ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2018-36

August 22, 2018

EDMONTON POLICE SERVICE

Case File Number F7565

Office URL: www.oipc.ab.ca

Summary: The Criminal Trial Lawyers' Association (the Applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Edmonton Police Service (the Public Body). It requested all records relating to the Public Body's YouTube series, "The Squad". In particular, the Applicant requested records relating to the planning and implementation of the series, criticism of the series, any reviews of criticism and the Public Body's response to criticism, and records containing information about why the series was cancelled.

The Public Body responded to the Applicant on September 10, 2013. The Public Body stated that it had located 1448 pages of responsive records. It informed the Applicant that it was severing information from these records under sections 16(1) (disclosure harmful to business interests of a third party), 17(1) (disclosure harmful to personal privacy), 20(1) (disclosure harmful to law enforcement), 24(1) (advice from officials), and 27(1) (privileged information) of the FOIP Act.

The Adjudicator found that in many cases, it had not been established that the information severed under section 17(1) was personal information. She directed the Public Body to make new decisions in relation to some records, confirmed the decision of the Public Body to sever information in other cases, and ordered the disclosure of some information.

The Adjudicator found that some of the information severed from the records was subject to section 24(1)(a) and (b), but found that the Public Body had taken into account irrelevant considerations when it exercised its discretion to withhold the information under these provisions. The Adjudicator found that two records were properly withheld on the basis of solicitor-client privilege but that the Public Body had failed to establish that sections 27(1)(a), (b), and (c) applied to the remaining records. The Adjudicator ordered the Public Body to give the Applicant access to the records that had not been established as subject to exceptions to the right of access and to re-exercise its discretion in relation to the records that she had found to be subject to section 24(1).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 6, 16, 17, 20, 21, 24, 27, 71, 72

Authorities Cited: AB: Orders 96-017; F2003-017, F2004-014, F2008-016, F2008-028; F2009-024; F2013-51, F2014-25, F2015-22, F2015-29,F2017-54, F2017-57, F2018-07, *MacDonald (Re)*, 2003 CanLII 71714 (AB OIPC); Decision P2011-D-003; **ON:** PO-3016

Cases Cited: *H. v. McDougall*, [2008] 3 S.C.R. 41; *John Doe v. Ontario (Finance)*, 2014 SCC 36; *Covenant Health v. Alberta (Information and Privacy Commissioner)*, 2014 ABQB 562; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010] 1 SCR 815; *Carey v. Ontario*, [1986] 2 SCR 637; *Solosky v. The Queen*, [1980] 1 SCR 821; *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31; *R. v. Campbell*, [1999] 1 S.C.R. 565

I. BACKGROUND

[para 1] On June 13, 2013, the Criminal Trial Lawyers' Association (the Applicant) made a request under the FOIP Act to the Public Body. It requested all records relating to the Public Body's YouTube series, "The Squad". In particular, the Applicant requested records relating to the planning and implementation of the series, criticism of the series, any reviews of criticism and the Public Body's response to criticism, and records containing information about why the series was cancelled.

[para 2] Prior to the cancellation of "The Squad", the Applicant's representative at this inquiry had written a letter to the Chief of the Public Body regarding this series.

[para 3] The Public Body responded to the Applicant on September 10, 2013. The Public Body stated that it had located 1448 pages of responsive records. It informed the Applicant that it was severing information from these records under sections 16(1), 17(1), 20(1), 21(1), 24(1), and 27(1) of the FOIP Act.

[para 4] The Applicant requested that the Commissioner review the Public Body's severing decisions.

[para 5] The Commissioner authorized a mediator to investigate and attempt to settle the matter. Following this process, the Applicant requested an inquiry regarding the Public Body's application of sections 17(1), 21(1), 24(1), and 27(1) to information in the

records. The Commissioner decided to conduct an inquiry and delegated her duty to conduct an inquiry to me.

[para 6] The Public Body elected not to provide any of the records over which it applied section 27(1)(a) for my review. However, it did provide records that it did not consider subject to section 27(1)(a).

[para 7] The parties exchanged submissions. Once I reviewed the affidavit of the Public Body's disclosure analyst, dated November 23, 2016, I asked questions of the Public Body.

[para 8] On January 18, 2017, I wrote the Public Body and asked it to provide more detailed evidence to support its application of sections 17(1), 24(1)(a), 24(1)(b), and 27(1)(a), (b), and (c) to information in the records.

[para 9] The Public Body provided an exchangeable and an *in camera* affidavit, which were sworn by the disclosure analyst.

[para 10] On August 3, 2017, I wrote the parties and asked the Public Body to address inconsistencies I noted in its evidence. I stated:

> I note that there are inconsistencies in the evidence submitted by the Public Body for the inquiry. This inconsistency arises primarily from the multiple provisions the Public Body has applied to the same information.
>
> I will use records 1213 – 1215 as an example to illustrate the problem. The Public Body has applied sections 21(1)(b), 24(1)(b), 27(1)(a), 27(1)(b), and 27(1)(c) to these records, in addition to section 17(1).
>
> Section 21(1)(b) applies to information supplied on conditions of confidentiality by a government listed in section 21(1)(a). Section 24(1)(b) applies to confidences and 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. Solicitor-client privilege, the basis of the Public Body's application of section 27(1)(a), applies to communications between solicitor and client made for the purpose of giving or seeking legal advice. Section 27(1)(b) applies to information prepared by a lawyer in relation to the provision of legal services. Section 27(1)(c) applies to information in correspondence between a lawyer (or Crown prosecutor) and another person in relation to a matter for which the lawyer (or Crown prosecutor) is providing advice or services. If information is subject to section 21(1)(b), it *cannot* be subject to section 24(1)(b), or 27(1)(a), (b), or (c), even if a lawyer sent the information on behalf of a government. This is because section 21(1)(b) applies to information supplied *by a government*, rather than "by a lawyer". Section 24(1)(b) applies to deliberations and consultations involving a public body's officers or employees, not the consultations and deliberations involving "a government" or "supplied by a government".
>
> Information supplied in confidence by a government to a public body cannot also be privileged communications of the Public Body. As noted above, solicitor-client privilege applies to communications between solicitor and client, not communications between government *qua* government and another government entity. In other words, if a public body claims section 21(1)(b) over records, it cannot also claim that the records are subject to solicitor-client privilege and that the privilege belongs to it.

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

> I will also take this opportunity to comment on a Public Body's application of all three of the provisions of section 27 to the same records.
>
> In my view, where the "legal services" or the "advice or other services" that are being provided by a public body's lawyer consist of legal advice, sections 27(1)(b) and 27(1)(c) are not intended to apply to the legal advice itself, nor to the communications made for the purposes of giving it, or the communications subsequently discussing it. Rather, these provisions are meant to cover other kinds of information, having some relationship to that advice, that needs to be freely prepared or exchanged.
>
> In other words, the parts of records that seek, provide or discuss legal advice, and thereby reveal it, themselves *constitute* the legal advice/service; they cannot sensibly be said to be 'information *in relation to* a matter involving the provision of legal services (or advice or other services)' within the terms of the latter two provisions. To say, for example, that legal advice prepared by a lawyer *relates to* a matter involving the provision (as a service) of that legal advice by that lawyer is to say something grammatically and logically incoherent.
>
> As well, if the converse were true, if it were the case, for instance, that section 27(1)(b) covered legal advice, or information that reveals legal advice, as one kind of information prepared by a public body or a public body's lawyer in relation to a matter involving the provision of legal services, the protection of solicitor-client privilege for public bodies under section 27(1)(a) would be largely redundant.

This reasoning has been applied in Orders F2016-31, F2016-35, F2017-54 and F2017-57. In these cases, it was not possible to support a public body's claim of privilege over all the information it withheld, in part because the public body asserted that sections 27(1)(a), (b), and (c) applied simultaneously to the information.

In addition, the Public Body's application of section 24(1)(b) and 27(1)(a), (b), and (c) to the same information is problematic. I am told in the exchangeable affidavit of [the disclosure analyst]:

The Responsive Records withheld under s. 24(1)(b) *often involved an EPS Lawyer and therefore were concurrently withheld under s. 27*. [my emphasis] These records contained communications involving:

> a. Consultations and deliberations between members of the Corporate Communications Branch and Digital Media Unit about production of the Squad and how the Squad would be filmed, edited, and distributed;
>
> b. Consultations and deliberations between members of the Corporate Communications Branch, senior EPS Members and EPS Lawyers relating to the response that should be provided to media inquiries about the Squad;
>
> c. Consultations and deliberations between members of the Corporate Communications Branch, senior EPS Members and EPS Lawyers relating to the response that should be provided to feedback and concerns raised by the public;

> d. Consultations and deliberations between members of the Corporate Communications Unit, senior EPS Members and EPS Lawyers relating to legal issues arising from the Squad;
>
> e. Consultations and deliberations between EPS Lawyers relating to the legal advice being sought, and the legal advice that should be provided to the EPS in relation to the Squad;
>
> f. Consultations and deliberations between members of the Corporate Communications Unit, senior EPS Members and EPS Lawyers where EPS Lawyers are providing legal advice and a recommended course of action, and the parties are discussing the impact of the same on the direction that the production of the Squad will take; and
>
> g. Consultations and deliberations between members of the Corporate Communications Unit, senior EPS Members and EPS Lawyers about the cancellation of the Squad.

From my review of the Responsive Records withheld under section 24(1)(b) of the FOIPP Act, I determined that the consultations and deliberations about the Squad took place between sworn or non-sworn members of the EPS as part of their roles within the organization. Their views were specifically sought and expected from their superiors. [my emphasis]

As the Public Body has applied section 24(1)(b) to all information to which it has applied the provisions of section 27(1), I understand that the above assertion applies to the records over which the Public Body is claiming solicitor-client privilege, in addition to sections 27(1)(b) and (c). However, the assertions in relation to section 24(1)(b) do not support finding that the records are subject to any of the provisions of section 27(1). Moreover, they appear to contradict the Public Body's *in camera* affidavit evidence in support of its claim of privilege regarding the same records. If it is the case that the records over which the Public Body is asserting both sections 24(1)(b) and 27(1) are consultations and deliberations involving its employees, and that its employees were responsible for providing advice, by virtue of their role as employees or officers, and not in their capacity as lawyers, then the appropriate provision to apply is section 24(1)(b) only, as sections 27(1)(a), (b) and (c) do not apply. Even if a lawyer is part of a communication, if a non-lawyer is responsible for providing the advice or analysis in a communication and provides it, the communication is not necessarily privileged.

The Public Body's affiant is attempting to establish facts in support of the application of provisions which require conflicting facts to ground their application. As a result, I am unable to say with any certainty that the exceptions the Public Body has applied, do apply.

I note too that in the recent case, *Alberta v. Suncor* 2017 ABCA 221, the Alberta Court of Appeal noted the difficulties that accompany making blanket assertions that privileges apply when one or the other cannot apply:

> 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.

While the Court in the foregoing excerpt is speaking about claiming solicitor-client privilege and litigation privilege to the same documents, in my view, its reasoning applies equally to the situation in which a public body applies multiple, mutually exclusive exceptions, and then attempts to assert through affidavit evidence that all apply simultaneously. The result is that the public body may undercut its evidence as to the application of all provisions, to the point that it fails to meet its burden under section 71.

I acknowledge that in the past, this office did not take issue with the application of multiple exceptions to information. As I noted in Order F2017-54:

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

In this case, the difficulty is magnified because the Public Body has applied sections 21(1)(b) (in the case of records 1213 - 1215), 24(1)(b), and 27(1)(a), (b), and (c) to the same information, with the effect that its evidence in relation to the application of one provision undercuts its evidence in relation to the other provisions.

As I consider it likely that the Public Body sought legal advice from its legal department and that communications made for the purpose of giving or seeking legal advice may be contained in the records before me, and because the Public Body prepared its evidence prior to the release of Orders F2017-54, F2017-57, as well as *Alberta v. Suncor* 2017 ABCA 221, I have decided that the Public Body should have the opportunity to determine which of the exceptions to disclosure it has applied, do apply to the information it seeks to withhold and to apply only applicable exceptions. If it decides to make use of this opportunity, I ask that it review the evidence it has provided for the inquiry for consistency, and to consider providing an affidavit sworn by a lawyer (possibly one who provided legal advice in relation to the matters in the records at issue) in support of its claim of privilege. The affidavit would be accepted *in camera*. If the Public Body determines that provisions other than section 27(1)(a) are properly claimed, then I ask that it provide those records for my review.

The Public Body confirmed that it was no longer relying on section 21(1)(b) to withhold information, but declined to provide additional evidence from a lawyer to support its claim of privilege.

II. INFORMATION AT ISSUE

[para 11] The information to which the Public Body applied sections 17(1), 21(1), 24(1), and 27(1) and withheld from the Applicant is at issue.

III. ISSUES

Issue A: Does section 17(1) of the FOIP Act (disclosure harmful to personal privacy) require the Public Body to withhold the information to which it applied this provision?

Issue B: Did the Public Body properly apply sections 24(1) to the information it severed under this provision?

Issue C: Did the Public Body properly apply section 27(1)(a) to the information it severed under this provision?

Issue D: Did the Public Body properly apply sections 27(1)(b) and (c) to the information it severed under these provisions?

IV. DISCUSSION OF ISSUES

The Burden of Proof in an Inquiry

[para 12] Section 71 states:

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

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

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

[para 14] Section 6 establishes that an applicant has no right of access to a record when an exception under Division 2 of Part 1 of the FOIP Act applies to information. Sections 17(1), 21(1), 24(1) and 27(1) are exceptions under Division 2 of Part 1. As a result, the Public Body must prove that these exceptions apply to the information to which it has applied them, with the result that the Applicant has no right of access to the information in these records

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

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

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

[para 17] In an inquiry under the FOIP Act, a public body must provide sufficiently clear, convincing, and cogent evidence to discharge its burden of proving that an exception to disclosure applies to information. As the Public Body decided to apply sections 24(1)(a) and (b), 27(1)(a), (b), and (c) to withhold information from the Applicant, it must prove that these provisions apply to this information with evidence that is sufficiently clear, convincing, and cogent to meet this purpose.

[para 18] If the Public Body establishes that the information to which it has applied section 17 is personal information, then the burden of proof in relation to its application of section 17 will shift to the Applicant under section 71(2). However, if the Public Body does not establish that the information to which it applied section 17 is personal information, then section 71(1) will apply. (See Order F2018-07 paragraphs 19 – 25.)

Issue A: Does section 17(1) of the FOIP Act (disclosure harmful to personal privacy) require the Public Body to withhold the information to which it applied this provision?

[para 19] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *17(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> > *[…]*
> >
> > *(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body […]*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *[…]*
> >
> > *(g) the personal information consists of the third party's name when*
> >
> > > *(i) it appears with other personal information about the third party, or*
> > >
> > > *(ii) the disclosure of the name itself would reveal personal information about the third party[…]*
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> > *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
> >
> > *(b) the disclosure is likely to promote public health and safety or the protection of the environment,*
> >
> > *(c) the personal information is relevant to a fair determination of the applicant's rights,*

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

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

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

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

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

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

[para 20] Section 17 does not say that a public body is never allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 21] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 22] Section 17(1) requires a public body to withhold information once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and the conclusion is reached that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 23] Once the decision is made that a presumption set out in section 17(4) applies to information, it is necessary to consider all relevant factors under section 17(5) to determine whether it would, or would not, be an unreasonable invasion of a third party's personal privacy to disclose the information.

[para 24] However, it is important to note that section 17(1) is restricted in its application to personal information. Before a public body may apply section 17(1), it must first determine whether the information in question is personal information or that it is likely to be so. In this case, I must consider whether the information to which the Public Body has applied section 17(1) is personal information.

[para 25] Section 1(n) of the FOIP Act defines "personal information". It states:

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

[para 26] In Order F2013-51, the Director of Adjudication reviewed cases of this office addressing the circumstances when information referring to an individual is personal information and when it is not. She said:

> From the severing conducted by the Public Body, it appears that it may have relied on section 17 to withhold information about its employees or those of University of Calgary employees acting in the course of their duties. For example, the Public Body withheld records such as the University of Calgary's representative's first name and the business phone and fax number at which she could be contacted, contained in records 3-1, 3-2, and 3-3.
>
> As well, the Public Body has severed information, partly in reliance on section 17, that may be properly characterized as 'work product'. For example, it has severed the questions asked by an investigator, in addition to the answers of those interviewed. It has also withheld what is possibly a line of inquiry which the investigator means to follow (the note severed from record

1-151). While some of the questions and notes may reveal the personal information of witnesses, it does not appear that it is always the case that they do, and it appears possible that the Public Body withheld information on the basis that it may reveal something about the investigator performing duties on its behalf, rather than personal information about third parties.

The Public Body has also withheld notes of an interview by the Public Body's investigator of the University of Calgary's legal counsel, in part in reliance on section 17. Information about the legal counsel's participation in the events surrounding the Applicant's complaint to the University is not her personal information unless it has a personal aspect, which was not shown.

As well, it may be that some of the information of persons interviewed in the third volume relating to the Applicant's 'retaliation' complaint, which was withheld in reliance on section 17, may be information about events in which these persons participated in a representative rather than a personal capacity. Again, to be personal in such a context, information must be shown to have a personal dimension.

In Order F2009-026, the Adjudicator said:

> If information is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. As noted above, the definition of "third party" under the Act excludes a public body. In Order 99-032, the former Commissioner noted:
>
> The Act applies to public bodies. However, public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.
>
> In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of section 17 may apply to the information. I must therefore consider whether the information about employees in the records at issue is about them acting on behalf of the Public Body, or is information conveying something personal about the employees.

In that case, the Adjudicator found that information solely about an employee acting as a representative of a public body was information about the public body, and not information about the employee as an identifiable individual. In *Mount Royal University v. Carter*, 2011 ABQB 28 (CanLII) Wilson J. denied judicial review of Order F2009-026.

In Order F2011-014, the Adjudicator concluded that the name and signature of a Commissioner for Oaths acting in that capacity was not personal information, as it was not information about the Commissioner for Oaths acting in her personal capacity. She said:

> Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.
>
> However, individuals do not always act on their own behalf. Sometimes individuals may act on behalf of others, as an employee does when carrying out work duties for an employer. In other cases, an individual may hold a statutory office, and the actions of the individual may fulfill the functions of that statutory office. In such circumstances, information generated in performance of these roles may not necessarily be about the individual who performs them, but about the public body for whom the individual acts, or about the fulfillment of a statutory function.

> I find that the names and other information about employees of the Public Body and the University of Calgary acting in the course of their duties, as representatives of their employers, cannot be withheld as personal information, unless the information is at the same time that of an individual acting in the individual's personal capacity.

[para 27] From the foregoing, I conclude that information about individuals acting in a representative capacity is not personal information within the terms of the FOIP Act, unless the information has a personal dimension and can be said to be "about an identifiable individual". Were it otherwise, a public body could withhold records from an applicant simply because they revealed information regarding the employees that created them, despite the fact that the records were created in a representative capacity. Such an outcome would undermine the purpose of the FOIP Act, which is to create a right of access to public records in the custody or control of the executive branch of government.

[para 28] The Public Body states in its submissions:

> The information withheld under s. 17 in the Responsive Records consists of personal information defined under s. 1(n)(i), (iv) (vii) and (ix). More specifically, the Responsive Records includes the following personal information:
>
> - Names of third parties;
> - Personal and work cell phone numbers;
> - Personal email addresses of EPS Member;
> - Payroll numbers of EPS Members;
> - EPS file numbers;
> - Personal employment history; and
> - Opinions provided by third parties, or opinions about a third party.
>
> The names of individuals involved in the production of the Squad have been released to the Applicant. Work cell phone numbers and fax numbers were withheld in instances where the staff member potentially used the cell phone number while off duty. Where the location of the unit where a sworn or non-sworn member was working in was sensitive information in itself, fax numbers were also withheld as they may be traced to that location.

[para 29] On January 18, 2017, I wrote the Public Body and stated the following with regard to its application of section 17(1):

> The Public Body has provided some records for my review from which it has severed information under section 17(1). It has also applied section 17(1) to records to which it has applied section 27(1)(a) and withheld from my review.
>
> Neither the exchangeable nor the *in camera* affidavit evidence of the Public Body speaks to the information to which it has applied sections 17(1). The basis of the Public Body's position that all the information it has severed under section 17(1) is personal information has not been established in this inquiry. While it makes arguments that the information has a personal dimension in some cases, it has not provided evidence that it does with regard to each record. It may have such a dimension, but this must be established with evidence. Moreover, in relation to the records that I have viewed, it is not clear to me that the information that has been severed from them has a personal dimension. Rather, it appears at least equally likely that the information that has been severed is about employees acting in a representative capacity.

> I acknowledge that section 71(2) of the FOIP Act places the burden of proof on an applicant when a record contains personal information. However, the evidence before me does not establish that the records contain personal information. As a result, section 71(2) has no application at this time and the burden under section 71(1) applies. To meet this burden, I ask that the Public Body provide affidavit evidence regarding the personal information it has severed from each of the records to establish that all the information it has severed under section 17(1) is personal information, and is personal information of the kind to which section 17(1) applies.

[para 30] The Public Body provided a second affidavit sworn by the disclosure analyst, which provided a further explanation of the Public Body's application of section 17 to information in the records. This affidavit indicates that work cell phone numbers and direct line phone numbers were withheld as they are not normally provided to the public.

Work cell phone numbers and direct line phone numbers

[para 31] The disclosure analyst indicated in her in camera affidavit that cell phone numbers and direct lines were severed from records 60, 63, 72, 93, 116, 242, 246, 247, 274-276, 289, 291, 299, 300, 304, 312, 313, 321, 331, 335, 339, 343, 345, 351, 352, 355, 358, 359 – 361, 363, 377, 383, 388, 395, 416, 418, 424, 438, 439, 447, 454, 459, 464, 468, 471, 476, 486, 487, 490, 493, 501, 502, 510, 515, 517, 541, 549, 551, 560, 583, 584, 586, 589, 592, 597, 598, 599, 600, 604, 608, 613, 626, 633, 634, 640, 648, 655, 663, 674, 694, 705, 782, 872, 880, 882, 888, 899, 910, 936, 937, 940, 942, 947, 949, 951, 953-955, 964, 968, 977, 987, 1007, 1038, 1041, 1048, 1055, 1074, 1078, 1090, 1091, 1102, 1105, 1106, 1108, 1115, 1118, 1123, 1125, 1128, 1130-1132, 1135, 1138, 1139, 1141, 1142, 1145, 1146, 1159, 1162, 1165, 1173, 1212-1214, 1219, 1223, 1227, 1231, 1233, 1240, 1242, 1243, 1245, 1247, 1248, 1250, 1253, 1254, 1260, 1262, 1263, 1265, 1266, 1275, 1276, 1277, 1278, 1280 1303, 1337, 1338, 1340, 1342, 1344, 1348, 1351, 1353, 1359, 1368, 1380, 1385, 1388, 1390, 1392, 1396, 1398-1400, 1402, 1406-1411, 1413, 1414, 1417, 1419, 1420, 1423, 1428, 1429, 1443, and 1444 on the basis that they may have been under section 17(1) as the numbers *may* have been used by the employee off duty (cell phone), or may have been assigned to an employee more than once (direct lines). The disclosure analyst does not indicate that she knows the facts she asserts to be true. Rather, this portion of the affidavit is speculative.

[para 32] There is no presumption or rule that a cell phone number is personal information. A cell phone number will be personal information if it is about an identifiable individual acting in a personal capacity. For example, I note that in Order PO-3016, a decision of the office of the Information and Privacy Commissioner of Ontario, the Adjudicator held:

> In my view, portions of the emails sent by police and the investigation notes (Records 1c, 1f and 3) do not constitute the "personal information" of any identifiable individual. I note that the police emails contain one of the officer's work cell phone number and describe the actions the police took upon arrival on the scene. I also note that portions of the investigation notes capture the investigator's efforts to schedule meetings and obtain evidence from individuals acting in their professional capacities. As a general rule, information associated with an individual in a

> professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].
>
> The ministry takes the position that the incident report and audio statement (Records 7 and 8) contain the personal information of the appellant's partner. I note that the information contained in these records were gathered in the course of the appellant's partner's professional duties and do not include information about her which is personal in nature. In my view, the information contained in the records which relate to the appellant and the patient which were provided by the appellant's partner, police, ministry EMS staff or dispatch constitutes the personal information of the appellant and the patient only. These individuals did not provide the information at issue in their personal capacities.
>
> I will order the ministry to disclose certain portions of Records 1c, 1f and 3 because they do not contain the "personal information" of any identifiable individual and thus personal privacy provisions in the *Act* cannot apply to this information […]

The reasoning in the foregoing case was adopted most recently in Order F2018-07. This reasoning is consistent with the approach adopted by this office and summarized in Order F2013-51, cited above.

[para 33] Clearly, if a cell phone number or direct line number conveys something about an employee as an identifiable individual, then the cell phone or direct line number is personal information. For example, a statement such as "the user of this cell phone number is married and owes thousands of dollars in back taxes" or a document that allows a reader to infer those facts about the user of the cell phone number, is information about an identifiable individual and would be personal information under the FOIP Act. However, a statement such as "Please contact me at this cell phone number so that I may provide assistance to you on behalf of the organization I represent", does not, without more, reveal personal information about an employee or contractor as an identifiable individual.

[para 34] I am unable to agree with the Public Body that the direct lines and work cell phone numbers it severed could be said to be personal information, as opposed to information about professional duties. If the Public Body had elected to provide evidence as to why it believes that the cell phone numbers may have been used in a personal context, then it might be possible to state with certainty whether some of the cell phone numbers constitute information about the Public Body's employees acting in a personal capacity or not. From the telephone numbers appearing in the records that were made available for my review, I was unable to identify any telephone numbers that could be construed, on the basis of the evidence, as the personal information of the user of the number.

[para 35] On the evidence before me, I cannot find that the telephone numbers are the personal information of the representatives of the Public Body to whom they are assigned and I will order the Public Body to give the Applicant access to the cell phone and direct line numbers.

Record 77

[para 36] The Public Body applied both section 24(1)(b) and 17(1) to sever information from emails on record 77. The Public Body severed the name of a journalist and the name of the contractor who provided voiceover services for the Squad from record 77. In my view, there is no personal dimension to the name of the journalist or the severed details about the contractor in this case. Rather, the journalist contacted the Public Body in her role as a member of the press, while the contractor provided services to the Public Body as a business.

[para 37] As I find below that section 24(1) does not apply to the information severed from record I will direct the Public Body to disclose record 77 in its entirety.

Records 240, 270, 315, 347, 368, 421, 691, 699, 1366, 1372, 1376, and 1426

[para 38] The disclosure analyst indicates that information was severed from records 240, 270, 315, 347, 368, 421, 691, 699, 1366, 1372, 1376, and 1426 as they contain the email address of Chief Knecht. She explains that the records indicate that Chief Knecht was being emailed and was responding to emails through this email address in his professional capacity. She states that the email address was withheld as this information is not typically disclosed to the public or routinely available.

[para 39] Of the records I was able to review, I note that many of them consist of the same email from the Applicant's representative and the same response from the Chief. The Applicant's representative contacted the Chief at the email address the Public Body has severed. The email address is visible in the Chief's response to the Applicant's representative. The Public Body also severed the Chief's email address from an email the Chief sent to another person seeking feedback regarding "The Squad".

[para 40] I agree with the Public Body that the Chief was emailing, and being emailed, in his professional capacity. I am unable to identify a personal dimension to the email address or the email itself. Rather, the Chief was carrying out his duties as Chief of the Public Body in receiving and sending the emails. While the Public Body's disclosure analyst states in her affidavit that the Chief's email address is not typically provided to the public, this detail does not bring the information within the scope of section 17. Unless an exception to disclosure authorizes withholding information from an applicant, a public body may not withhold information (assuming the right of access applies to the information). In this case, the email address is not personal information and the Public Body has not argued that another exception applies.

[para 41] I find that the email address is not personal information to which section 17(1) can apply and I will order the Public Body to disclose it.

Records 241, 271, 315 – 317, 348, 353, 354, 422, 645, 679, 682 – 692, 696, 697, 699, 700, 709, 715, 720, 721, 726, 733, 734, 1347, 1367, 1373, 1377, 1427, 1431, 1433, 1434 and 1435

[para 42] The disclosure analyst asserts that records 241, 271, 315 – 317, 348, 353, 354, 422, 645, 679, 682 – 692, 696, 697, 699, 700, 709, 715, 720,721, 726, 733, 734, 1347, 1367, 1373, 1377, 1427, 1431, 1433, 1434 and 1435 contain a copy of an email sent from [the Applicant's representative] to Chief Knecht referring to the names of EPS constables acting in their professional capacities. The disclosure analyst is concerned that the email contains allegations of misconduct that would be damaging to the constables.

[para 43] The Public Body explains that it severed the names of police officers to whom the Applicant's representative refers in a letter to the Chief. In that letter, the Applicant's representative commented on "The Squad" and provided several points of criticism to the Chief. However, I am unable to identify a portion of the email in which the Applicant's representative or the Applicant alleged misconduct against the police officers. The Applicant's representative names the police officers he viewed in the webisode; however, I am unable to read his letter as a complaint regarding misconduct by individual police officers. Rather, he provided the Chief with a critique from a legal perspective regarding the public message "The Squad" conveyed regarding the Public Body, its officers, and its approach to policing.

[para 44] Further, it bears mention that the webisode of "The Squad" that was the subject of the Applicant's email, as the term "webisode" suggests, was aired on the internet. As a consequence, the activities that are the subject of the Applicant's email were initially made available to the public on the Public Body's website. The Applicant, like other members of the public, was free to view the conduct of the Public Body's employees in the course of their duties, and to comment, which suggests that the Public Body did not have any concerns regarding misconduct when the webisode was originally posted.

[para 45] As a result, it appears that the Public Body is concerned only that the Applicant's representative's comments reveal misconduct. This position does not take into consideration the fact that the email was created by the Applicant's representative and that he is free to disseminate it should he choose. As a consequence, the Public Body's position that it is protecting the reputations of its officers by withholding references to them in the Applicant's representative's email, does not serve the Public Body's purpose in withholding the information.

[para 46] In Order F2018-08, I discussed the "absurd result" principle, which has been considered as a factor weighing in favor of access under section 17(5) in previous orders. (See Order F2018-08 at paragraphs 26 – 27.) While it is not clearly the case that the information regarding the police officers in the Applicant's email is anything other than a description of their work on behalf of the Public Body, if it is assumed that it has a personal dimension, then I would find that relevant factors weighing in favor of access outweigh any interests in withholding the information. These factors are the fact that the information was initially supplied by the Applicant's representative (section 17(5)(i)) and the fact that severing would be pointless, given that the Applicant's representative may

disseminate the email he wrote at any time. In my view, the application of these two factors would outweigh any presumption against disclosure, again assuming that the information about the officers in the email could be construed as their personal information.

[para 47] For the foregoing reasons, I will order the Public Body to disclose to the Applicant his email in its entirety.

Record 243

[para 48] The disclosure analyst indicates that record 243 contains a copy of an email between a digital media supervisor and a communications officer, the content of which contains a personal conversation between the two individuals and a reference to a third party name that is unrelated to the Squad.

[para 49] From my review of the email, I conclude from the context that the person described as a "third party" is also an employee of the Public Body. While this employee may not have worked on "The Squad", that would not mean that the employee is a "third party" vis-à-vis the Public Body or within the terms of section 1(r) of the FOIP Act.

[para 50] I am also unable to identify a personal dimension to the email. It appears from the email that two colleagues are using their work email accounts in order to do their work on behalf of Public Body. Further, with regard to the colleague referred to in the email, I am similarly unable to identify a personal dimension to the discussion. It may be the case that if one had more personal knowledge of the colleague to whom the employees refer that it could be determined that the information has a personal dimension; however, the records themselves to not provide sufficient context to enable me to discern a personal dimension.

[para 51] As I am unable to find that the information in record 243 is personal information, I am unable to support the Public Body's application of section 17(1) to it and I will order its disclosure.

Records 77, 309, 420, 427, 490, 502, 504, 577, 606, 681, 752, and 756

[para 52] The Public Body withheld information it considers to be the personal opinions of its employees from records 77, 309, 420, 427, 490, 502, 504, 577, 606, 681, 752, and 756. In some instances it has provided the record, but in other instances, such as record 309, it has not provided the record.

[para 53] The disclosure analyst describes record 309, which was not provided for my review, as created by an employee expressing his personal views.

[para 54] I will address the Public Body's withholding of personal information from record 309 with reference to records with which I was provided in which information is described as the digital media supervisor's "personal view". For example, record 606 is

described as containing "a personal opinion" about a well-known journalist who had written about "The Squad".

[para 55] From my review of the information the disclosure analyst describes as a "personal opinion" I am unable to conclude that the information can be characterized in this way. It was the employee's duty to his employer to analyze and respond to the questions, and the employee did so. There is nothing in the record to suggest that the employee stopped performing his duties in part of the email, made a comment about the subject of his work duties as a private citizen, and then returned to his professional capacity as a digital media supervisor to finish the email. It may be the case that the disclosure analyst or the Public Body does not agree with the content of the email; however, this would not mean that the email is anything other than the digital media supervisor's work product. Possibly, the Public Body considers that disclosing the email could have personal consequences for the employee who wrote it; however, if that is so, there is no evidence before me to support finding this to be the case.

[para 56] Moreover, the Public Body also applied section 24(1)(b) to withhold the information described as a personal opinion, which suggests that it considers the email to be the digital media supervisor's work product, given that 24(1)(b) applies to consultations or deliberations involving a public body's employees.

[para 57] As will be discussed below, I find that the severed content of records 427 and 606 is subject to section 24(1)(b). However, the fact that the Public Body has simultaneously applied sections 17(1) and 24(1) to the same information, suggests that it is asserting two conflicting sets of facts regarding the creation of the same record in its evidence and in its submissions. If the severed information is a private, personal opinion, the email would have been created for personal purposes and section 24(1) could *not* apply to it.

[para 58] Clearly, a party may make alternative legal arguments as to the significance of facts that have been proven in an inquiry. However, in this case, the Public Body is simultaneously asserting that information was created within the scope of employment relationship and outside it. While these assertions reflect two opposing legal theories, they also require opposing sets of facts: i.e. an employee created the records in order to advise the Public Body as part of his work duties, but at the same time created the records as a private citizen outside the scope of his employment. With regard to the records I have available to me that the Public Body argues contain personal views and opinions, I am able to determine, from reviewing the record, that the information in question is most likely work product rather than personal information; however, in relation to record 309, I am unable to do so, because the Public Body has declined to produce the record as evidence to support the application of exceptions.

[para 59] The Public Body also applied section 24(1)(b) to record 309. With regard to the Public Body's application of section 24(1)(b) to each record to which it applied it, the disclosure analyst asserted in her affidavit of November 23, 2016:

> From my review of the Responsive Records withheld under section 24(1)(b) of the FOIPP Act, I determined that the consultations and deliberations about the Squad took place between sworn or non-sworn members of the EPS as part of their roles within the organization. Their views were specifically sought by and expected from their superiors. [Emphasis added.]

The foregoing description precludes the idea that the information to which the Public Body applied section 24(1)(b) contains the personal views or opinions of its employees, as here, their responses are described as "part of their roles within the organization." I note, too, that the description of the information as a personal view or opinion also contradicts the description of record 309 offered in the Public Body's *in camera* submissions in support of its claim of privilege over the record. If the digital media supervisor were taking part in, or reviewing conversations between, the Public Body's lawyers and the Public Body regarding the Public Body's legal affairs as a private individual, any privilege attaching might be lost by his involvement.

[para 60] From my review of the records that the disclosure analyst has described as containing personal views or opinions, or alternatively, "consultations or deliberations" provided as part of their roles within the Public Body, I am unable to conclude that the information severed from them is anything other than employee work product, despite the disclosure analyst's sworn assertions to the contrary. I have therefore decided that I am only able to treat the assertions in the affidavit as arguments about what findings I ought to make about the records, in contrast to being evidence about the content and nature of the records. Further, it would be unreasonable to reject the disclosure analyst's evidence as representative of the facts in relation to the records I am able to view, but accept it for the records I cannot. This conclusion applies equally to my analysis with regard to the remainder of the records and to the disclosure analyst's evidence in relation to other provisions.

[para 61] For the foregoing reasons, I find that the Public Body has not established that the information it severed from records 77, 309, 420, 427, 490, 502, 504, 577, 606, 681, 752, and 756 under section 17(1) has a personal dimension. I therefore find that it cannot reasonably withhold this information from the Applicant under this provision.

Records 323 and 637

[para 62] Record 323 contains three emails. The Public Body indicates that the first email on this record was withheld from the Applicant under sections 17 and 24 and as "nonresponsive". Record 637 contains the same email. Although the severing on the record indicates that sections 17 and 24 were applied to the entire email, and that the whole record was considered "nonresponsive", I understand that it is only a sentence that refers to a social event attended by a family member that has been withheld as nonresponsive or as personal information. I agree with the Public Body that the sentence of the email that asks about the social event is nonresponsive. However, I find that the remainder of the email is not subject to section 17(1) or nonresponsive. As will be discussed below, I find that section 24(1) does not apply to the remaining information, and I will order the emails in these records to be disclosed, but for the nonresponsive information.

Records 378 – 380, 389, 396 – 398, 402, 406, 417, 419, 430, 440 – 442, 516, 519, 520, 527, 532, 542, and 625

[para 63] The Public Body severed email addresses from records 378 – 380, 389, 396 – 398, 402, 406, 417, 419, 430, 440 – 442, 516, 519, 520, 527, 532, 542, and 625.

[para 64] The disclosure analyst explains that the email address in the records is a personal email address, but that the emails were written in a professional capacity. She notes that email addresses are not typically disclosed to the public or made routinely available by the Public Body.

[para 65] I agree with the disclosure analyst that the emails in question appear to be written in the employee's professional capacity. However, I am unable to say that the email address has a personal dimension. The context in which the email address appears does not indicate whether the email address is used for anything other than as a representative of the Public Body. As the disclosure analyst does not indicate the source of her belief that the email address has a personal dimension, I am unable to find that it has. If it is the case that the Public Body does not routinely disclose the email address, this fact alone would not establish that the email address has a personal dimension.

[para 66] I am unable to conclude that the email address appearing in records 378 – 380, 389, 396 – 398, 402, 406, 417, 419, 430, 440 – 442, 516, 519, 520, 527, 532, 542, and 625 has a personal dimension and I will order it to be disclosed.

Records 379, 380, and 389

[para 67] The Public Body severed portions of records 379, 380, and 389 from the records under section 17(1) and as "nonresponsive". As the severed portions are essentially seasonal greetings, I agree with the Public Body that these portions are nonresponsive to the access request.

Records 408 and 603

[para 68] Records 408 and 603 contain emails to and from a member of the performance management unit. The disclosure analyst indicates that she severed these emails because the author of the email is a sergeant who performs a specific kind of training. She reasons that revealing the fact that the sergeant wrote the email would reveal sensitive information about an employee the training.

[para 69] I disagree with the disclosure analyst's characterization of the email and the significance of the sergeant's role in training. I am unable to say that the email reveals anything about a member receiving training. While the disclosure analyst asserts this to be her reason for severing information, she does not explain the basis of the assertion that the training was taking place. The information she asserts is not inferable from the email. The email does not indicate what kind of work the sergeant is doing that led to the email

being sent. It is unclear whether he is providing specific training to a member, or providing services to a group generally. If it is the latter, then it could not be said that there is any personally identifying information in the email. The sergeant later abandoned the request for records, which suggests he was not engaged in the particular type of training.

[para 70] If it is the case that the email does, in fact, reveal that a particular member is receiving the training, then the Public Body may redact the identity of the recipient of the training from the email. However, once that is done, there is no reason to withhold any other information from the email.

[para 71] I have decided that I will direct the Public Body to determine whether the sergeant was writing regarding a specific individual when he wrote the email. If he was working on a specific matter, and the identity of the individual member who was the subject of the training is revealed in the email (it is not clearly the case that it is), then the Public Body may redact the identifying information (i.e. rank) from the email. If not, the Public Body must give the Applicant access to the email.

[para 72] I am unable to find that records contain any information that has a personal dimension and could be construed as subject to section 17(1).

Record 687

[para 73] The Public Body indicates that it severed information from this record that refers to an employee returning from a trip. The disclosure analyst asserts that the reference to a trip is personal information and that it is nonresponsive.

[para 74] I am unable to say that the reference to the trip is personal information, as there is no evidence before me to establish that the trip was personal. In addition, I am unable to say that the information is nonresponsive, as the trip was offered as a reason not to respond to a question about "The Squad" immediately but to take additional time.

[para 75] As I am unable to find that the severed information is personal information or nonresponsive, and as it states in its submissions that is no longer relying on section 24(1)(b) in relation to this record (despite indicating on the record and in its indices that it is), I will direct the Public Body to give the Applicant access to the information it severed from record 687.

Records 832 – 833

[para 76] The Public Body severed the address and telephone number of a consultant from the records. While this information may be considered to be personal information, section 17(2)(f) establishes that it is not an unreasonable invasion of personal privacy to disclose "financial and other details of a contract to supply goods and services to a public body". The address and telephone number in this case disclose details

about the identity and nature of the vendor that supplied services to the Public Body under contract.

[para 77] In Order F2004-014, former Commissioner Work held that the purpose of section 17(2)(f) is to promote transparency in the manner in which government spends public funds (paragraph 38). In my view, finding that the contact information is subject to section 17(2)(f) is consistent with this purpose, as it enables an applicant to learn more about the parties with whom government contracts.

[para 78] For the foregoing reasons, I find that section 17(2)(f) applies to the information severed from records 832 and 833 and that section 17(1) cannot apply to the information.

Records 838 – 850

[para 79] The Public Body severed payroll numbers and its payment decisions regarding overtime from records 838 – 850. In my view, this information is nonresponsive to the access request.

Record 1404

[para 80] The Public Body withheld information it indicates is sensitive information about an EPS member. It states that the information is sensitive because it is about the conduct of the member. I am unable to say that the information is sensitive or has a personal dimension, as I am unable to view the record and the description I have been provided is inadequate for the purpose. It may be that the information has a personal dimension, or it may not. As I am unable to find in the circumstances that any references to the EPS member have a personal dimension, it follows that I find section 17(1) cannot be reasonably applied to the information.

Records 78 – 81, 114, 427, 428, 606, 607, 753, and 754

[para 81] The Public Body withheld the name of a well-known journalist employed from the records. The context created by the records established that the journalist contacted the Public Body to ask questions about "The Squad" in her capacity as a professional journalist, rather than as a private citizen. I am unable to identify a personal dimension to the information about the journalist in the records. I will therefore order references to the journalist to be disclosed, except in the circumstances where an exception to disclosure applies.

Records 152 – 171, 237, and 249 – 268

[para 82] Records 152 – 171, 237, and 249 – 268 are online comments made regarding "The Squad". The Public Body severed all user names and images associated with user names from the records under section 17(1).

[para 83] From my review of the records, I note that some user names are aliases, and that some of the severed images are pictures of animals or cartoon characters. It is therefore not clearly the case that these user names and images could be reasonably associated with an identifiable individual.

[para 84] I also note that the comments were posted in a public forum. It is therefore unclear whether those who posted the comments did so with expectations of privacy.

[para 85] As it is not clearly the case that the information the Public Body severed from records 152 – 171, 237, and 249 – 268 is personal information, or that it would be an unreasonable invasion of personal privacy to disclose it, if it is, I will direct the Public Body to review the information again, and to gather evidence if necessary, in order to decide whether the information is personal information, and whether it can reasonably be withheld under section 17(1).

Records 319, 601, 602, 706, 872, 873, 874, 875, 1071, 1072, 1131, 1132, 1133, 1136, 1139, 1140, 1143, 1147, 1150, 1214,1215, 1378, and 1379

[para 86] The Public Body indicates that it severed the direct line and email address of a Crown prosecutor "acting in her professional capacity" from records 319, 601, 602, 706, 872, 873, 874, 875, 1071, 1072, 1131, 1132, 1133, 1136, 1139, 1140, 1143, 1147, 1150, 1214,1215, 1378, and 1379. The Public Body's rationale for the severing is that the email and telephone number are not typically disclosed to the public or routinely available.

[para 87] There is no exception to disclosure for information that is not typically disclosed to the public or routinely available. As set out in section 6, a public body may only withhold information subject to the FOIP Act if an exception to disclosure applies to the information. As described to me, the information severed from the records is not subject to an exception to disclosure and is not personal information. I must therefore direct the Public Body to give the Applicant access to the information it severed under section 17(1) from records 319, 601, 602, 706, 872, 873, 874, 875, 1071, 1072, 1131, 1132, 1133, 1136, 1139, 1140, 1143, 1147, 1150, 1214, 1215, 1378, and 1379.

[para 88] Had the Public Body provided evidence or argument that supported finding that an exception to the right of access applied to the direct line and email address, it might have been possible to find in favor of the Public Body's decision. However, in the absence of evidence or argument of this kind, I am unable to do so.

Records 383, 502, 506, 599, 698, 1345, 1346, 1369, 1371, 1374, 1375, 1425, 1430, 1432, 1436

[para 89] The disclosure analyst indicates that records 383, 502, 506, 599, 698, 1345, 1346, 1369, 1371, 1374, 1375, 1425, 1430, 1432, and 1436 contain copies of emails sent internally within the EPS that refer to the Applicant's representative and contain his name.

[para 90] In my view, there is no purpose served by withholding records referring to the Applicant's representative or created by him under section 17(1). The Applicant's representative made the access request on behalf of the Applicant, fully aware that his information would be responsive to the access request. In my view, it cannot be an unreasonable invasion of his personal privacy under section 17(5), to disclose the information to the Applicant in this circumstance.

[para 91] I will therefore order the Public Body to give the Applicant access to references to its representative's personal information where it appears in 383, 502, 506, 599, 698, 1345, 1346, 1369, 1371, 1374, 1375, 1425, 1430, 1432, and 1436.

Records 368, 369, and 780

[para 92] Records 368, 369, and 780 contain the name of a professor of Police Studies. The Public Body severed the name of the professor, but disclosed the following from an email written by the Chief:

> I had sent the three DVD episodes of "The Squad" to a professor in charge of Police Studies Program in Kingston, Ontario, where we have done some significant and successful recruiting. His students reviewed the DVD and provided feedback.

[para 93] In my view, the Public Body has essentially identified the professor, given that there would only be one professor in charge of the police studies program in Kingston. Moreover, it appears that the professor provided feedback as part of a class project, and never stepped outside his role as a professor of police studies. I am unable to identify a personal dimension to the professor's correspondence. As a result, I find that the name of the professor is not personal information in the context of the records, and I will order the Public Body to disclose the information it severed.

Record 541

[para 94] Record 541 contains reference to a phone call from a member of the public about "The Squad" and a recommendation relating to the call. The Public Body severed personally identifying information about a caller from record 541 and advice relating to the call. I agree with the Public Body that the information it severed is personal information and that it would be an unreasonable invasion of personal privacy to disclose it. As will be discussed below in my analysis under section 24(1), I also agree that the information severed from the record under this provision is advice.

Records 545, 703 and 704

[para 95] Records 545, 703 and 704 contain a copy of a letter sent by the Applicant's representative in his capacity as a lawyer, on behalf of clients who are not the Applicant.

[para 96] The disclosure analyst indicates that records 545, 703, and 704 were withheld from the Applicant because they contain the names of the Applicant's representative's clients. Even though the Applicant's representative sent the letter, he did not do so as the Applicant's representative, but as the lawyer for his clients. In my view, it would be an invasion of the Applicant's representative's clients' reasonable expectations of privacy if the Public Body were to give the Applicant access to their personal information in relation to criminal matters, simply because both have the same representative.

[para 97] That being said, I find that the severing in the email is overly broad. Once the personally identifying information is removed from the records, the remaining information is neutral information that would not disclose personal information about the Applicant's representative's clients. I will therefore order the Public Body to sever the personally identifying information of the Applicant's representative's clients from the email and provide the remainder to the Applicant.

Record 409

[para 98] The Public Body severed personally identifying information of an individual who was arrested from this record (name, date of birth and address), as it states *in camera*, but it also severed the remaining information in the email, which indicates simply that records are being requested. If a particular officer is the subject of a professional standards investigation, the identity of that officer is not inferable from the email.

[para 99] I agree with the Public Body that personally identifying information in this record (the name, address, and file number) should be severed under section 17(1), given that this is sensitive personal information. I will therefore order the Public Body to withhold the name and address of the accused person referenced in the email, and the file number, but to disclose the remaining information.

Record 443

[para 100] Record 443 contains an email replying to the email in record 409. The Public Body severed file numbers from the email, in addition to the body of the email, under section 17(1).

[para 101] In my view, it is only the name and contact information about an accused and the file numbers that may be construed as personal information in this record. I will confirm the decision of the Public Body to sever the name, contact information and file number, but require it to disclose the remaining information from record 443.

Records 455, 461, 472, 473, and 489

[para 102] The disclosure analyst explains that portions of these records were severed as they contain references to an employee of the Public Body who suffered an injury. I

agree with the Public Body that these references are nonresponsive, as the information does not have any relationship to the subject matter of the Applicant's access request.

Records 494 and 495

[para 103] The disclosure analyst explains that she withheld information regarding payroll matters from the Applicant on the basis that this information is nonresponsive to the access request and on the basis of section 17(1). I agree with the disclosure analyst that this information is nonresponsive to the access request.

Record 500

[para 104] The disclosure analyst explains that she withheld a portion of record 500 that refers to a "personal fact". I am unable to see record 500 because the Public Body also applied section 27(1)(a) to it. It is unclear to me in what context the information disclosure analyst referred to as a personal fact appears, or whether this personal fact relates to the subject matter of the access request. It is also unclear that factors weighing in favor of withholding the information would outweigh factors weighing in favor of disclosure under section 17(5), discussed above, if the information described as a personal fact is personal information.

[para 105] For the foregoing reasons, I am unable to find that the information about the digital media supervisor leaving is personal information or subject to section 17(1).

Record 504

[para 106] Record 504 is described as being withheld because it contains a remark made by an employee about lawyers.

[para 107] I am unable to say that the severed remark is personal information. It is unclear that the remark is not simply hyperbole intended to put the recipient of the email at ease, so that the response to the request that follows the remark will be favorable. I am unable to say that the remark is not simply part of the way the employee who made it communicates to perform his employment duties effectively.

[para 108] As I am unable to determine that the severed information is personal information, or that disclosing the severed information would have a personal impact on the employee it is about, and as I find below that this email is not subject to section 24(1), I must order the Public Body to give the Applicant access to this email.

Record 513

[para 109] Record 513 contains comments by a member of the Public Body about a segment of "The Squad". The disclosure analyst asserts that these comments are the personal views of the member. However, in relation to the application of section 24(1)(b), which was also applied to this record, the disclosure analyst asserts that the comments

"took place between sworn or non-sworn members of the EPS as part of their roles within the organization and that members' views were specifically sought and expected from their superiors.

[para 110] In this case, as will be discussed below, the evidence provided by the content of the record establishes that section 24(1)(b) applies, and not section 17(1), as I find that the severed comments were made as part of the member's role in providing advice to the Public Body. To conclude, while I find that section 17(1) does not apply because the information lacks a personal dimension, I find that section 24(1) applies. I will therefore not order disclosure of record 513.

Record 577

[para 111] The Public Body severed information regarding an ill family member from an email on record 577. Having reviewed the information and the email, I agree with the Public Body that this information is nonresponsive personal information. I will therefore confirm the Public Body's decision to sever information from record 577 under section 17(1).

Records 578 - 579

[para 112] The Public Body severed information from records 578 – 579 on the basis that the information was either nonresponsive, or subject to section 17(1) and 24(1)(b). The disclosure analyst describes the record as containing reference to personal opinions and to a payroll matter.

[para 113] I am unable to identify any information that could be construed as being personal opinions rather than work product, or as otherwise having a personal dimension, other than the reference to payroll information. I am unable to say that there are any comments in the emails that are personal opinions, as opposed to the opinions of employees carrying out their duties and bringing information about matters to the attention of other employees. The Public Body also applied section 24(1)(b) to this information, which means it is also subject to the disclosure analyst's blanket assertion that she has reviewed all the records and that all information to which she applied section 24(1)(b) is advice given within the employee's role within the organization and was expected by superiors.

[para 114] I am unable to say that any of the information severed from the record, other than the payroll information, is nonresponsive or personal information. Further, as will be discussed below, I am unable to find that section 24(1) applies to the information severed by the Public Body. I will therefore order the Public Body to disclose these records, but for the payroll information.

Record 621

[para 115] Record 621 contains an email from a member to the digital media supervisor. The email contains a compliment and ends with a humorous admonishment. The Public Body severed the admonishment on the basis that it is a comment about personal work habits.

[para 116] I am unable to agree that the severed admonishment is personal information about work habits. Rather, it is intended to be a joke and not as truthful or accurate information. In my view, the author of the email wrote the email as part of his role to compliment a colleague on the colleague's work. I am unable to identify a personal dimension to the severed portion of the record. I will therefore order the Public Body to disclose record 621.

Records 570 – 571, 573, 596, 597, and 598

[para 117] The Public Body severed the names and contact information of reporters from Bell Media and Metro News from these records. It is clear from the records that the reporters were acting in the capacity of representatives of Bell Media and Metro News and not as individuals. I am unable to identify a personal aspect to the information and I will direct the Public Body to give the Applicant access to it.

Records 879 and 1259

[para 118] The Public Body did not provide records 879 and 1259 for my review as it also applied sections 24(1)(b) and 27(1)(a),(b), and (c) to the information. The Public Body explains that the information to which it applied section 17(1) is information about an individual under investigation, including the individual's address. If that is so, then I confirm the decision of the Public Body to sever the personally identifying information of the individual from the records.

Records 910, 1055, 1340, 1417, and 1423

[para 119] Records 910, 1055, 1340, 1417, and 1423 are described as an email between the digital media supervisor and an information management inspector that was copied to a superintendent in charge of legal services. These records were not provided for my review. The Public Body states that it severed an EPS investigation file number from these records "belonging to an accused individual".

[para 120] I accept that the file number is personal information; however, I am unable to confirm the Public Body's decision in relation to any other information withheld from the email as personal information.

Records 942, 947, 949, 951, 954, 955, 964, 1041, 1118, 1242, and 1245

[para 121] Records 942, 947, 949, 951, 954, 955, 964, 1041, 1118, 1242, and 1245 are described as copies of an email from the digital media supervisor to an information management inspector and the director of the legal advisor's section, which was copied to the superintendent of the legal and regulatory services division. The Public Body did not provide these emails for my review. It states that it severed an investigation file number belonging to an accused person from the email. I accept that the file numbers are personal information and I will confirm the Public Body's decision to sever this information.

Nonresponsive information

[para 122] The Public Body provided me with records and further explanation as to why it decided some information was nonresponsive. I agree with the Public Body that the information discussed in pages 13 - 15 of the disclosure analyst's supplemental affidavit of May 1, 2017 is nonresponsive.

Issue B: Did the Public Body properly apply sections 24(1)(a) and (b) to the information it severed under these provisions?

[para 123] In Order F2015-29, the Director of Adjudication interpreted sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said:

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

[para 124] I agree with the analysis of the Director of Adjudication as to the purpose and interpretation of sections 24(1)(a) and (b), and agree these provisions apply to information generated when a decision maker asks for advice regarding a decision, or evaluates a course of action. I note too that this interpretation is consistent with *John Doe v. Ontario (Finance)*, 2014 SCC 36 in which the Supreme Court of Canada commented on the purpose of the "advice and recommendation" exception in Canada's various freedom of information regimes. The Court held:

In my opinion, Evans J. (as he then was) in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [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] 2 S.C.R. 69, at p. 86; *OPSEU v. Ontario (Attorney General)*, [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.

Section 24(1)(a)

Records 581, 585, 716, 1404

[para 125] The Public Body indicates that it applied section 24(1)(a) to records 581, 585, 716, and 1404. As it also applied section 27(1)(a) to these records, it has not provided them for my review.

[para 126] The disclosure analyst asserts that the information severed from these records is advice and / or recommendations provided by lawyers of the Public Body to employees of the Public Body. However, in the absence of the records, I am unable to find that the information severed as advice or recommendations can be so characterized. I accept that the disclosure analyst believes that the severed information can be characterized in this way; however, I cannot, on the evidence before me, make a finding that the records contain advice or recommendations independently. As I find that the

Public Body has not met its burden of proving that the records contain advice or recommendations within the terms of section 24(1)(a), and as I find below that the Public Body has not established that sections 27(1)(a), (b), or (c) apply, I must order the Public Body to give the Applicant access to these records.

Section 24(1)(b)

[para 127] In relation to its application of section 24(1)(b), the Public Body states:

> The Responsive Records contain information regarding consultations or deliberations created in the course of internal decision-making and, as a result, should be exempt from disclosure under section 24(1)(b). Specifically, the consultations and discussions involve:
>
> - Consultations and deliberations between members of the Corporate Communications Branch and Digital Media Unit about production of the Squad and how the Squad would be filmed, edited, and distributed;
> - Consultations and deliberations between members of the Corporate Communications Branch, senior EPS Members and the EPS lawyers relating to the response that should be provided to media inquiries about the Squad;
> - Consultations and deliberations between members of the Corporate Communications Branch, senior EPS Members and EPS lawyers relating to the response that should be provided to feedback and concerns raised by the public;
> - Consultations and deliberations between members of the Corporate Communications Unit, senior EPS Members and the EPS Lawyers relating to legal issues arising from the Squad;
> - Consultations and deliberations between EPS Lawyers relating to the legal advice being sought, and the legal advice that should be provided to the EPS;
> - Consultations and deliberations between members of the Corporate Communications Unit, senior EPS Members and EPS Lawyers where EPS Lawyers are providing legal advice and a recommended course of action, and the parties discussing the impact of the same on the direction the production of the Squad take; and
> - Consultations and deliberations between members of the Corporate Communications Unit, senior EPS Members and EPS Lawyers about the cancellation of the Squad.
>
> Affidavit of [the disclosure analyst] at para. 25 [TAB A]
>
> These portions of the Responsive Records involve numerous individuals providing discussion as to the appropriateness of a course of actions in relation to the production of the Squad. The consultations and deliberations were specifically sought from these individuals by decision makers of the EPS. As many of these discussions related to legal advice sought and given to EPS Lawyers, they are also withheld under s. 27 by virtue of the solicitor-client privilege.

[para 128] From the Public Body's submissions, and from my review of its severing, I understand that it considers consultations or deliberations within the terms of section

24(1)(b), to encompass advice in relation to a decision volunteered by an employee who is not responsible for making a decision, or who has not been asked to provide advice.

[para 129] In my view, section 24(1)(b) does not operate in this way. Rather, as discussed above, consultations take place when those responsible for making a decision seek advice in relation to what is to be decided, and deliberations take place when those responsible for making decisions weigh courses of action. Clearly, there can be overlap between 24(1)(a) and 24(1)(b), when a decision maker requests advice or considers advice. The advice, being both given and considered, then falls under either provision. However, when advice or other information falling within section 24(1)(a) is developed by an employee or employees for the Public Body and there is no indication that the advice has been specifically requested or considered by a decision maker, but the advice is offered as part of the employee's or employees' duties, section 24(1)(a) may apply, but section 24(1)(b) does not.

[para 130] I have decided that where the Public Body has applied section 24(1)(b) to information falling within the terms of section 24(1)(a), I will consider whether section 24(1)(a) or any of the other provisions of section 24(1) applies. I have decided to do so, as in some instances, the arguments of the Public Body and the content of the record support applying section 24(1)(a), even though it applied section 24(1)(b).

[para 131] In Order F2008-016, the Adjudicator was faced with a situation where a Public Body withheld information under one provision, but its arguments indicated to her that it had really withheld information in accordance with another provision. She said:

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

Similarly, I have decided that where section 24(1)(a) applies to the information to which the Public Body applied section 24(1)(b), I will consider it to have applied section 24(1)(a).

[para 132] From the Public Body's explanation of its application of section 24(1)(b) I understand that it relies on *Covenant Health v. Alberta (Information and Privacy Commissioner)*, 2014 ABQB 562 and takes the position that a consultation or deliberation takes place whenever employees *discuss* an issue:

> However, it was noted by the Alberta Court of Queen's Bench that '[t]here is no basis to insist that one of the person in the group [involved in the discussions and consultations] has to have the authority to "take or implement an action". In other words, a consultation and deliberation only needs to involve two or more officers or employees of a public body discussing an issue which the public body may at some future time or must presently resolve."

(Page 13, paragraph 45 of the Public Body's initial submissions). In my view, the more recent decision of the Supreme Court of Canada, in *John Doe (supra)*, renders this position untenable. In that case, the Court tied the exceptions for advice and deliberations in FOIP schemes to the need to protect the process by which government makes decisions and evaluates policy options. Moreover, if it were the case that any discussions between employees would be withheld under section 24(1), regardless of whether the discussion contributed to a governmental decision making process, the right of access would be nugatory, given that any government communication could meet this criterion.

[para 133] I turn now to the records to which the Public Body's application of section 24(1) to the records.

Records 77 – 79

[para 134] Records 77 – 79 contain emails between a deputy chief and a communications advisor. The Public Body applied section 24(1)(b) to both record 77 and 78. I agree with the Public Body that record 79 is subject to section 24(1), although I consider it to be subject to section 24(1)(a), rather than section 24(1)(b), given that it contains advice as to a course of action to be taken by the deputy chief. However, I find that the information severed from record 77 is not subject to section 24(1)(b) as it does not appear to contain any information that can be withheld under section 24(1). Neither email appearing on record 77 appears to have any relationship to the Public Body's decision making process.

[para 135] As I find that the information severed from record 77 is not subject to section 24(1), I will order the information on record 77 to be disclosed.

Record 301

[para 136] The Public Body withheld emails appearing on record 301 under section 24(1)(b). I am unable to identify any information in this record that could be considered a consultation or deliberation, or as information falling within the framework of section 24(1)(a). The emails state facts, but the facts presented do not appear intended to propose a course of action or to assist in making a decision. In other words, these emails were written for purposes of providing information but are outside the deliberative process.

[para 137] As I find that section 24(1) does not apply, I will order the Public Body to give the Applicant access to this record.

Record 323

[para 138] Record 323 contains an email from an employee of the Public Body to the director of the corporate communications branch. The email describes how a meeting with the media went. I am unable to identify any information in the email that could be construed as falling under section 24(1) and I find that it is not part of the Public Body's deliberative process.

[para 139] As I find that section 24(1) does not apply, I will order disclosure of record 323, but for the nonresponsive part of the email referring to a family member.

Record 337

[para 140] Record 337 contains a request, and some background information supporting the request. However, the email also asks the recipient for advice. It appears that the author of the email in writing is to ask whether a proposed course of action is viable, and he then receives advice in response. I find that the first record appearing on record 337 is a consultation within the terms of section 24(1)(b), while the second email contains advice within the terms of section 24(1)(a).

Record 338

[para 141] The Public Body severed portions of the first three emails appearing on record 338 under section 24(1)(b). I find that section 24(1)(b) applies to the severed information as the employees who wrote the emails are trying to decide what course of action to take.

Record 341

[para 142] The Public Body severed emails between employees of corporate communications employees from this record under section 24(1)(b). I am unable to find that any of the information severed is subject to section 24(1). There is no indication that the emails form part of any advice or other information subject to section 24(1)(a), nor do they appear to reflect consultations or deliberations in regard to a decision.

[para 143] As I find that section 24(1) does not apply, I will order disclosure of record 341.

Record 343

[para 144] The Public Body severed an email under section 24(1)(b) from record 343. The email states a fact and asks a question. I am unable to say that the author's purpose in writing the email was to suggest or guide a course of action, or to ask for assistance to make one.

[para 145] I am unable to find that section 24(1) applies to record 343.

Record 344

[para 146] The Public Body severed the email appearing at the top of record 344 under section 24(1)(b).

[para 147] I reviewed the record and find that section 24(1) does not apply. The record conveys information about a statement developed to communicate a decision. The email does not indicate that advice is being sought about the statement, such that section 24(1)(b) could apply, or that the statement is being provided as advice (or other similar information) such that section 24(1)(a) could apply. Rather, it appears that the statement is final and is being provided to inform the recipient of the email of both the statement and the decision the statement communicates.

[para 148] As I find that none of the provisions the Public Body applied to this record, applies, I will order the Public Body to disclose this record.

Record 355

[para 149] Record 355 contains two emails. The first email in time may be construed as a request for advice, or "consultation", within the terms of section 24(1)(b), and the second email in time could be construed as "advice" and "analysis" within the terms of section 24(1)(a). I find that section 24(1) applies to both emails.

Record 357

[para 150] Record 357 contains three emails between employees. The first email in time proposes a course of action. The second email agrees with the course of action proposed, while the third email indicates that the course of action is no longer viable, and may be viewed as requesting further advice. I find that section 24(1)(b) applies to the final email in time, and that section 24(1)(a) applies to the first two emails in the chain.

Record 373

[para 151] The Public Body severed two emails from record 373 under section 24(1)(b). The first email in the sequence asks a question and the second email answers the question. I am unable to say that the employee who asks the question is asking for advice that the employee may use in making a decision. Rather, it appears that the employee is asking for direction. The answering email provides the requested direction. I find that section 24(1) does not apply to the information severed from record 373. I will direct the Public Body to give the Applicant access to this record.

Record 374

[para 152] Record 374 contains an email from an employee of the corporate communications branch to another employee. It requests that the employee perform a task. The email leaves it to the discretion of the employee as to whether the task should be done one way or another. I am unable to identify information in this record that falls within the terms of section 24(1). As a result, I must order the Public Body to give the Applicant access to record 374.

Records 375 – 376

[para 153] Record 375 contains an email directing an employee to perform certain task, and an email from the employee confirming that the task has been performed. Record 376 contains emails from an employee requesting direction as to how to perform a task, rather than requesting advice to consider. I am unable to identify any information in these emails that is subject to section 24(1). I will order the Public Body to give the Applicant access to the information severed from these records.

Record 377

[para 154] Record 377 contains an email written by a director of the corporate communications branch to the digital media supervisor and another employee. The email asks for the reasons for a decision and whether another decision has been made.

[para 155] I find that section 24(1) does not apply to the information severed from record 377. Asking why a decision was made, or whether a decision has been made, is not the same thing as asking for assistance in making a decision, or providing advice to assist in the making of a decision. I am unable to find that any of the information in record 377 formed part of the Public Body's deliberative process.

Records 378 - 381

[para 156] Records 378 – 381 contain a series of emails. The Public Body severed four of the emails under section 24(1)(b). I agree with the Public Body that the first three emails in the sequence contain the consultations or deliberations of employees. However, the final email in time, dated December 28, 2012 at 10:43, requests a confirmation of factual information. I am unable to find that this email contains information subject to section 24(1)(a) or (b) and I will order the Public Body to disclose it.

Record 382

[para 157] The Public Body severed two emails from record 382. The first email contains factual information and is not intended to deliberate a course of action or to guide or influence a decision. The second in the sequence, dated May 7, 2013 at 8:21 contains advice as to a course of action. In my view, section 24(1)(a) applies to the 8:21 email, but section 24(1) does not apply to the first email in the sequence. I will order the Public Body to disclose the first email (written at 8:05) in the sequence.

Record 383

[para 158] Record 383 contains emails. The Public Body severed the second email on the page under section 17(1) and 24(1)(b). I find neither provision applies. The employee asked a factual question in a representative capacity. In other words, he wanted to know why a particular decision had been made. However, the employee was not deliberating the decision or asking for advice. He simply wanted to know what happened and why. As

I find that neither section 17 nor 24 applies to the email, I will direct the Public Body to give the Applicant access.

Record 386

[para 159] Record 386 is a duplicate of record 374, which I have already addressed.

Record 389

[para 160] Record 389 is a duplicate of an email appearing on record 379. I have already addressed this email.

Records 427 and 606

[para 161] The Public Body severed an email, written by a communications advisor to the digital media supervisor, from these records under section 24(1)(b). While it is not clear to me that the communications advisor is consulting or deliberating a decision, she provides analysis regarding a situation that has arisen and indicates that the digital media supervisor could consider taking a particular course of action when addressing the situation. I find that the information severed from records 427 and 606 is subject to section 24(1)(a).

Record 449

[para 162] Record 449 contains an email from a member of corporate communications to a third party contractor who was hired to narrate "The Squad". The Public Body severed a sentence of this email under section 24(1)(b). I find that the severed sentence merely recites facts, and does not contain information subject to section 24(1).

[para 163] As I find that section 24(1) does not apply to record 449, I will order the Public Body to give the Applicant access to it.

Record 454

[para 164] Record 454 contains two emails. The initiating email indicates tasks that the author of the email wants done. The second email, dated May 9, 2013, 09:37 contains analysis of a legal issue. I am unable to find that the initiating email contains information subject to section 24(1); however, I find that the subsequent email created at 09:37 contains analysis in support of addressing information in "The Squad" in a particular way. I find that section 24(1)(a) applies to the email created at 09:37 on record 454. However, I find that the other email is not subject to section 24(1) and I will order it to be disclosed to the Applicant.

Records 483 - 485

[para 165] Records 483 – 485 contain emails between employees. They contain an analysis of an issue that had arisen and proposals as to how to address it. I find that these emails contain information subject to section 24(1)(a).

Record 490

[para 166] Record 490 contains two emails between an employee of corporate communications and the digital media supervisor. The Public Body severed these two emails under section 24(1)(b). I am unable to identify any information in these emails that could be construed as subject to section 24(1). I must therefore order the Public Body to give the Applicant access to this record in its entirety.

Records 494 – 495

[para 167] Records 494 – 495 contain five emails. The two emails that begin the sequence are nonresponsive to the access request. However, the final three emails in temporal sequence are responsive to the access request. The final two emails (written at 8:50 and 9:30), appearing on record 494, were withheld by the Public Body under section 24(1)(b).

[para 168] I am unable to identify information falling within the terms of section 24(1) in these emails. The emails contain factual information and comments; however, the authors of the emails are not proposing or suggesting a course of action, nor are they deliberating one. I find that these emails fall outside the Public Body's deliberative process. As I find that section 24(1) does not apply to these emails, I will direct the Public Body to give the Applicant access to them.

Record 502

[para 169] Record 502 contains 5 emails. The Public Body severed three emails under section 24(1)(b) and section 27(1)(a) and did not provide them for my review. The record indicates that it severed an email created on May 17, 2013 at 9:44 under section 17 and 24(1)(b); however, the Public Body did not provide this record for my review.

[para 170] As discussed elsewhere in the order, I am unable to find that the Public Body properly withheld the records that have not been provided for my review.

Record 504

[para 171] Record 504 contains two emails between employees. The Public Body severed the initiating email under section 24(1)(b).

[para 172] The initiating email contains factual information and questions about facts. There is nothing in the email that suggests a decision will be made or that the email was intended to assist someone to make a decision, or take a course of action.

[para 173] As I am unable to find that section 24(1) applies to record 504, I will order the Public Body to give the Applicant access to it.

Record 506

[para 174] Record 506 contains two emails. The Public Body severed the first email in temporal sequence under sections 24(1)(b), 27(1)(a), and 17(1). It severed the later email, which appears at the top of the page, under section 24(1)(b) and 17(1).

[para 175] It is unclear to me why the Public Body severed either email under section 24(1)(b). With regard to the email I have been shown, I am unable to identify any information that could be termed a consultation or deliberation. As I found above that it has not been established that there is a personal dimension to the email, and as I find that the Public Body has not established that section 24(1)(b) applies to any of the records I have not been shown, I will direct the Public Body to give the Applicant access to this record.

Record 513

[para 176] Record 513 contains an email from an employee of the Public Body to an employee of corporate communications. The email proposes a course of action and contains analysis as to why the proposal is appropriate.

[para 177] I find that section 24(1)(a) applies to the information severed from record 513.

Record 514

[para 178] Record 514 contains two emails to which the Public Body applied section 24(1)(b) only. The top email on the page contains a question. The email to which the statement is a response, contains a statement and a question.

[para 179] I find that the two emails consist of the deliberations of two employees evaluating courses of action. I find that section 24(1)(b) applies to the emails.

Record 530

[para 180] Record 530 contains a list of options created by an employee of corporate communications which he sent to himself. From the context created by the email, I conclude that record 530 contains options for the leadership of the Public Body to consider in the future. I find that section 24(1)(a) applies to this information, as the email is intended to form part of, and steer, a future decision making process.

Record 541

[para 181] The Public Body severed a portion of an email appearing on record 541 on the basis of section 24(1)(b). I find that the severed portion is advice regarding a particular situation that had arisen. I find that section 24(1)(a) applies to the severed information.

Record 550

[para 182] Record 550 contains two emails. The first email proposes a course of action, while the second email analyses the first email and then recommends an additional course of action. I find that both emails are subject to section 24(1)(a).

Record 551

[para 183] Record 551 contains an email written by the digital media supervisor and sent to a deputy chief. It contains background information as to what has been done, and then requests assistance. It is unclear whether this email contains information subject to section 24(1).

[para 184] If the email is intended as advice or as a consultation, then it is unclear what the advice would be or the decision to be made. It may be the case that the author of the email is requesting help making a statement, but it is also possible on the wording of the email, that the statement being provided has already been approved and that the assistance being sought is for the deputy chief to respond to the media. It seems unlikely that the digital media supervisor would ask the deputy chief to assist in writing a statement; it appears more consistent with the roles of both that the deputy chief was being asked to make a public statement personally.

[para 185] I am unable to find that the email reveals information subject to section 24(1)(a) or (b). I must therefore direct the Public Body to give the Applicant access to record 551.

Record 553

[para 186] Record 553 is an email between an employee of corporate communications and the digital media supervisor. The email is entitled "Letter to Squad 7". The Public Body has withheld the first sentence of the email on the basis of solicitor-client privilege. The body of the email has been withheld on the basis of section 24(1)(b), although it was originally withheld on the basis of solicitor-client privilege and section 27(1)(b) and (c).

[para 187] From my review of the email, I note that it appears to be a letter to Squad 7, as the title suggests. I am unable to identify any information in this email that falls within the terms of section 24(1), as the information in the email is a recitation of facts.

The letter sets out what has been decided, and provides some reasons for making the decision. There is no indication that the letter was sent in order to get advice, or to advise, as to the letter's content.

[para 188] As I find that section 24(1) does not apply to this record, and as I find below that the Public Body has not met its burden of establishing that the records to which it applied section 27(1)(a) are privileged, I must direct it to give the Applicant access to record 553.

Record 574

[para 189] Record 574 contains emails between the digital media supervisor and a deputy chief. The Public Body severed a factual question asked by the digital media supervisor and the deputy chief's response to it under section 24(1)(b). I find that this information is not subject to section 24(1) and I will direct the Public Body to disclose it.

Record 579

[para 190] Record 579 contains an email written by the director of the corporate communications branch. The email confirms that events took place and remarks on the events. There is no indication in the email that the author was attempting to provide advice or other information subject to section 24(1)(a), or to consult or deliberate a decision he was responsible for making. Instead, his email appears intended to draw to his colleague's attention to events that had taken place and to lighten the mood.

[para 191] I am unable to find that record 579 is subject to section 24(1) and I will direct the Public Body to disclose it.

Record 591

[para 192] Record 591 contains several emails. The Public Body severed an email that appears on the top of the page under section 24(1)(b). The email was written by the corporate communications director and contains a comment regarding the Public Body. I am unable to characterize the email as a consultation or deliberation, and I cannot guess at why the Public Body has characterized the email in this fashion. I am also unable to find that the information in the email could be reasonably construed as information falling within the terms of section 24(1)(a).

[para 193] As I find that the email on the top of record 591 is not subject to section 24(1), I must require the Public Body to give the Applicant access to it.

Record 595

[para 194] The Public Body severed the body of an email that appears at the bottom of record 595 under section 24(1)(b). The email contains a factual question. I find that this email does not contain information falling within the scope of section 24(1). As I find

that section 24(1) does not apply to the email, I will order the Public Body to give the Applicant access to it.

Records 358 and 604

[para 195] Records 358 and 604 are duplicates. These records contain two emails. The first email in time proposes a course of action. The second email in time states who will be responsible for performing a task. I find that the earlier email is subject to section 24(1)(a). However, I find that the later email, which appears on the top of the page, is not subject to section 24(1).

[para 196] As I find that the later email is not subject to section 24(1), I will direct the Public Body to disclose it.

Record 605

[para 197] The Public Body severed an email created by an employee in communications under section 24(1)(b). The email recommends a course of action. In my view, this email is subject to section 24(1)(a).

Records 606 - 608

[para 198] The Public Body severed two emails from these records under section 24(1)(b). I find that these emails were written by employees of the Public Body to analyze a situation that had arisen and to propose courses of action in response. I find that these emails are subject to section 24(1)(a).

Record 611

[para 199] Record 611 contains three emails that appeared on record 357 and which I have already found to be subject to section 24(1). There is a fourth email appearing on the top of the page that was not part of record 357. I find that this email contains advice and is subject to section 24(1)(a).

Record 612

[para 200] Record 612 contains emails in which employees discuss how best to proceed. Some of these emails appear on record 514. The Public Body severed these emails under section 24(1)(b). I find that the employee discussions are consistent with deliberations within the terms of section 24(1)(b) and that section 24(1)(b) applies to the emails severed by the Public Body.

Record 620

[para 201] Record 620 contains an email from an employee in communications to the deputy chief. The email contains analysis of events and a recommendation as to how

events should be handled. I find that the email on record 620 is subject to section 24(1)(a).

Records 622 – 623

[para 202] Records 622 – 623 contain emails between employees of the Public Body evaluating various courses of action, in relation to "The Squad". I find that these emails fall within the terms of section 24(1)(b).

Record 625

[para 203] Record 625 contains an email with a comment regarding "The Squad". The purpose of the comment appears intended to suggest that an aspect of "The Squad" be changed. I find that this email is intended to advise the Public Body regarding a course of action and is subject to section 24(1)(a).

Record 637

[para 204] Record 637 contains an email that the Public Body severed under section 24(1)(b). It was created by an employee of corporate communications for the corporate communications director. The email contains factual information. It does not appear to be a consultation or deliberation, and it does not appear intended as advice or other information falling within section 24(1)(a). I find that the email severed from record 637 is not subject to section 24(1) and I will order the Public Body to give the Applicant access to it.

Record 652 – 658

[para 205] Record 652 contains an email written by a member of the Public Body. It analyzes issues raised by filming and airing "The Squad". I find that this email is subject to section 24(1)(a). Although the Public Body also indicated on the record that it believes this email, and attachment, is nonresponsive, I disagree. However, as the email is subject to section 24(1)(a), I will not order its disclosure. I agree that the emails at the bottom of record 655 and records 656 – 658 are nonresponsive.

Records 659 – 665

[para 206] Records 659 – 665 are duplicates of records 652 – 658.

Record 674

[para 207] Record 674 contains three emails. The Public Body withheld the emails appearing on the top and bottom of the page under section 24(1)(b). The middle email was withheld on the basis of section 24(1)(b) and section 27(1)(a), (b), and (c). I find that neither email I was shown can be characterized as a consultation or deliberation within the terms of section 24(1)(b). In both cases, the author of the email asked factual

questions. The author of the top email also expressed uncertainty, but I am unable to say that he was requesting assistance in making a decision that he had authority to make.

[para 208] As I find that section 24(1) does not apply to the two emails that were shown to me, I will direct the Public Body to give the Applicant access to them.

Record 681

[para 209] The Public Body severed a comment from record 681. I find that the comment is not subject to section 24(1). I will order the Public Body to give the Applicant access to record 681 in its entirety.

Record 702

[para 210] Record 702 contains an email from a deputy chief that contains advice as to a course of action. I find that this email is subject to section 24(1)(a).

Record 716

[para 211] Record 716 contains an email from the director of legal services to the director of corporate communications. The Public Body severed this email under section 24(1)(a) and (b). The email refers to decisions that have been made and directs staff to follow them. I am unable to identify any information that could be construed as providing advice or other information subject to section 24(1)(a) or a consultation or deliberation within the terms of section 24(1)(b).

[para 212] Arguably, the information in record 716 is consistent with an instruction issued to staff within the terms of section 24(2)(f). If information is subject to a provision of section 24(2), it cannot be withheld under section 24(1). In any event, as I find that the information severed by the Public Body is not subject to section 24(1)(a) or (b), it cannot withhold this information in any event.

Record 730

[para 213] Record 730 is a duplicate of record 702. I have already found this record is subject to section 24(1)(a).

Record 752

[para 214] Record 752 contains an email from the digital media supervisor to the deputy chief. The Public Body withheld this email under section 24(1)(b). I find that the email was not written to provide information subject to section 24(1), but to thank the deputy chief. I am unable to identify any information falling within the terms of section 24(1) in the email.

[para 215] As I find that section 24(1)(b) (and section 17(1) which was also applied) does not apply to this email, I will direct the Public Body to provide access to it.

Record 753

[para 216] Record 753 contains an email from a communications employee to a deputy chief. It contains recommendations as to a course of action and also analyzes advice that had been given to date. I find that the email on record 753 is subject to section 24(1)(a).

Record 1344

[para 217] The index prepared by the Public Body indicates that it applied sections 24(1)(b) and 27(1)(a), (b), and (c) to withhold record 1344, although the record itself indicates that it applied section 17(1) to it.

[para 218] I find, below, that section 27(1)(a) applies to record 1344 and so it is not strictly necessary that I address section 24(1)(b). However, I have decided to discuss it to illustrate the difficulty I have with the Public Body's decisions to apply section 24(1)(b) and 27(1)(a) to the same information.

[para 219] If it were the case that the lawyer who created the privileged communication on record 1344 did so in order to consult regarding a decision or to deliberate a decision, then he could not be said to be providing legal advice, but rather, to be making a decision. If he wrote the email to provide advice "developed *by or for the Public Body*" within the terms of section 24(1)(a), then this fact, if true, would also undermine the claim of privilege.

[para 220] If advice is developed by or for a public body, within the terms of section 24(1)(a), then the advice may not be subject to solicitor-client privilege, for two reasons. First, if a solicitor is developing advice as a public body or on its behalf, he or she is not acting as a solicitor, but as the public body. In such a scenario, there is no solicitor for the public body, because the lawyer is acting *as* the public body in developing the advice.

[para 221] Secondly, for the purposes of the privilege, a public body is not a privilege holder. In *Solicitor-Client Privilege*, Adam Dodek notes:

> […] the public official who has the legal authority to decide the Crown's interest in a matter is "the client". [1]

In the case of the Public Body, the client for the purposes of solicitor-client privilege would be the Chief. That is not to say that an employee of a public body cannot obtain legal advice from a public body's legal counsel. However, the employee does so on behalf of the privilege holder, not on behalf of the public body generally. The Public Body and the Chief are different legal entities. As a consequence, asserting that

[1] Adam Dodek, *Solicitor-Client Privilege* , (Markham; LexisNexis Canada Inc. 2014) p. 435

information is advice developed by or for a public body and asserting that the same information is legal advice developed for the Chief, is to assert two conflicting facts. Despite this, my review of the record enables me to find with certainty that record 1344 contains legal advice provided to the Chief.

Record 1403

[para 222] Record 1403 was not provided for my review. The index provided by the Public Body on December 7, 2017 indicates that only section 24(1)(b) was applied to sever the record. However, the disc of records I was provided indicates that sections 27(1)(a), (b), and (c) were applied to sever record 1403 in its entirety. I find that there is inadequate evidence before me to support the Public Body's application of section 24(1)(b) to this record. As I find, below, that the Public Body has not established that sections 27(1)(a), (b), or (c) applies to the records not provided for my review, I will order the Public Body to disclose record 1403.

Exercise of Discretion

[para 223] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010] 1 SCR 815, the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that are involved. The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

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

[para 224] While the foregoing case was decided in relation to the law enforcement provisions in Ontario's legislation, it is clear from paragraphs 45 and 46 of this decision that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in freedom of information legislation in particular. The provisions of section 24(1) of Alberta's FOIP Act are discretionary.

[para 225] 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.

[para 226] 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…*

[para 227] The disclosure analyst explained that she exercised discretion on behalf of the Public Body in favor of withholding records under sections 24(1)(a) and (b) by considering the following:

> a) The impact the disclosure would reasonably be expected to have on the EPS' ability to carry out similar decision –making processes in the future;
>
> b) That the sworn and non-sworn members of the EPS had a reasonable expectation that their advice, analyses and recommendations could be provided freely within the EPS and would be kept confidential;
>
> c) That the sworn and non-sworn members of the EPS had a reasonable expectation that consultations and deliberations could take place feely within the EPS and would be kept confidential; and
>
> d) The objectives and purposes of the Act, including the Applicant's right of access.

[para 228] I agree with the Public Body that points "a" and "d" are important considerations in exercising discretion in relation to section 24(1)(a) and (b). Ensuring that the Public Body's decision making processes are not disrupted so that decisions can be made effectively is a persuasive public policy reason for withholding records, provided that withholding the records is reasonably likely to serve this purpose.

[para 229] In *Carey v. Ontario*, [1986] 2 SCR 637, the Supreme Court of Canada set out the following factors to consider when deciding whether releasing records will inhibit the functioning of government:

> The foregoing authorities, and particularly, the *Smallwood* case, are in my view, determinative of many of the issues in this case. That case determines that Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important. So far as the protection of the decision-making process is concerned, too, the time when a document or information is to be

> revealed is an extremely important factor. Revelations of Cabinet discussion and planning at the developmental stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet government, but this can scarcely be the case when low level policy that has long become of little public interest is involved. [Emphasis added.]

[para 230] The Court held that when deciding to withhold or disclose information about government decision making in the public interest, it is important to consider the level of the government decision making process, whether the decision that was being made is current, whether the decision is significant and, in that case, whether producing the record serves the administration of justice.

[para 231] *Carey* addresses Crown privilege, rather than a freedom of information request; however, the considerations for applying Crown privilege to refuse production, and for withholding information under section 24(1) of the FOIP Act are similar. In my view, the factors listed in *Carey* assist in determining whether discretion is appropriately applied in relation to section 24(1). In the case of some records, it seems likely that the Public Body's decision making process could be impeded by their disclosure; however, in other cases, it is not clear that disclosure to the Applicant could have that effect, given the age of the information, the nature of the decision, and the level of the employees making the decisions for which advice was sought or given. While I agree with the Public Body that it should consider whether disclosing the information would affect its decision making processes, it is not clearly the case that this would be a reasonably likely outcome of disclosing all the records to which section 24(1)(a) or (b) applies, given that in some cases the level of the decision maker, the subject matter of the decision, and the age of the information argues against it.

[para 232] While I do not disagree that points "a" and "d" considered by the Public Body may be considered in an appropriate exercise of discretion, "b" and "c" are irrelevant to the determination of whether the public interest is best served by withholding or disclosing the records. Records that are subject to the FOIP Act are *public* records – records over which the Public Body has custody or control as a result of performing its public functions. The Public Body manages these records for the benefit of the public. If it decides to withhold records from an applicant, it must find that doing so benefits the public interest, rather than the private interests of its representatives, such as their personal expectations. While the Court referred to consideration of "private interests" in *Ontario (Public Security)*, the Court is referring to the private interests of requestors, citizens, and affected third parties. Employees that create (or are referred to) in public records in their role as representatives of a public body, do not have private interests in such records. Any expectation of such employees is irrelevant in deciding whether it is in the public interest to disclose records or not.

[para 233] As the Public Body took into account the expectations of its employees when it applied sections 24(1)(a) and (b), and these expectations are irrelevant to the question of whether the public interest is best served by withholding or disclosing the records, and because it is not clear that disclosing all the records I have found are subject either to section 24(1)(a) or (b) would affect the Public Body's decision making

processes, I must ask the Public Body to reconsider its exercise of discretion and consider whether disclosure would be reasonably likely to affect its decision making processes when it does so.

Records that have not been provided for my review

[para 234] On the evidence before me, I am unable to conclude that the records I have not been provided are subject to section 24(1). With regard to the records I am able to see, I have been unable, in many instances, to find that they are subject to section 24(1)(a) or (b). As discussed above, in relation to the Public Body's application of section 17(1), it would be unreasonable for me to reject the Public Body's arguments in relation to records I can see, but to accept them in relation to records I cannot. There is simply insufficient evidence before me to ground the application of section 24(1) to the records that have not been entered into evidence. As I am unable to find that section 24(1) applies, I will order the disclosure of the records to which the Public Body applied section 24(1) but did not provide for the inquiry, with the exception of record 704, which I find below, is privileged.

Issue C: Did the Public Body properly apply section 27(1)(a) to the information it severed under this provision?

[para 235] Section 27 of the FOIP Act states, in part:

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

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

[para 236] The Public Body is asserting solicitor-client privilege over some of the records and has applied section 27(1)(a) for that reason.

[para 237] In *Solosky v. The Queen*, [1980] 1 SCR 821, Dickson J. (as he then was) speaking for the majority, stated the following criteria for establishing the presence of solicitor-client privilege:

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

[para 238] The test for establishing the presence of solicitor-client privilege is not a narrow one. In *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112, the Alberta Court of Appeal determined that records need not contain legal advice to be subject to solicitor-client privilege. If the information has been communicated so that legal advice could be obtained or given, even though the information is not in itself legal advice, the information meets the requirements of "a communication made for the purpose of giving or seeking legal advice". The Court said:

> The appellant also argues that even if some of the documents contain legal advice and so are privileged, there is no evidence that all of the documents do so. For example, the appellant argues that minutes of meetings, emails and miscellaneous correspondence between Justice Canada lawyers and the Department of Indian and Northern Affairs may not contain any actual advice, or requests for advice, at all. The solicitor-client privilege is not, however, that narrow. As the court stated in *Balabel v. Air India*, [1988] Ch 317, [1988] 2 All E.R. 246 at p. 254 (C.A.):
>
> > Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

> The miscellaneous documents in question meet the test of documents which do not actually contain legal advice but which are made in confidence as part of the necessary exchange of information between the solicitor and client for the ultimate objective of the provision of legal advice.

[para 239] From the foregoing authorities, I conclude that communications between a solicitor and a client that are part of the necessary exchange of information between them so that legal advice may be provided, but which do not actually contain legal advice, may fall within the scope of solicitor-client privilege.

[para 240] Where government entities are concerned, it is not always the case that communications involving such lawyers are made within the solicitor-client framework. In *Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31, the Supreme Court of Canada held as follows (at paragraphs 19 and 20):

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

[para 241] In *R. v. Campbell*, [1999] 1 S.C.R. 565, the Supreme Court of Canada stated:

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

> lawyer. As Lord Hanworth, M.R., stated in *Minter v. Priest*, [1929] 1 K.B. 655 (C.A.), at pp. 668-69:
>
> > [I]t is not sufficient for the witness to say, "I went to a solicitor's office." ... Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office.
>
> Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered […].

[para 242] From the foregoing authorities, I conclude that communications to and from a lawyer that are not made in the lawyer's capacity as a legal advisor, but in another capacity, are not protected by solicitor-client privilege. The Courts in *Pritchard* and in *Campbell* acknowledged that government lawyers may have functions other than providing legal advice, even when they draw on their legal expertise.

[para 243] In Decision P2011-D-003, former Commissioner Work stated:

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

[para 244] From the authorities I have cited, I understand that questions may be asked (and answered) as to the purposes for which, and the circumstances in which, communications over which a public body asserts privilege took place. Whether solicitor-client privilege attaches to a communication between the public body and a government lawyer depends on the nature of the relationship, the subject matter of any advice, and the circumstances in which any advice is sought and rendered. To meet its burden under section 71, it is not enough for a public body to state generally that the communications to which it has applied section 27(1)(a) are privileged or involve the giving or seeking of legal advice; a public body must provide persuasive evidence regarding the nature of the relationship between itself and the lawyer, the subject matter of the advice, and the circumstances in which it sought advice, sufficient to allow a decision as to whether the information is subject to the claimed exception.

[para 245] I find, for the reasons that follow, that the Public Body has not proven its claim of privilege over the records to which it applied section 27(1)(a) of the FOIP Act.

Records 319 – 320, 599 – 602, 706, 872 – 873, 874 – 875, 1071 – 1072, 1131 – 1147, 1150 – 1151, 1212 – 1215, 1378 – 1379: Communications with a Crown prosecutor

[para 246] Records 319 – 320, 599 – 602, 706, 872 – 873, 874 – 875, 1071 – 1072, 1131 – 1147, 1150 – 1151, 1212 – 1215, 1378 – 1379 are described as communications

between a Crown prosecutor and a staff lawyer of the Public Body or communications that relay, respond to, discuss, or implement such a communication.

[para 247] From the Public Body's *in camera* submissions, I understand that a Crown prosecutor emailed a staff lawyer of the Public Body and provided an opinion on a "disclosure issue" relating to a prosecution in which the Crown prosecutor was involved. The Public Body's staff lawyer then disseminated the opinion to other lawyers of the Public Body and to representatives of the Public Body's corporate communications area. Given that the Applicant requested records relating to the planning and implementation of "The Squad", criticism of that series, any reviews of criticism and the Public Body's response to criticism, and records containing information about why the series was cancelled, and given that the Crown's email and the subsequent dissemination of it among the Public Body's employees was considered to be responsive to the access request, it can be inferred that the Crown's email related in some way to the categories of information requested by the Applicant. In other words, I infer that the email related in some way to "The Squad" and / or its cancellation.

[para 248] The Public Body argues that the communications between its lawyer and a Crown prosecutor are subject to solicitor-client privilege. It states:

> The Supreme Court of Canada in *R. v. Shirose* has recognized the existence of a solicitor-client relationship between the Crown and a policing service. This relationship was described as follows in the context of the Federal Crown and RCMP:
>
> > The solicitor-client privilege is based on the functional needs of the administration of justice. The legal system, complicated as It Is, calls for professional expertise. Access to justice is compromised where legal advice is unavailable. It is of great importance, therefore, that the RCMP be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings.
>
> In *R v. K.B.*, the Court cited *R. v, Shirose* and further summarized the law of solicitor-client privilege and concluded that communications between the police and the prosecutors within the scope of the confidential relationship in which legal advice is sought and received are subject to solicitor-client privilege and need not be disclosed. More specifically:
>
> > 31. Whether solicitor-client privilege attaches to communications involving government lawyers and the police depends on "the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered."...Officers have to be able to obtain legal advice about criminal investigations without having to worry about whether that advice will be used against the Crown in the case. Solicitor-client privilege applies to communications between police officers and the Crown in circumstances in which confidential legal advice is being given... That would include communications that are within the framework of the advice giving and advice receiving confidential relationship.
>
> As outlined in the Supplemental Affidavit, pages 319-320, 599-602, 706, 872-873, 874-875, 1071-1072, 1131-1147, 1150-1151, 1212-1215, and 1378-1379 contained a series of email communications where a Crown Prosecutor contacted an EPS Lawyer and provided her opinion on a disclosure issue that had implications in a criminal prosecution. Her opinion was communicated to the EPS Lawyer for further consideration, and a response was sought from the EPS Lawyer relating to the legal issue, It was clear that the communications took place in the

> context of a confidential relationship between a Crown Prosecutor and an EPS Lawyer acting on behalf of the policing service, that led to the mutual exchange of opinions on a legal issue. These communications fell within the continuum in which solicitors were tendering opinions as to what should be done in the relevant legal context. Such communications are considered to be protected by solicitor-client privilege.
>
> While there were third parties brought into the communications, the third parties were either other EPS Lawyers or employees of the EPS. Their involvement and communications can all be considered to be within the framework of the opinions that were being exchanged between the Crown Prosecutor and the EPS Lawyer. More specifically:
>
> - The EPS Lawyer refers the legal issue to the other EPS Lawyers acting In their capacities as professional lawyers, inviting them to provide their own opinions. One of the EPS Lawyers responds, agreeing to the opinions provided by the Crown Prosecutor and the EPS Lawyer;
> - The agreed upon legal opinion is brought back to the Crown Prosecutor by the EPS Lawyer, and in the communications, certain members of Corporate Communications were included in the email as the opinion had a direct effect on the work that they were doing for the EPS.
>
> The dissemination of the opinion between the EPS Lawyers and the further instruction provided to members of Corporation Communications on what steps need to be taken to abide by the opinion should all fall within the protection of solicitor-client privilege. As indicated in the EPS' initial written submissions, solicitor-client privilege applies to information in written communications, including notes, between officials or employees of the public body, in which the officials or employees quote or discuss the legal advice given by the public body's solicitor.
>
> In summary, the EPS maintains the application of s. 27 to pages 319-320, 599-602, 706, 872-873, 874-875, 1071-1072, 1131-1147, 1150-1151, 1212-1215, and 1378-1379.

[para 249] It is not clearly the case that a Crown prosecutor has a client, or that a Crown prosecutor's communications with members of a police service are solicitor-client confidences. (See Order F2017-57 at paragraphs 65 – 97.) In saying this, I accept that there may be situations in which a police officer or police service and a government lawyer may form such a relationship. As the Supreme Court of Canada stated in *R. v. Campbell*, [1999] 1 SCR 565:

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

In the foregoing case, the Court determined that solicitor client privilege may apply when police officers seek legal advice from government lawyers in connection with criminal investigations and legal advice is otherwise unavailable. However, the Court did not extend the application of the privilege to communications between a Crown prosecutor and police service lawyers, to matters outside a criminal investigation, nor did it suggest that a Crown prosecutor acting in that capacity may enter a solicitor-client relationship with a police service.

[para 250] Moreover, the Court tied the presence of solicitor-client privilege to the need of the police to obtain legal advice in connection with ongoing *criminal investigations*. On the evidence before me, I infer that a Crown prosecutor volunteered her opinion regarding disclosure issues arising from "The Squad" and the possible impact the series might have either on the prosecution she was conducting, and / or on prosecutions in general, to the Public Body's lawyer. In this circumstance, the preconditions for the presence of the privilege set out in *Campbell* are not met. Offering an opinion in such circumstances cannot be said to be in connection with a criminal investigation currently being conducted by the Public Body. Moreover, depending on what was communicated, the advice might not be legal advice, but be consistent with policy advice, given that there is no indication the Public Body asked the Crown prosecutor for legal advice. Finally, it does not seem likely that access to justice would be unavailable to the Public Body if its lawyer did not receive the email from Crown counsel. Rather, it would seem likely that the Public Body could obtain legal advice from its own lawyers.

[para 251] If it is the case that the Crown prosecutor found that "The Squad" had a direct bearing on the case she was prosecuting, this circumstance would also argue against finding that the Crown prosecutor and the Public Body entered a solicitor-client relationship. In Order F2017-57 I rejected the argument that a Crown prosecutor and a police service enter a solicitor-client relationship when the Crown prosecutor is exercising prosecutorial functions. I said at paragraphs 94 - 95:

> The decision to prosecute is a decision made in the exercise of prosecutorial discretion. In *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372 the Supreme Court of Canada described prosecutorial discretion and the necessity for such decisions exercising prosecutorial discretion to be made independently in constitutional terms:
>
> > The gravity of the power to bring, manage and terminate prosecutions which lies at the heart of the Attorney General's role has given rise to an expectation that he or she will be in this respect fully independent from the political pressures of the government. In the U.K., this concern has resulted in the long tradition that the Attorney General not sit as a member of Cabinet. See Edwards, *supra*, at pp. 174-76. Unlike the U.K., Cabinet membership prevails in this country. However, the concern remains the same, and is amplified by the fact that the Attorney General is not only a member of Cabinet but also Minister of Justice, and in that role holds a position with partisan political aspects. Membership in Cabinet makes the principle of independence in prosecutorial functions perhaps even more important in this country than in the U.K.
> >
> > It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions. Support for this view can be found in: Law Reform Commission of Canada, *supra*, at pp. 9-11. See also Binnie J. in *R. v. Regan*, [2002] 1 S.C.R. 297, at paras. 157-58 (dissenting on another point).
>
> When making prosecutorial decisions, the Attorney General and her agents, the Crown prosecutors, must act independently of partisan concerns. Forming a solicitor-client relationship with a police service in the course of bringing a prosecution – with the effect that the Crown would be acting on the instructions of its client, the police service, in electing to prosecute – would be antithetical to the constitutional requirement of independence to which the Court in *Krieger* refers. In my view, the proper functioning of the administration of justice, to which

> *Campbell* refers, requires finding that the Crown prosecutor did *not* enter a solicitor-client relationship with the Public Body in making the decision to prosecute. In *Campbell*, the police officer and a government lawyer entered a solicitor-client relationship in the course of the investigation conducted by the police in which the police officer had no other means of accessing legal advice; in the case before me, I note that the Public Body had *completed* the investigation and referred the results of the investigation to the Minister of Justice and Solicitor General under section 45(2) of the *Police Act* for prosecution. As a result, the functional needs of the administration of justice in *Campbell* and the case before me are different.

[para 252] If the Crown prosecutor emailed her opinion to the Public Body as a result of reviewing the impact of footage from "The Squad" on the viability of a prosecution, then she did so in circumstances where "the functional needs of the administration of justice" require that she be independent of partisan concerns. As discussed in the excerpt from Order F2017-57, above, taking on the police service as a client in relation to a prosecution would be antithetical to prosecutorial independence in such circumstances.

[para 253] I find that it has not been established in this inquiry that the Public Body and a Crown prosecutor formed a solicitor-client relationship. I therefore find that the Crown prosecutor's email and any subsequent discussions of it are not subject to solicitor-client privilege.

[para 254] In making this finding, I do not mean to say that a Crown prosecutor can never communicate confidentially as a Crown prosecutor, or provide legal advice to the Minister of Justice and Solicitor General in the capacity of legal counsel. However, the argument of the Public Body is that it formed a solicitor client relationship with a Crown prosecutor, acting in that capacity, and I reject this argument. I have been provided insufficient evidence in this inquiry to be able to find that an alternative basis exists for authorizing the Public Body to withhold the information I am told was provided by a Crown prosecutor.

Record 516

[para 255] The Public Body severed record 516 on the basis of section 27(1)(a). The email is entitled "The Squad re-edit" and an employee of corporate communications sent the email to his home email address. The Public Body did not provide a record description, other than the subject line of the email.

[para 256] The subject line of the email and the fact that an employee of corporate communications sent the email to himself is insufficient to ground the claim of privilege.

[para 257] As I have no basis on which to find that record 516 is privileged, I am unable to find on the balance of probabilities that it is and I will order the record to be disclosed to the Applicant.

Record 635

[para 258] The Public Body severed a portion of record 635 under section 27(1)(a). While the severed portion of the record indicates that it was withheld under sections

24(1)(b) and 27(1)(b) and (c), in addition to section 27(1)(a), the Public Body subsequently clarified that it now relies on section 27(1)(a) alone.

[para 259] Record 635 contains key messages prepared for the Deputy Chief by the Public Body's corporate communications department. The severed sentence appears as a key message under the heading: "What will happen to the episodes already filmed?"

[para 260] In its *in camera* description of record 635, the Public Body indicates that the record entitled "key messages" was provided to the Deputy Chief to inform him of the reasons why "The Squad" was cancelled. In explaining its severing, the Public Body asserts that a portion of the key message made reference to a legal opinion and the reference was therefore severed under section 27(1)(a).

[para 261] In my view, the *in camera* description is inaccurate as to the purpose of the "key messages" document, as it omits mention of the role of this document in the Public Body's communication strategy. While it may be true that the document served the purpose of informing the Deputy Chief of the reasons for cancelling "The Squad", the purpose of this record was primarily to advise the Deputy Chief how he should respond in public to questions about the cancellation on behalf of the Public Body.

[para 262] I take notice that "key messages" are prepared for persons responsible for speaking on behalf of a public body to guide them to answer questions from the public, the media, or particular groups in a particular way. The key messages in the case of record 635 were prepared for the Deputy Chief by the Public Body's corporate communications branch. The unredacted key messages in record 635 allow me to infer that the key messages were prepared for, and given to, the Deputy Chief to answer questions from the media regarding the Public Body's decision to cancel "The Squad". In addition, record 323 makes it clear that the Deputy Chief used the key messages for the purpose of communicating to the media.

[para 263] I also take notice that some of the key messages from record 635 appear in a media article in which the Deputy Chief was interviewed[2] and are also referred to as having been part of a news release issued by the Public Body. This fact also supports finding that the "key messages" document was intended to serve the same purpose for which "key messages" are generally drafted: to communicate a public body's chosen message to the public.

[para 264] In the interview I have cited, the Deputy Chief describes taking legal advice and the nature and substance of the legal advice. Whether this legal advice is the legal advice that was severed, or is other legal advice, is irrelevant. What is significant about the presence of legal advice in key messages is that the Public Body expected the Deputy Chief to communicate this information to the public in the event he was asked a particular question.

[2] See Global News May 31, 2013 "Edmonton Police Cancel 'The Squad' webseries

[para 265] As noted above, solicitor-client privilege applies to *confidential* communications between a solicitor and a client. While I accept that the Public Body severed part of a key message that was derived from legal advice, I cannot ignore the fact that the severed information is part of a key message. That the legal advice appears in a key message means that the Deputy Chief was expected to refer to the legal advice should he be asked by the media what would happen to the existing footage. Whether or not the Deputy Chief ever responded to this question with reference to the information described as advice, the fact that legal advice appears in a "key message" supports finding that the Public Body intended the legal advice to be disclosed. As a consequence, the preconditions for the existence of solicitor-client privilege are not met in relation to the severed portion of record 635, given that solicitor-client privilege applies only to communications intended to be confidential.

Record 704

[para 266] Record 704 contains emails sent by the Chief to the superintendent of legal and regulatory services. The Public Body severed the subject line and the body of the emails on the basis of section 24(1)(b), 27(1)(a), (b), and (c). However, it provided an attachment and the subject line of the emails for my review.

[para 267] From reviewing the attachment and the subject line, I am able to infer that the Chief referred the attachment, which gives notice of a legal matter, to the superintendent of legal and regulatory services in order to obtain legal advice regarding the matter, either from the superintendent or from a lawyer who reported to him,. I accept that this request was confidential.

[para 268] I find that the information severed from record 704 is subject to solicitor-client privilege and that section 27(1)(a) applies to it. I will therefore confirm the Public Body's decision to withhold this record from the Applicant.

Record 1344

[para 269] The records indicate that the Public Body applied section 17(1) only to record 1344, while the index indicates that it applied sections 24(1)(b), and 27(1)(a), (b), and (c) to withhold this record.

[para 270] From my review of the record, I am satisfied that it is subject to solicitor-client privilege and that section 27(1)(a) applies to it.

Remainder of records to which the Public Body applied section 27(1)(a)

[para 271] I turn now to the remaining records. The Public Body applied section 24(1)(b), 27(1)(a), 27(1)(b), and 27(1)(c) to withhold these records.

[para 272] With regard to the application of section 24(1)(b), the disclosure analyst asserted the following facts in her affidavit accompanying the Public Body's initial submissions:

> The Responsive Records withheld under section 24(1)(b) often involved an EPS lawyer and therefore were concurrently withheld under s. 27. These records contained communications involving [emphasis added]:
>
> > a) Consultations and deliberations between members of the Corporate Communications Branch and Digital Media Unit about production of the Squad and how the Squad would be filmed, edited, and distributed;
> >
> > b) Consultations and deliberations between members of the Corporate Communications Branch, senior EPS Members and EPS Lawyers relating to the response that should be provided to media inquiries about the Squad;
> >
> > c) Consultations and deliberations between members of the Corporate Communications Branch, senior EPS Members and EPS Lawyers relating to the response that should be provided to feedback and concerns raised by the public;
> >
> > d) Consultations and deliberations between members of the Corporate Communications Unit, senior EPS members and EPS lawyers relating to legal issues arising from the Squad;
> >
> > e) Consultations and deliberations between EPS lawyers relating to the legal advice being sought, and the legal advice that should be provided to the EPS in relation to the Squad;
> >
> > f) Consultations and deliberations between members of the Corporate Communications Unit, senior EPS Members and EPS Lawyers where EPS Lawyers are providing legal advice and a recommended course of action, and the parties are discussing the impact of the same on the direction that the production of the Squad will take; and
> >
> > g) Consultations and deliberations between members of the Corporate Communications Unit, senior EPS Members and EPS Lawyers about the cancellation of the Squad.
>
> From my review of the Responsive Records withheld under section 24(1)(b) of the FOIPP Act, I determined that the consultations and deliberations about the Squad took place between sworn or non-sworn members of the EPS as part of their roles within the organization. Their views were specifically sought and expected from their superiors.
>
> […]
>
> In exercising discretion pursuant to section 24(1)(a) and 24(1)(b) of the FOIPP act, I considered the following:
>
> […]
>
> That the sworn and non-sworn members of the EPS had a reasonable expectation that their advice, analyses and recommendations could be provided freely within the EPS and would be kept confidential;
>
> That the sworn and non-sworn members of the EPS had a reasonable expectation that consultations and deliberations could take place freely within the EPS and be kept confidential […]

[para 273] With regard to the application of section 27 to the same records, the disclosure analyst asserted:

> In addition to this Affidavit, I have also sworn an *in camera* Affidavit describing in further detail, the Responsive Records and information withheld under s. 27. These records consist of confidential communications between non-sworn members of the EPS (particularly members of the Corporate Communications Branch and Digital Media Units), senior EPS Members, and the lawyers referred to above in paragraph 21 ("the EPS Lawyers") The communications disclose facts in relation to which confidential legal advice was sought, and provide factual background for the advice. These communications are part of an ongoing request for legal advice sought by EPS sworn and non-sworn members.
>
> Information was shared between sworn and non-sworn members, and the EPS Lawyers so the EPS Lawyers could be informed about the developing nature of the legal issue, and so confidential advice may be sought and given. Revealing this information would reveal the nature of the legal advice being sought and given. The Responsive Records consist of communications between sworn and non-sworn members of the EPS, and EPS Lawyers, and they reference the giving and seeking of legal advice and are intended to be confidential by the parties. It is my belief that the release of this information would permit the Applicant to gain access to, and gain an understanding of the nature of the legal advice sought and given.
>
> Based on my review of the Responsive Records, it is my belief that following the review of the confidential information that was provided to them, there was a substantial amount of consultation and deliberation between EPS Lawyers. This information reflects discussion between EPS Lawyers acting in their capacity as in house lawyers to the EPS, as they were considering legal issues, and providing legal advice to the EPS. It is my belief that these discussions were distilled into legal advice that was subsequently provided to their client, the EPS […]

[para 274] The *in camera* affidavit referred to in the foregoing excerpts indicates the identities of authors and recipients of the communications that were severed under section 27(1)(a). At my request, the disclosure analyst also swore a supplemental *in camera* affidavit in which she provided a brief overview of each record. The *in camera* affidavits assert that various lawyers acted in their capacities as professional lawyers, without indicating why the disclosure analyst believes the lawyers were acting in their professional capacities. The affidavits refer to "legal advice" but do not explain on what basis the information is being categorized in this way.

[para 275] The disclosure analyst's assertions regarding the application of section 24(1)(b) provide greater detail with respect to the subject matter of the records and her rationale for applying section 27(1)(a) than does her evidence intended to ground the application of section 27(1)(a). In my view, the assertions in relation to section 24(1)(b) undermine, and in some cases, contradict, the Public Body's claim of privilege over the records.

[para 276] As set out above, the disclosure analyst frames her assertions regarding section 24(1)(b), stating: "[the responsive records] […] *often involved an EPS lawyer* and *therefore* were concurrently withheld under s. 27." I interpret this sentence to mean that the disclosure analyst withheld as privileged any communications she considered to be consultations or deliberations between employees that also involved an EPS lawyer.

However, to be privileged, a record must be a communication between a client and a lawyer made for the purpose of seeking legal advice. That a communication involves an employee that happens to be a public body's lawyer, does not make the communication with the employee privileged. The communication may be privileged, but it may not be.

[para 277] The matters described as the subject of consultations and deliberations involving lawyers, do not, in all cases, appear to be legal matters. For example, some of the consultations and deliberations involving EPS lawyers are described as "relating to the response that should be provided to media inquiries about the Squad", or as "relating to the response that should be provided to feedback and concerns raised by the public", or as "between members of the Corporate Communications Unit, senior EPS Members and EPS Lawyers about the cancellation of the Squad".

[para 278] As discussed in *Campbell*, *supra*, solicitor-client privilege does not attach to every communication or piece of advice provided by a government lawyer. Rather, privilege will attach if the communication is legal advice or part of the continuum of communications in which legal advice is sought or given. Without more, simply being involved in discussions about "The Squad's" cancellation, or a discussion as to how to respond to media questions or concerns from the public, or being copied on such discussions, does not mean that a lawyer is providing legal advice to a client or being asked to do so.

[para 279] In *Blood Tribe v. Canada (Attorney General)*, cited above, the Alberta Court of Appeal accepted that legal advice involves more than telling the client the law; it also includes advice as to "what should prudently and sensibly be done in the relevant legal context". The Court did not suggest that statements made to or by a lawyer in the absence of legal context are subject to solicitor-client privilege. In my view, advising how to respond to concerns expressed by members of the public, such as those that appear among the records at issue, is not advice as to what should be done in the relevant legal context. It may be advice within the terms of section 24(1)(a), but it is not necessarily privileged , given that it would lack a legal context.

[para 280] The disclosure analyst described some of the communications to which she applied section 24(1)(b) and 27(1)(a) as "relating to legal issues" (bullet d) and "relating to legal advice" (bullet e). It is unclear from her evidence what she considers "relating to legal issues" or "relating to legal advice" to mean when she uses these phrases. Information may relate to a legal issue or legal advice, and not be legal advice or fall on the continuum of communications by which legal advice is sought or given.

[para 281] I note too that the disclosure analyst states that the communications she severed as privileged: "disclose facts in relation to which confidential legal advice was sought, and provide factual background for the advice". While I accept that factual information and background may form part of the continuum of communications, as discussed by the Alberta Court of Appeal in *Blood Tribe v. Canada (Attorney General)*, I have been provided with insufficient context to determine whether the "facts" and "factual background" discussed by the disclosure analyst form part of the continuum of

confidential communications. First, as noted above, the Deputy Chief confirmed to the media that the Public Body had taken legal advice regarding "The Squad" and had followed it. He stated:

> The other concern was around the legal piece. We did run it through our legal department to make sure we were on solid footing. It's always an opinion, it's always a decision piece, but that was part of the decision around it. Let's get to a spot that's comfortable for everybody.

If the facts or background that have been severed as privileged are simply that the Public Body sought legal advice to determine whether it should air the "The Squad", then that fact has been communicated to the public. If the facts relate solely to responding to public concerns or media inquiries, as the disclosure analyst asserts in relation to the application of section 24(1)(b), then the facts and background information severed from the records is likely not privileged, as it is not intended to be confidential.

[para 282] I accept that there may be some records to which the disclosure analyst applied section 27(1)(a) that may be appropriately characterized as legal advice. However, based on the descriptions I have been provided of the records, I am unable to conclude that any particular record is privileged.

[para 283] From my review of the records, it appears that the Public Body applied section 24(1)(b) to every record to which it applied section 27(1)(a), but for record 635, which I have addressed separately. As a result, the assertions contained in bullets a – g of pages 11 and 12 of the disclosure analyst's initial affidavit apply to each record to which the Public Body applied section 27(1)(a). As discussed above, several of these assertions contradict the claim of privilege.

[para 284] Without further evidence as to context, I am unable to find that the communications to which the disclosure analyst applied sections 24(1)(b) and 27(1)(a) are subject to solicitor-client privilege. As a result, I am unable to find that section 27(1)(a) applies to the remaining records and I will order the Public Body to disclose them.

[para 285] As discussed above, the disclosure analyst in her evidence describes information as "legal advice" and made decisions to withhold such information on the basis of solicitor-client privilege. However, inadequate basis for her conclusions has been provided for the inquiry and assertions made in support of the application of other provisions to the information appear to contradict her conclusions. If I were to accept the disclosure analyst's conclusions regarding privilege as definitive of how I should answer the question of whether section 27(1)(a) has been shown to apply to the records, I would essentially be permitting the Public Body to decide whether it has shown the exceptions to disclosure to apply, which is the ultimate issue in the inquiry. Section 2(e) of the FOIP Act establishes that one of the purposes of the FOIP Act is "to provide for independent reviews of decisions made by public bodies under this Act". If I were to accept what in most cases amounts to the Public Body's bare and internally conflicting assertions that its decisions to sever information under sections 27(1)(a) of the Act were made appropriately, as determinative of the issues for inquiry, I would be undermining this

purpose of the Legislature in enacting the FOIP Act, and denying the Applicant his right to an independent review.

Issue D: Did the Public Body properly apply sections 27(1)(b) and (c) to the information it severed under these provisions?

[para 286] In Order F2015-31, the Director of Adjudication discussed the application of sections 27(1)(b) and (c), stating:

> I note with respect to each of these provisions that they apply to information that is either prepared by, or is in correspondence involving, one of the listed people, that is *in relation to a matter involving the provision of legal services, or of advice or other services*.
>
> The Public Body says it also applied sections 27(1)(b) and 27(1)(c) "to the records at issue" (although in the index it supplied in its initial submission it indicated it did not apply section 27(1)(b) to sixteen of the records). More particularly, it says in its initial submission (at para 25) that:
>
> > The records withheld under subsection 27(1)(b) were prepared by lawyers of the Minister of Justice and Solicitor General in relation to matters involving the provision of legal services.
>
> In its January 6, 2015 submission (at para 14), it adds to this explanation by saying that this provision was applied because the records "were prepared 'by or for' a lawyer of the Minister of Justice and Attorney General, in connection with the provision of a legal service, *i.e. the advice given by the Crown to the CPS as to the suitability of the Applicant as a witness in legal proceedings*".
>
> As to section 27(1)(c), in its initial submission (at para 26) the Public Body says that it relied on this provision:
>
> > … to withhold information in correspondence between lawyers of the Minister of Justice and Solicitor General and other persons (i.e. CPS and CPA) in relation to matters involving the provision of advice and other legal services by the Public Body's Crown Prosecution. Correspondence includes letters, memorandums and emails where legal services are being provided, whether internally or externally.
>
> For the same reasons that I found above that these communications sent to the CPS and CPA by the Chief Crown Prosecutor do not consist of legal advice, I find that these letters do not consist of the provision of a legal service, or of advice or other services, by the ACPS to the CPS. In my view, "advice" in the context of section 27, whether legal or otherwise, is information that provides counsel or guidance, in the sense of giving options, recommendations and reasons as to what it is best to do.

[para 287] The term "legal services" is undefined in the FOIP Act. In Order F2008-028, the Adjudicator reviewed past orders of this office interpreting this phrase and said:

> Section 27(1)(b) gives a public body the discretion to refuse to disclose to an applicant information prepared by or for certain persons in relation to a matter involving the provision of legal services. Those persons are the Minister of Justice and Attorney General, his or her agent or lawyer, or an agent or lawyer of a public body. The term "legal services" includes any law-related service performed by a person licensed to practice law (Order 96-017 at para. 37; Order F2007-013 at para. 67).

> Pages 298 and 299 are memoranda that refer to proposals, recommendations and options for government. In the absence of more specific submissions from the Public Body, I find that the information is not in relation to a matter involving the provision of legal services. There is no evidence, on the face of pages 298 and 299, that the information on them relates to a law-related service performed by a person licensed to practice law. While one of the pages refers to amendments, these are stated as being proposed by a public body, rather than being prepared by a lawyer. Legislative amendments can also be proposed from a policy – rather than legal – perspective. Although the reference in section 27(1)(b) to information "in relation to" legal services has been recognized as quite broad (Order 96-017 at para. 38), a public body must provide evidence that the information in the particular record is indeed in relation to legal services[…]

In the foregoing order, the Adjudicator followed previous orders and determined that the term "legal services" includes any law-related service performed by a person licensed to practice law. He found that policy proposals and legal services are not synonymous terms. He also determined that a public body must provide evidence that information in the particular record is in relation to legal services in order to succeed. Finally, he decided at paragraph 157 that information must be "substantive" in order to fall within the terms of section 27(1)(b).

[para 288] Order F2009-024 states:

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

[para 289] In Order F2014-25, the Adjudicator reviewed decisions of this office relating to section 27(1)(b). She said:

> In Order F2008-021, the adjudicator discussed the scope of section 27(1)(b)(ii). She said:
>
> > It follows, then, that the person contemplated by the provision who is preparing the information, is doing so for the purpose of providing legal services, and therefore must be either the person providing the legal service or a person who is preparing the information on behalf of, or, at a minimum, for the use of, the provider of legal services, who is, in this case, an Alberta Justice lawyer.
>
> In Order F2009-024 she stated:
>
> > Information "prepared for an agent or lawyer of the Minister of Justice and Attorney General" then, is information prepared on behalf of an agent or lawyer so that the agent or lawyer may provide legal services.

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

[para 290] In Order F2008-028, the Adjudicator considered that the Legislature's use of the term "prepared" in section 27(1)(b) meant that section 27(1)(b) applies to substantive information about the legal services being provided only, and did not apply to information such as dates. The term "prepared" in section 27(1)(b) in its ordinary sense means "made or got ready for use." The term "prepared" is not synonymous with "writing" or "creating", and "writing an email" is not the same thing as "preparing an email." Had the Legislature worded section 27(1)(b) so that it encompassed any information "written by an agent or lawyer of a public body in relation to a matter involving the provision of legal services" it could have easily done so . However, the Legislation chose the word "prepared" to describe the lawyer's interaction with the information covered by this provision. To put the point differently, section 27(1)(b) is intended to encompass information such as a lawyer's work product, although it is not necessarily restricted in its application to such information.

[para 291] The phrase "for" in section 27(1)(b) has been interpreted in past orders to mean "on behalf of". In order F2017-54, I reviewed past orders of this office regarding the interpretation of section 27(1)(b) and said:

> Past orders of this office have held that the term "for" in section 27(1)(b) means "on behalf of" as it does elsewhere in the FOIP Act. (See Orders 99-022, F2008-021, F2008-028 and F2010-007). I agree with the reasoning in these orders. Moreover, I am unable to see what purpose would be served by creating an exception for information that is merely sent to a lawyer. If the information entails the seeking of legal advice, then section 27(1)(a) would apply to it. If the information relates to a legal matter over which the lawyer has carriage, then section 27(1)(c) would apply. As noted above, in my view, the proper interpretation of section 27(1)(b) is that it applies to information prepared by or on behalf of a lawyer so that the lawyer may provide legal services. This interpretation enables each of the three subsections (a), (b) and (c) to have discrete meanings (thereby avoiding redundancy), and it enables a public body to sever the work product of a lawyer that would not meet the terms of either section 27(1)(a) or (c).

[para 292] To fall within the terms of section 27(1)(b), information must be prepared by, or on behalf of, a lawyer or agent, or the Minister of Justice and Attorney General, in relation to a matter involving the provision of legal services. At a minimum, to establish that this provision applies, a public body must provide clear evidence that the information was prepared by or on behalf of one of the persons enumerated in the provision, and that the purpose for which the information was prepared was use in the provision of legal services.

[para 293] The Public Body states:

> Section 27(1)(b) is broader in scope than s. 27(1)(a). It applies to any law-related service performed by a person licensed to practice law.
>
> Information that meets the requirements for solicitor-client privilege under s. 27(1)(a) can meet the requirements for s. 27(1)(b), if the information is prepared by or for a person listed in subclauses 27(1)(b)(i-iii).
>
> In providing argument in relation to solicitor-client privilege and the application of s. 27(1)(a), the EPS has also explained how these records contain information prepared by or for an agent or lawyer of the EPS in relation to a matter involving the provision of legal services.
>
> The EPS properly did not apply s. 27(1)(b) to information that was not prepared by or for a lawyer of the EPS in relation to the provision of legal services. This most often occurred in instances where emails were sent between members of corporate communications where there was a discussion of solicitor-client privileged information, but an EPS lawyer was not part of the communication chain. Another example is the meeting minutes from the Office of Strategy Management that contained a summary of legal advice, but the meeting minutes were not prepared by or for an EPS lawyer.

[para 294] From the descriptions of the records in the *in camera* affidavits, and from its arguments, I am unable to say that any of the information severed by the Public Body was prepared by or on behalf of a lawyer in relation to the provision of legal services. In many cases, the information in the record is described as having been sent or forwarded to a lawyer by a non-lawyer, which, as discussed above, is not the same thing as "information prepared by or for a lawyer". For example, records 361, 549, 1339, and 1392 were apparently created by the digital media supervisor and sent to a lawyer. As discussed above, information that is merely sent to a lawyer is not information that is "prepared by or for a lawyer".

[para 295] In addition, I note that the Public Body suggests that section 27(1)(b) applies to " any law-related service" and cites Order F2003-017 as authority.

[para 296] In Order F2003-017, the adjudicator stated:

> Section 27(1)(b)(iii) has a broader scope than section 27(1)(a). It applies to "any law-related service performed by a person licensed to practice law": see Order 96-017. Although I cannot disclose information that the Public Body is entitled to withhold, I can say that the contents of the record, the letterhead found on the unnumbered page preceding page 12, the date of that record, and the record following it, satisfy me that the information in these records was prepared by legal counsel for the Public Body within the meaning of section 27(1)(b)(iii).

[para 297] In Order 96-017, to which the adjudicator referred, former Commissioner Clark defined "legal services" as "any law-related service performed by a person licensed to practice law". Former Commissioner Clark did not suggest that section 27(1)(b) (then section 26(1)(b)) applied to any law-related service performed by a person licensed to practice law. Rather, he concluded that information prepared by or for a lawyer in relation a matter involving the provision of such a service was subject to section 27(1)(b). In my view, Order F2003-017 is in error insofar as it suggests that section 27(1)(b)

applies generally to "any law-related service performed by a person licensed to practice law".

[para 298] With regard to record 1344, the only record to which the Public Body applied section 27(1)(b) that I was able to review, I find that section 27(1)(b) does not apply. The email was not *prepared* by the lawyer in relation to a matter that involved the provision of legal services; it is the legal service itself. Regardless, I find that section 27(1)(a) applies to record 1344.

[para 299] In any event, from the Public Body's evidence, I am unable to find that section 27(1)(b) applies to the records to which it applied this provision. Moreover, where it applied section 27(1)(b) to correspondence sent to, or copied to, a lawyer, I find that it incorrectly applied section 27(1)(b). I will therefore order the Public Body to disclose the records to which it applied section 27(1)(b), but for records 704 and 1344, which I find to be subject to section 27(1)(a).

Section 27(1)(c)

[para 300] Section 27(1)(c) contemplates information in correspondence between a public body's lawyer or agent, and any other person; however, the correspondence must be in relation to a matter which involves the provision of advice or services by the lawyer. At a minimum, a public body seeking to rely on this provision must establish that the lawyer (or agent) involved in the correspondence in question is providing advice or services in relation to the matter that is the subject of the correspondence. As a result, a public body must provide convincing evidence regarding the matter, the subject of the correspondence, and the role of the lawyer or agent, in order to meet its burden.

[para 301] In Order F2015-22, I interpreted the word "matter" in section 27(1)(c) in the following way:

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

In my view, where section 27(1)(c) refers to a "matter" it is referring to a legal matter, in relation to which a lawyer or the Minister of Justice and Solicitor General or an agent may provide advice or services.

[para 302] Section 27(1)(c) applies, then, to information in correspondence between the Minister of Justice and Solicitor General, a lawyer or agent and someone else, in relation to a legal matter, such as a proceeding, for which the Minister of Justice and Solicitor General, lawyer or agent is providing advice or other services.

[para 303] The Public Body argues:

> In order for a record to qualify for an exemption under s. 27(1)(c), a public body must fulfill the following criteria:
>
> • The record must be correspondence between an agent or lawyer of the public body and any other person; and
> • The information in the correspondence must be in relation to a matter involving the provision of advice or other services by the agent or lawyer.
>
> Order 98-016: Alberta Justice (January 14, 1999) at para. 17 [TAB 25]
>
> In OIPC External Adjudication Order #4, McMahon J. makes additional comments about s. 27(1)(c):
>
> ...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 extend to the non-legal staff...) 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.
>
> OIPC External Adjudication Order #4, supra at paras. 12-13 [TAB 23]
>
> Section 27(1)(c) creates an even broader exemption as compared to s. 27(1)(b), and is satisfied in this instance as s.27(1)(c) has been appropriately applied to communications where an EPS Lawyer was involved in the communications, and was providing legal services in relation to the production of the Squad. Section 27(1)(c) was not applied to communications that did not involve a lawyer of the EPS, or other documents like the Office of Strategy Management meeting minutes (p.563), where the content of legal advice was summarized, but it was not clear that the minutes were communicated or forwarded to an EPS Lawyer.

[para 304] From the foregoing, I understand that the Public Body applied section 27(1)(c) to any correspondence that was communicated or forwarded to a lawyer or involved a lawyer. The Public Body relies on *MacDonald (Re)*, 2003 CanLII 71714 (AB OIPC) a decision of McMahon J. acting as an external adjudicator, in support of its position that section 27(1)(c) may be applied to information of this kind. In that decision, Adjudicator McMahon stated:

> As can be seen from the forgoing, 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 [emphasis added].

[para 305] In my view, Adjudicator McMahon did not construe the parameters of section 27(1)(c) as broadly as the Public Body has applied them. At the same time, I do

not agree that section 27(1)(c) is a "crafted impediment" to the right of access (if by that descriptor Adjudicator McMahon meant that the Legislature designed the provision for no other reason than to impede the right of access), or that information could ever be properly withheld under this provision if that were its purpose. I do agree that section 27(1)(c) applies to information in correspondence relating to a matter involving the provision of services by the agent or lawyer who sends or receives the correspondence described by section 27(1)(c).

[para 306] As discussed in Order F2015-22 at paragraphs 122 – 126, sections 27(1)(b) and (c) appear intended to capture "situational" privileges, as litigation and settlement privilege were considered to be at the time the FOIP Act was amended. In *Blank v. Canada (Minister of Justice),* [2006] 2 SCR 319, Fish J., speaking for the majority, illustrated the way a situational privilege would apply in an access to information regime when he said at paragraph 53:

> The extended definition of litigation, as I indicated earlier, applies no less to the government than to private litigants. As a result of the *Access Act*, however, its protection may prove less effective in practice. The reason is this. Like private parties, the government may invoke the litigation privilege only when the original or extended proceedings are pending or apprehended. Unlike private parties, however, the government may be required under the terms of the *Access Act* to disclose information once the original proceedings have ended and related proceedings are neither pending nor apprehended. A mere hypothetical possibility that related proceedings may in the future be instituted does not suffice. Should that possibility materialize — should related proceedings in fact later be instituted — the government may well have been required in the interim, in virtue of the *Access Act*, to disclose information that would have otherwise been privileged under the extended definition of litigation. This is a matter of legislative choice and not judicial policy. It flows inexorably from Parliament's decision to adopt the *Access Act*. Other provisions of the *Access Act* suggest, moreover, that Parliament has in fact recognized this consequence of the Act on the government as litigator, potential litigant and guardian of personal safety and public security.

While Fish J. clearly considered that proceedings under the FOIP Act are related proceedings, given that he considered privilege could be claimed in FOIP proceedings once related proceedings were instituted, an argument could be made that they are not. Proceedings under the FOIP Act are not necessarily related to the actions for which requested records may have been created as they do not arise from the same actions or activities. As a result, even if related proceedings were ongoing or within contemplation, and the requested records were held to be subject to litigation or settlement privilege in such proceedings, the requested records would not necessarily be privileged in proceedings before the Commissioner, which are unrelated.

[para 307] If litigation privilege and settlement privilege are considered situational privileges, there is a need to enact section 27(1)(b) to protect a lawyer's work product, and section 27(1)(c) to protect such things as communications with experts or offers of settlement, to prevent parties opposed in interest to the Government from obtaining such information in an access request. That being said, there is no question that sections 27(1)(b) and (c) have been drafted in broad terms and capture more kinds of information than information prepared for the dominant purpose of litigation or settlement communications.

[para 308] As discussed above, I decided in Order F2015-22 that the word "matter", which is used in section 27(1)(c), refers to a "legal matter". In addition, the information in correspondence that may be subject to section 27(1)(c) is restricted to information in relation to a matter in which the lawyer or agent in question is providing advice or other services. In the government context, this would mean that the lawyer or agent has been assigned to, or given authority to address the legal matter in question, given that a lawyer or agent who has not been assigned to a file could not be expected to act on behalf of the government in relation to a file, in the absence of any authority to do so. Both lawyers and agents act on behalf of someone else in relation to matters: neither can act for someone else in relation to a matter without authority from a principal or client to do so.

[para 309] From its submissions, I understand that the Public Body applied section 27(1)(c) to *any* communications involving a lawyer or that were forwarded to one. As discussed above, section 27(1)(c) does not apply to such communications unless the communications are in relation to a matter for which the lawyer is providing advice or services with authority to do so. However, the Public Body has not indicated whether the lawyers who were sent or copied on communications, were providing advice or services in relation to a *matter*, or that they had any authority to act regarding the matter.

[para 310] Further, as noted above, in my view, the matter in question must be a legal matter. In many cases, the Public Body tells me that the communications to which it applied section 27(1)(c) relate generally to "The Squad", or to reviewing footage, or to responding to communications from the Public Body. It is not clearly the case that these communications are in relation to a "matter" within the terms of section 27(1)(c).

[para 311] With regard to record 1344, the only record I was able to view, I am not satisfied that section 27(1)(c) applies. While I accept that this record contains legal advice from a lawyer acting in that capacity, I am not satisfied that the record can be construed as correspondence in relation to a legal *matter* for which the lawyer was providing advice or services.

[para 312] As the Public Body's evidence does not establish that section 27(1)(c) applies to the information it severed under this provision, I must order the Public Body to give the Applicant access to these records, with the exception of records 704 and 1344, which the Public Body has established are subject to section 27(1)(a).

V. ORDER

[para 313] I make this Order under section 72 of the Act.

[para 314] I confirm the decision of the Public Body to withhold information from the records that I have found to be subject to sections 17(1).

[para 315] I confirm the decision of the Public Body to sever information from records 704 and 1344 on the basis of solicitor-client privilege.

[para 316] I confirm the decision of the Public Body not to include records in its response as nonresponsive, except to the extent that I have found records it severed as nonresponsive to be responsive in this order.

[para 317] I order the Public Body to reconsider its decision to apply section 17(1) to records 152 – 171, 237, and 249 – 268, and 408 and 603.

[para 318] I order the Public Body to re-exercise its exercise of discretion in relation to the records I have found to be subject to section 24(1) and to consider only relevant factors, as discussed in the body of this order.

[para 319] I order the Public Body to give the Applicant access to the remainder of the records.

[para 320] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

_____

Teresa Cunningham
Adjudicator