with respect to the remaining Records at Issue, the completion of which has been extended until November 30, 2017.

[para 232] Given the delay detailed above, the complexity and with a view to the efficient use of resources, I am retaining jurisdiction to consider the Public Body's decision with respect to the June 10, 2016 Records at Issue in compliance with this Order for Reconsideration. If it decides to disclose the records, the Public Body must provide them to both Applicants within 50 days of the receipt of this Order. If it decides not to disclose all or part of them, the Public Body should inform both of the Applicants of its decision and reasons, within 50 days of receipt of this Order for Reconsideration, with a copy to me as the External Adjudicator. I reserve my jurisdiction to ask for further submissions from the parties, including any affected third party(ies) given notice by the Public Body who make a Request for Review, and to make further determinations and rulings under the *FOIP Act* about the June 10, 2016 Records at Issue. I will inform the Public Body and the Applicants in due course of the results of any determinations I make in this regard.

[para 233] The Public Body must comply with this Order for Reconsideration of its application of s. 24 and s. 16 to the June 10, 2016 Records at Issue and inform both of the Applicants and myself as External Adjudicator within 50 days of receiving a copy of this Order, as required by s. 74(1) of the *FOIP Act.*

[para 234] I order the Public Body to notify me, in writing, within 50 days of receiving a copy, that it has complied with the Order for Reconsideration.

S. Dulcie McCallum, LL.B.
External Adjudicator

ORDER F2017-61
APPENDIX A: TABLE OF CONCORDANCE

COLUMN A Aug-Sept 2012 FOIP Request List of Exemptions	COLUMN B Aug. 6, 2014 Main Inquiry Index of Records at Issue (564 pages)	COLUMN C Jun. 10, 2016 Index of Records at Issue (38 pages)	COLUMN D Sept. 30, 2016 Main Inquiry Index of Records at Issue (2,570 pages)	COLUMN E Dec. 14, 2016 Amended June 10, 2016 Index of Records at Issue	COLUMN F Jan. 19, 2017 Main Inquiry Index of Records at Issue (2,570 pages)	COLUMN G Feb. 2, 2017 Amended June 10, 2016 Index of Records at Issue	COLUMN H Apr. 7, 2017 Amended June 10, 2016 Index of Records at Issue (35 pages)	COLUMN I Apr. 7, 2017 Main Inquiry Index of Records at Issue (2,570 pages)
32: Draft or information non-responsive	32: [Not listed]	32: Document Non-Responsive	32: January 5, 2011 memo from Ray Bodnarek to Allison Redford RELEASED	32: January 5, 2011 memo from Ray Bodnarek to Allison Redford RELEASED	32: January 5, 2011 memo from Ray Bodnarek to Allison Redford RELEASED	32: January 5, 2011 memo from Ray Bodnarek to Allison Redford RELEASED	32: January 5, 2011 memo from Ray Bodnarek to Allison Redford RELEASED	32: January 5, 2011 memo from Ray Bodnarek to Allison Redford RELEASED
98: [No description] Exempted in entirety 24(1)(a), 24(1(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	98: Email 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	98: Email 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	98: Email 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	98: 8 Dec 2010 Email 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	98: Email 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	98: 8 Dec 2010 Email 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	98: 8 Dec 2010 Email 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	98: Email 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)
99-107: Draft or information non-responsive	99-107: [Not listed]	99-107: Document Non-Responsive	99-102: Document Non-responsive	99-102: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	99-102: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	99-102: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	99-102: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	99-102: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)

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103-107: Draft or information non-responsive	103-107: [Not listed]	103-107: [Shown as part of 99-107] Document Non-Responsive	103-107: Document Non-responsive	103-107: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	103-107: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	103-107: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	103-107: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	103-107: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)
113-119: [Shown as part of 113-127] Draft or information non-responsive	113-119: [Not listed]	113-119: Document Non-Responsive	113-116: Document Non-responsive	113-116: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(b)(i), 27(1)(a), 27(1)(b)((ii)	113-116: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(b)(i), 27(1)(a), 27(1)(b)((ii)	113-119: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(b)(i), 27(1)(a), 27(1)(b)((ii)	113-119: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(b)(i), 27(1)(a), 27(1)(b)((ii)	113-116: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(b)(i), 27(1)(a), 27(1)(b)((ii)
120: [Shown as part of 113-127] Draft or information non-responsive	120: [Not listed]	120: Document Non-Responsive	120: Document Non-responsive	120: Document RELEASED* * Public Body intended to release Sept 30, 2016 but the actual release date was June 15, 2017.	120: Document RELEASED* * Public Body intended to release Sept 30, 2016 but the actual release date was June 15, 2017.	120: Document RELEASED* * Public Body intended to release Sept 30, 2016 but the actual release date was June 15, 2017.	120: Document RELEASED* * Public Body intended to release Sept 30, 2016 but the actual release date was June 15, 2017.	120: Document RELEASED* * Public Body intended to release Sept 30, 2016 but the actual release date was June 15, 2017.

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129: [No description] Exempted in entirety 24(1)(a), 24(1(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	129: Email 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	129: 8 Dec 2010 Email from G. Sprague to L. Merryweather 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	129: Email 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	129: 8 Dec 2010 Email 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	129: Email 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	129: 8 Dec 2010 Email 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	129: 8 Dec 2010 Email 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)	129: Email 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii), 27(1)(c)(ii)
210: [No description] Partial severing 24(1)(a)	210: December 29, 2010 email from Renee Craig Partially released 24(1)(a)	210: 29 Dec 2010 email from Renee Craig to Margaret Dallimore Partially released 24(1)(a)	210: December 29, 2010 email from Renee Craig Partially released 24(1)(a)	210: 29 Dec 2010 email from Renee Craig to Margaret Dallimore Partially released 24(1)(a)	210: December 29, 2010 email from Renee Craig to Margaret Dallimore Partially released 24(1)(a)	210: 29 Dec 2010 email from Renee Craig to Margaret Dallimore Partially released 24(1)(a)	210: 29 Dec 2010 email from Renee Craig to Margaret Dallimore Partially released 24(1)(a)	210: December 29, 2010 email from Renee Craig to Margaret Dallimore Partially released 24(1)(a)
211: [No description] Partial severing 24(1)(b)(i)	211: December 29, 2010 email from Jeff Henwood Partially released 24(1)(a)	211: 29 Dec 2010 email from Jeff Henwood to Renee Craig Partially released 24(1)(b)(i)	211: December 29, 2010 email from Jeff Henwood Partially released 24(1)(b)(i)	211: 29 Dec 2010 email from Jeff Henwood to Renee Craig Partially released 24(1)(b)(i)	211: December 29, 2010 email from Jeff Henwood to Renee Craig Partially released 24(1)(b)(i)	211: 29 Dec 2010 email from Jeff Henwood to Renee Partially released 24(1)(b)(i)	211: 29 Dec 2010 email from Jeff Henwood to Renee Partially released 24(1)(b)(i)	211: December 29, 2010 email from Jeff Henwood to Renee Craig Partially released 24(1)(b)(i)

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258-264 [Shown as part of 258-271] [No description] Exempted in entirety 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	258-264 [Not listed]	258-264 Document 16(1)(a)(ii), 16(1)(b), 16(1)(c), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	258-264 [Shown as 258-261 and 262-264] Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	258-264 [Shown as 258-261 and 262-264] Document 16(1)(a)(ii), 16(1)(b), 16(1)(c), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	258-264 [Shown as 258-261 and 262-264] Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	258-264 [Shown as 258-261 and 262-264] Document 16(1)(a)(ii), 16(1)(b), 16(1)(c) 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	258-264 [Shown as 258-261 and 262-264] Document 16(1)(a)(ii), 16(1)(b), 16(1)(c) 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	258-264 [shown as 258-261 and 262-264] Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)
262-264 [Shown as part of 258-271] [No description] Exempted in entirety 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	262-264: [Not listed]	262-264: [Shown as part of 258-264] Document 16(1)(a)(ii), 16(1)(b), 16(1)(c), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	262-264: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	262-264: [No description] 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	262-264: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	262-264: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	262-264: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	262-264: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)

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265-268: [Shown as part of 258-271] [No description] Exempted in entirety 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	265-268: [Not listed]	265-268: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	265-268: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	265-268: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	265-268: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	265-268: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	265-268: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	265-268: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)
565: [Not listed]	565: [Not listed]	565: Action Request Cover Sheet Non-Responsive	565: Action Request Cover Sheet RELEASED	565: Action Request Cover Sheet RELEASED	565: Action Request Cover Sheet RELEASED	565: Action Request Cover Sheet RELEASED	565: Action Request Cover Sheet RELEASED	565: Action Request Cover Sheet RELEASED
566-569: [Not listed]	566-569: [Not listed]	566-569: * Document Non-Responsive *Page 568 in the June 10, 2016 Records at Issue (later renumbered ABJ000647) is different from page 568	566: Email 24(1)(a), 27(1)(c)(ii) 567: Email 24(1)(b)(i), 27(1)(c)(ii)	626-634: * Document *Mistake in numbering and number of pages corrected by the Public Body Feb. 2, 2017 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i),	645-653: * Document *Mistake in numbering and number of pages corrected by the Public Body Feb. 2, 2017 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i),	645-648: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	645-648: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	645-653: * Document *Only 645-648 are at issue in this phase of the Inquiry 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i),

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		released on Sept. 30, 2016	568: ACTION REQUEST COVER SHEET RELEASED 569-575: Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii) _____ 566-569 renumbered as 645-653 Document 16(1)(a)(ii), 16(1)(b), 16(1)(c)(i), 24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)	24(1)(a), 24(1)(b)(i), 27(1)(a), 27(1)(b)(ii)			27(1)(a), 27(1)(b)(ii)