ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

INTERIM DECISION F2018-D-02
ORDER F2018-39

August 30, 2018

ALBERTA HEALTH

Case File Numbers F6748/F6749

Office URL: www.oipc.ab.ca

Summary: The Applicant made two separate access to information requests to Alberta Health [Public Body], one request for the Contingency Fee Agreement [CFA] and the other request for documents related to the CFA, regarding the arrangements the Province made with outside counsel to pursue litigation under the *Crown's Right of Recovery Act* to recoup smoking-related health care costs. In response to the access requests, the Public Body refused the Applicant access to all of the Records at Issue totalling 1,004 pages. At the time this matter was sent to Inquiry, the two Case Files were consolidated into one Inquiry by the Information and Privacy Commissioner [Commissioner], with the consent of the Applicant, based on confirmation from the Public Body that the Records at Issue for Case File #F6748 were included as part of the Records at Issue for Case File #F6749. During the final stage of the Inquiry, the Public Body continued to rely on two separate Exhibited Indices and when queried as to why, it withdrew its earlier representation that all records were included within Case File #F6749 and, therefore, the External Adjudicator advised there would be separate dispositions for each Case File under the Order.

During the initial phase of the Inquiry in 2014, the External Adjudicator raised a Preliminary Evidentiary Issue, which resulted in the release of Decision 2014-D-05/Order F2014-52 [2014 Decision/Order]. The Public Body sought Judicial Review, which application has been adjourned *sine die.*

The Public Body applied s. 27(1)(a) of the *Freedom of Information and Protection of Privacy Act* [*FOIP Act*] to the majority of the Records at Issue claiming solicitor client privilege and/or litigation privilege and, therefore, the bulk of the Records at Issue were not provided to the External Adjudicator. The Public Body also claimed other exceptions: s. 4(1)(q), s. 24(1), s. 27(1)(b), s. 27(1)(c), and s. 29(1) of the *FOIP Act*.

In addition to making submissions that the Public Body had not provided sufficient evidence to meet its burden of proof, the Applicant argued that the Records at Issue should be released pursuant to s. 32 of the *FOIP Act:* the public interest override, for which s/he acknowledged s/he had the burden of proof.

In January 2017 the Public Body provided some of the Records at Issue to the External Adjudicator, in partial compliance with the 2014 Decision/Order. This consisted of 53 Records at Issue totalling 150 pages. This prompted the External Adjudicator to issue the 2017 Notice of Continuation to the parties.

Shortly thereafter, the Public Body retained new counsel. As a result of the Public Body having new counsel, an Amended Notice of Continuation was distributed to the parties amending the Schedule for Submissions. In order to be fair and to accommodate the new counsel's need for time, the External Adjudicator extended the dates for the submissions, to which the Applicant did not object so long as his/her deadlines were adjusted accordingly.

In addition to earlier submissions at the outset of the Inquiry in 2014, the Public Body provided a 2017 Affidavit of Records from in-house counsel with two Exhibited Indices attached, all of which was submitted to meet its evidentiary burden of proof for the exceptions claimed, in particular, its claim to both solicitor client privilege and litigation privilege pursuant to s. 27(1)(a). The evidence revealed the Public Body had considered the identity of the Applicant, an irrelevant consideration in making its access to information decisions.

The External Adjudicator found that the Public Body had met its burden of proof to establish that it had properly relied on and applied s. 27(1)(a) for some of the Records at Issue where it had submitted *sufficiently* clear, convincing, and cogent evidence to establish the records were protected by solicitor client privilege under the *Solosky* test and/or the *Lizotte* criteria for litigation privilege. In addition, the External Adjudicator found that the Public Body had properly exercised its discretion under s. 27(1)(a) to refuse access to the Applicant where it had established the records were protected by either or both legal privileges.

The evidence submitted for some of the Records at Issue over which legal privilege had been claimed, however, did not meet the *Solosky* test for solicitor client privilege or the *Lizotte* criteria for litigation privilege and fell short in meeting the evidentiary requirements as set out in *ShawCor*, the Alberta Rules of Court and the *OIPC Privilege Practice Note*. For these Records at Issue because she was unable to make a decision where the Public Body had failed to discharge its burden of proof, the External Adjudicator made an Interim Decision giving the Public Body the opportunity to make a decision for those Records at Issue. The External Adjudicator reasoned that because of the importance of legal privilege, she was not prepared to issue an Order requiring the Public Body to give the Applicant access to the records thereby placing potentially legally privileged information in jeopardy because the Public Body had fallen short in meeting its burden of proof to provide *sufficiently* clear, convincing, and cogent evidence to demonstrate legal privilege for the remaining Records at Issue. Significant gaps in the evidence included failing to describe when any of the senior government officials were acting in his/her capacity as a lawyer, as a representative of the client or as a policy advisor.

The External Adjudicator found that the Public Body had failed to provide sufficient evidence that it had properly claimed s. 27(1)(b) and s. 27(1)(c) as the Exhibited Indices do not specify a paragraph under s. 27(1).

The External Adjudicator issued an Interim Decision giving the Public Body the opportunity to make a decision for the Records at Issue over which it claimed legal privilege pursuant to s. 27(1)(a) where it had not met its burden of proof in a manner that complies with legal precedents and the evidentiary requirements as set out in *ShawCor*, the Alberta Rules of Court and the *OIPC Privilege Practice Note*. The Interim Decision detailed the kind of direct evidence that was required from the Public Body to meet its evidentiary burden, details the External Adjudicator had already outlined for the Public Body in the 2017 Notice of Continuation.

The Applicant had the burden of proof with respect to his/her submission that the public interest override should apply in these unique circumstances. The Applicant relied on two public reports coming out of the Office of the Ethics Commissioner and one public report solicited by the Minister of Justice from a former Supreme Court of Canada Justice (Iacobucci) as evidence to meet his/her burden of proof under s. 32 of the *FOIP Act* with respect to how the public interest override should apply.

The External Adjudicator found that because the Applicant had met his/her burden of proof, s. 32(1)(b) would override all the discretionary exceptions to all the Records at Issue withheld under the discretionary exceptions (s. 21(1)(a), s. 24(1), s. 25(1), s. 27(1)(b) and s. 27(1)(c)) and should be released to the

Applicant, other than any record properly withheld under s. 27(1)(a). This will also apply to those Records at Issue where the Public Body is unable to meet its burden of proof to establish that the records are protected by solicitor client privilege and/or litigation privilege pursuant to s. 27(1)(a) in its decision under the Interim Decision.

The Public Body claimed some of the Records at Issue were non-responsive [NR]. The External Adjudicator found that some or all of the information on the records where NR had been applied were within the scope of the Applicant's access to information requests and, on that basis, ruled that records were within scope, as that is what defines a Record at Issue as responsive: *any* information responsive to an access request that is *anywhere* on a record.

The Public Body properly applied s. 4(1)(q) in claiming one record did not fall under the *FOIP Act*.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2, 4, 6, 12, 16, 17, 21, 24, 25, 27, 29, 32, 51, 56, 69, 71, 72, 74; *Crown's Right of Recovery Act*, S.A. 2007, c. C-35; *Conflicts of Interest Act*, R.S.A. 2000, c. C-23.

Authorities Cited: AB: Decision F2014-D-05/Order F2014-52, Order 96-011, Order 97-018, Order 99-023, Order 2000-003, Order 2001-028, Order F2006-010, Order F2007-014, Order F2009-007, Order F2010-007, Order F2010-036, Order F2012-01, Order F2014-38/Decision F2014-D-02, Order F2017-14, Order F2017-28; **BC**: Order F13-15; **NS**: Department of Business (Re), 2016 NSOIPC 10; **ON:** Order PO-1998.

Cases Cited: *Alberta (Information and Privacy Commissioner) v. University of Calgary,* 2016 SCC 63; *Pritchard v. Ontario (Human Rights Commission),* 2004 1 SCR 809*; IMS Health (Canada) v. Alberta (Information and Privacy Commissioner),* 2008 ABQB 213*; Leahy v. Canada (Minister of Citizenship and Immigration), 2012 FCA 227; Canadian Natural Resources Ltd. v. ShawCor Ltd.,* 2014 ABCA 289; *Lizotte v. Aviva Insurance Company of Canada,* 2016 SCC 52; *Solosky v. The Queen*, [1980] 1 SCR 821; *Imperial Tobacco Co v. Newfoundland and Labrador (Attorney General),* 2007 NLTD 172; *R. v Cunningham,* [2010] 1 SCR 331; *Hayes v. New Brunswick (Minister of Justice and Consumer Affairs),* 2008 NBQB 112; *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner),* 2014 ABCA 231; *R. v. Lavallee* [2002] 3 SCR 209; *British Columbia (Attorney General) v. Lee,* 2017 BCCA 219; *Alberta v. Suncor Inc,* 2017 ABCA 221; *R. v. Campbell,* [1999] 1 SCR 565; *Descôteaux et al. v. Mierzwinski* [1982] 1 SCR. 860; *British Columbia v. British Columbia (Information and Privacy Commissioner),* [1996] BCJ No. 2534; *FH v. McDougall* 2008 SCC 38*; Canada (Privacy Commissioner) v. Blood Tribe Department of Health,* 2008 SCC 44; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23; *John Doe v. Ontario (Finance),* 2014 SCC 36; *Calgary (Police Service) v. Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114.

Other Sources Cited: Adjudication Practice Note 1; OIPC Privilege Practice Note (2016); Solicitor-Client Privilege Adjudication Protocol (2008); Alberta Rules of Court, Rule 5; FOIP Guidelines and Practices (2009); Ethics Commissioner Wilkinson Investigation Report (December 2013); Acting Ethics Commissioner Fraser Re-Investigation Report (March 2017); Iacobucci Review Report (March 2016); CBC News Article (April 3, 2017).

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I. BACKGROUND

[para 1] On May 16, 2014, after receiving my delegation from the Information and Privacy Commissioner [Commissioner] and swearing an oath pursuant to s. 51(7) of the *Freedom of Information and Protection of Privacy Act* [*FOIP* Act], I sent my initial correspondence to the parties.

[para 2] The correspondence to the Public Body and the Applicant on May 16, 2014 confirmed that they had received a copy of my delegation and had agreed with the Commissioner's decision to consolidate Case Files #F6748 and #F6749 into one Inquiry. At the same time, I also notified the parties that I had taken the statutory oath under the *FOIP Act*.

[para 3] The background to the consolidation of the two Requests for Inquiry into one Inquiry was the subject of correspondence between the Commissioner and the Minister of Health, as the head of the Public Body, and the Applicant. The Commissioner's letter dated February 27, 2014, confirmed there would be one inquiry for Case Files #F6748 and #F6749 and the basis for that decision, as follows:

> *In response to my question about consolidating the case files for inquiry, [*name of Applicant*] stated that [*s/he*] agreed with consolidation, provided that all the records were accounted for and included in the inquiry. [*His/her*] agreement on consolidation was contingent on receiving assurances of same. [*Name of lawyer*], legal counsel to Alberta Health, provided those assurances in a November 21, 2013 letter to me, which was copied to [*name of Applicant*]. Therefore, there will be one inquiry for Case Files F6748 and F6749.*

[para 4] The November 21, 2013 letter from the Public Body's counsel, to which the Commissioner refers, stated, in part:

> *The Department agrees with your suggestion that there be an inquiry only in Case F6749. I confirm that this inquiry would involve the same records with respect to Case File F6748.*

[para 5] On June 6, 2014, I issued the Notice of Inquiry [2014 Notice] to the Public Body and the Applicant. The 2014 Notice reads as follows:

> *This inquiry arises from two separate requests to access information filed by the same Applicant with Alberta Health [the "Public Body"] pursuant to s. 7 of the Freedom of Information and Protection of Privacy Act [the FOIP Act].*
>
> *The Applicant filed the first request to access information [#F6748] with the Public Body on June 12, 2012, which reads as follows:*
>
> > *We request copies of the following records in the custody or control of the Ministry of Health, for the time period beginning September 2005 and ending as of the date of this request:*
> >
> > *(a) all agreements between [*name of law firm*], or any member of that [*name of law firm*];*
> >
> > *(b) all agreements between Alberta and any other law firms or lawyers retained to prosecute, or to assist in prosecuting, Alberta's lawsuit against tobacco manufacturers;*
> >
> > *(c) all agreements between Alberta and any other province or territory concerning [*name of law firm*]; and*
> >
> > *(d) all agreements between Alberta and any other province or territory concerning lawsuits against tobacco manufacturers*
> >
> > *(collectively, the "Agreements").*
> >
> > *We have made a broader but separate request for records in the custody or control of the Ministry of Health that relate to the News Release and the Agreements.*
>
> *On November 16, 2012, the Public Body made a decision with respect to the first request to access information from the Applicant, which reads as follows:*
>
> > *Access to all of the information that you requested is denied under section 24 (Advice from Officials) and section 27 (Privileged information). The sections of the Act used to remove records have been noted on the attached exception sheet, as well as copies of the Explanatory Notes for the FOIP provisions.*
>
> *The Applicant filed a second request to access information [#F6749] with the Public Body on June 12, 2012, which reads as follows:*
>
> > *For the time period beginning September 2005 and ending as of the date of this request, we request copies of all records (including, but not limited to, agendas, aide-memoires, analyses, authorizations, briefing books, briefing notes, costing data, diaries, drafts, emails, guidelines, instructions, letters, manuals, memos, minutes of meetings, notes, notes to file, opinions, policy statements, presentations, reports, research papers, rules, speeches, studies, travel claims and visit/travel reports) in the custody or control of the Ministry of Health that relate to the News Release or to any of the following records:*
> >
> > *(a) all agreements between [*name of law firm*], or any member of that [*name of law firm*];*
> >
> > *(b) all agreements between Alberta and any other law firms or lawyers retained to prosecute, or to assist in prosecuting, Alberta's lawsuit against tobacco manufacturers;*
> >
> > *(c) all agreements between Alberta and any other province or territory concerning [*name of law firm*]; and*

(d) all agreements between Alberta and any other province or territory concerning lawsuits against tobacco manufacturers

(collectively, the "Agreements").

We have made a separate request for copies of the Agreements in the custody or control of the Ministry of Health, which we accordingly exclude from this request.

On November 16, 2012, the Public Body made a decision with respect to the Applicant's second request to access information, which reads as follows:

Access to all of the information that you requested is denied under section 24 (Advice from Officials), section 27 (Privileged information), and section 29 (information that is or will be available to the public.) The information on pages 138-171 can be accessed at http://www.qp.alberta.ca/ (Crown's Right of Recovery Act Chapter C-35)

In addition, some documents have been excluded from the scope of the FOIP Act under section 4(1)(q). The sections of the Act used to remove records have been noted on the attached exception sheet, as well as copies of the Explanatory Notes for the FOIP provisions. Please note we have removed some information as non-responsive (N/R.)

Attached to the decision letter are copies of the sections of the FOIP Act referred to in the Public Body's decision, but no exception sheet is attached, contrary to what the decision states.

*On January 14, 2013, the Applicant filed a Request for Review of the Public Body's decision to refuse access to all records responsive to [*his/her*] first request to access to information. On the same date, the Applicant filed a Request for Review of the Public Body's decision to refuse all records responsive to [*his/her*] second request to access information.*

The Commissioner subsequently authorized a portfolio officer to investigate and attempt to settle both matters, however, this was not successful.

*On June 25, 2013, the Applicant filed a Request for Inquiry with respect to [*his/her*] first request to access information. On the same date, the Applicant filed a Request for Inquiry with respect to [*his/her*] second request to access information.*

By consent of the parties, the two Requests for Inquiry regarding the Public Body's decisions in response to the two requests to access information from the Applicant were consolidated into one inquiry provided that all of the records were accounted for and included in the inquiry. The Applicant's agreement on consolidation was contingent on receiving assurances to that effect. Legal counsel for the Public Body provided those assurances in a letter to the Commissioner dated November 21, 2013, which was copied to the Applicant. The Commissioner confirmed the basis of the agreement to consolidate by letter dated February 27, 2014 to both parties.

I. ISSUES IN THE INQUIRY

Based on my reading of both of the Requests for Inquiry with the requisite attachments, I have identified the following issues relevant to the consolidated inquiry:

1. *Whether the Public Body properly relied on and applied s. 4(1)(q) of the FOIP Act [records excluded under the FOIP Act] to the information in the records.*

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

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

4. *Whether the Public Body properly relied on and applied s. 29 [information that is or will be available to the public] to the information in the records.*

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

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

This list may not be exhaustive. I encourage both parties to identify any additional issues in their initial submissions. In addition, I reserve the right to identify further issues as the inquiry proceeds.

II. RECORDS

No copies of the Record have been received and none are being requested at this stage.

The Public Body's decision letters indicate that wherever it has withheld all or part of the Record, it has claimed all or some of the exceptions listed above. The Public Body is asked to confirm in its initial submission that the decision letters have been interpreted correctly.

For the purpose of this inquiry, I request that the Public Body provide an Index of Records that identifies the exceptions claimed, in accordance with Adjudication Practice Note 1. Consistent with the parties' agreement to consolidate, the Index is to detail the complete Record that is responsive to both requests to access information, including all the exceptions claimed. I refer the Public Body to the exception sheet provided with its decision in #F6748, which could be used as the foundation for the Index. As noted above, no exception sheet was attached in #F6749. [Emphasis in original]

[para 6] In accordance with the Schedule set out in the 2014 Notice, the Applicant submitted his/her Initial Submission on July 8, 2014 [2014 AIS] and the Public Body provided its Initial Submission on August 6, 2014 [2014 PBIS]. Shortly thereafter, on August 22, 2014, I raised a Preliminary Evidentiary Issue [PEI]. An exchange of submissions regarding the PEI followed resulting in Decision 2014-D-05/Order F2014-52 [2014 Decision/Order]. Subsequently, the Public Body applied for Judicial Review of that Decision/Order, which application has since been adjourned *sine die*.

[para 7] On January 19, 2017, I received correspondence from the Public Body providing two updated Indices of Records for #F6748 and #F6749, respectively, copies of which correspondence and updated Indices were also provided to the Applicant on the same date by the Public Body. The letter from the Public Body read as follows:

Re: Inquiry #F6748/#F6749

Following the decision of the Supreme Court of Canada in the University of Calgary case, the Ministry has reviewed the Index of Records for these matters.

I am enclosing an updated "Index of Records (Exchanged Among the Parties)" for Inquiry #F6748. All of these Records are protected by solicitor-client or other legal privilege (as well as other exceptions).

I am also enclosing an updated "Index of Records (Exchanged Among the Parties)" for Inquiry #F6749. This updated Index identifies:

(a) Records with respect to which the Ministry is not asserting solicitor-client or other

legal privilege (although the Ministry asserts other exceptions to disclosure). These Records are indicated with light burgundy shading in the enclosed Index.

(b) Records which the Ministry deems to be non-responsive to the access requests. These Records are indicated by "N/R" in the enclosed Index.

The Ministry is providing a copy of this letter and the two updated Indexes to [Name of the Applicant]*, who is a party to the Inquiry.*

The Ministry is providing to you (but not to the parties [sic] *to the Inquiry) with two copies of the Records identified in (a) above, as well as those non-responsive records identified in (b) above which are not protected by solicitor-client or other legal privilege.*

With respect to these records, please note the following:

1. *The numbering in the revised Index refers to the number at the bottom right of each Record.*

2. *In reviewing the Records, the Ministry found some which are privileged that had not been marked as such originally. The Ministry has noted these by including a footnote.*

The Ministry would be pleased to respond to any questions you might have about the revised Index.

[para 8] The Public Body provided me with two copies of a portion of the Records at Issue for #F6749, excluding any records over which the Public Body had claimed solicitor client and/or other legal privilege. The Public Body did not disclose any portion of the Records at Issue to the Applicant. The provision of these Records at Issue were accepted as partial compliance with the 2014 Order/Decision.

[para 9] On March 8, 2017, I acknowledged receipt of the updated Indices and a portion of the Records at Issue by letter to the Public Body, shared with the Applicant in the Inquiry, which read as follows:

Re: Inquiry #F6748/#F6749: Updated Index of Records and Disclosure of a portion of the Records at Issue to the External Adjudicator

The purpose of this letter is threefold: to acknowledge receipt of the updated Index of Records and a portion of the Records at Issue from Alberta Health (Public Body), to confirm what has been received from the Public Body, and to update the parties regarding the continuation of this Inquiry.

By letter dated November 24, 2016, I extended the anticipated completion for this Inquiry to November 30, 2017 to allow the Inquiry to proceed once the Public Body made its decision with respect to complying with my Decision F2014-D-05/Order F2014-52 by providing a complete set of the Records at Issue in the Inquiry. It was anticipated that the Public Body's decision would be made either after a ruling that was expected from the Supreme Court of Canada and/or the Judicial Review application of my Decision F2014-D-05/Order F2014-52 was completed or resolved.

The following day, on November 25, 2016, the Supreme Court of Canada (SCC) issued two decisions: Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53 and Lizotte v. Aviva Insurance Company of Canada, 2016 SCC 52.

On January 19, 2017, the Public Body corresponded with me as the External Adjudicator with copies to the parties indicating that following the decision in the University of Calgary case, it

reviewed the Index of Records for this Inquiry. As a result of that review, the Public Body made a decision to provide an updated Index of Records and a portion of the Records at Issue. The updated indices included one new index for case file #F6748 and one for case file #F6749, both of which were provided to me and the Applicant. The Public Body also provided me, as the External Adjudicator, with two copies of a portion of the Records at Issue for case file #F6749, excluding those Records at Issue over which the Public Body has claimed the solicitor-client or other legal privilege exceptions, following the rulings in the SCC. The provision of this portion of the Records at Issue complies, in part, with my Decision F2014-D-05/Order F2014-52.

It is my intention to activate this Inquiry with respect to the Records at Issue including those provided by the Public Body on January 19, 2017. I will, therefore, be advising the parties of the next steps for the Inquiry in the near future. Please acknowledge receipt of this correspondence in writing. Should you have any questions in this regard, you may contact Registrar [name] *by email [above] or phone at 780-422-6860 or 1-888-878-4044 within Alberta.*

[para 10] On September 6, 2017, after receiving the portion of the Records at Issue and the updated Indices, I issued a Notice of Continuation of Inquiry [2017 Notice], which read as follows:

Re: Inquiry #F6748/#F6749: Notice of Continuation of Inquiry

In partial compliance with my Decision F2014-D-05/Order F2014-52 [2014 Decision/Order], the Public Body has provided me with a portion of the Records at Issue in this Inquiry. On January 19, 2017 the Public Body provided two updated Indices and two copies of some of the pages of the responsive Records at Issue, the latter being produced to the Office of the Information and Privacy Commissioner [Commissioner] in the subject Inquiry. On March 8, 2017 I confirmed that the provision of this portion of the Records at Issue complies, in part, with my 2014 Decision/Order. The portion of the records provided excluded any pages of records where the Public Body has claimed a legal privilege exception. While the Applicant received a copy of the updated 2017 Indices, the Public Body did not disclose any records to the Applicant.

By letter dated November 24, 2016, I extended the anticipated completion for this Inquiry to November 30, 2017. As my March 8, 2017 letter to the parties indicated, the extension was done while awaiting the Public Body's decision in response to my 2014 Decision/Order with respect to the Preliminary Evidentiary Issue [PEI]. The Public Body's response was to file an Application for Judicial Review, which I understand has been adjourned sine die.

The Inquiry is now positioned to continue. Prior to the PEI and the Decision/Order that followed, the Public Body and the Applicant had each provided their respective Initial Submission in the Inquiry. The major development since is the provision of a portion of the Records at Issue by the Public Body to me. Details in that regard are as follows:

1. *On January 19, 2017, the Public Body corresponded with me to advise that following the ruling in the Alberta (Information and Privacy Commissioner) v. University of Calgary [U of C] case regarding legal privilege in the Supreme Court of Canada, the Ministry had reviewed its 2014 Index of Records at Issue [2014 Index] for this Inquiry. The result of that review appears to be that the Ministry decided to produce and provide two updated Indices of Records for #F6748 and #F6749, respectively, copies of which correspondence and updated Indices were also provided to the Applicant by the Public Body on the same date;*

2. *Included with its January 19, 2017 correspondence, the Public Body provided me with two copies of a portion of the Records at Issue for case file #F6749, excluding those records over which the Public Body has claimed solicitor-client and other legal privilege;*

3. *The updated #F6748 Index lists 114 pages for the Records at Issue in the Inquiry. The Public Body did not provide any of these pages to me as it has claimed a legal privilege*

exception under s. 27(1) of the FOIP Act for all 114 pages. No pages were disclosed to the Applicant on January 19, 2017; and

4. *The updated #F6749 Index lists 1,004 pages for the Records at Issue in the Inquiry. The Public Body has provided 150 pages of the records to me, withholding the remaining 854 pages over which it has claimed a legal privilege exception under s. 27(1) of the FOIP Act. No pages were disclosed to the Applicant on January 19, 2017. The Public Body has not advised if the pages in #F6748 are included within the pages for #F6749. The reason this may be important is because these two case files were merged into one inquiry on the basis that the Public Body represented to the Commissioner's Office that the Records at Issue were the same (refer to the Public Body's letter dated November 21, 2013). If the pages are included, is there a Table of Concordance available to clarify which page in the 2017 Index for case file #F6748 coincides with which page in the 2017 Index for case file #F6749?*

The Issues in the Inquiry were listed in the Notice of Inquiry dated June 6, 2014 [2014 Notice of Inquiry] as follows:

1. *Whether the Public Body properly relied on and applied s. 4(1)(q) of the FOIP Act [records excluded under the FOIP Act] to the information in the records.*

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

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

4. *Whether the Public Body properly relied on and applied s. 29 [information that is or will be available to the public] to the information in the records.*

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

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

Without disclosing the contents of the Records, the following is a summary of a number of matters that arise from the 150 pages of the records provided to me:

1. *The Public Body refers to the 2017 Index for #F6748 as "updated." The number of pages [114] and the exceptions applied remain the same as in the 2014 Index [Public Body Initial Submission at Tab 1]. The only change to the 2017 Index appears to be that Table 2 shows shading for pages 1-45. This shading does not appear in Table 1 where both s. 24 and s. 27 have been claimed for those pages. In the updated Index for #F6749 there is no example where shading has been applied to pages where s. 27 has been claimed. Given that the key at the top of the Tables in the #F6748 Index indicates that the shading is for "Records withheld under non s. 27 FOIP exceptions" and that the updated Index is a result of the Ministry conducting a review of the 2014 Index following the release of the U of C decision, the question is whether the Public Body continues to rely on s. 27 for pages 1-45. While the answer may seem obvious given that these pages have not been provided to me, because of the Public Body's overall reliance on legal privilege, confirmation is warranted.*

2. *In the 2017 Index for #F6749 some pages have not been shaded though s. 27 has not been claimed. Examples are pages 807-808, which are not shaded, are marked Non-Responsive and, in fact, have been provided to me. How the shading has been applied leads to discrepancies.*

3. *In #F6749, there are discrepancies between the exception claimed in the 2017 Index for a particular page and the exception noted on the page itself [for the 150 pages given to me]. An example is page 218 where the page cites s. 4(1)(l) but the updated 2017 Index continues to refer to s. 4(1)(q) as appeared in the 2014 Index. It is important to note that the list of Issues contained in the 2014 Notice of Inquiry makes no reference to s. 4(1)(l).*

4. *In #F6749, the Public Body advised it had added Non-Responsive to some of the pages of records. There are discrepancies, however, such as: pages 890-891 where the record itself cites s. 24(1) and Non-Responsive while the Index only refers to s. 24(1) and there is no reference to Non-Responsive in the 2017 Index or in any footnote. By way of comparison: Non-Responsive has been added to the 2017 Index for pages 705-706, which is consistent with the Public Body's January 19, 2017 cover letter.*

5. *In #F6749, there are examples of handwritten comments (possibly written on the page of the record or on a stickum, applied while preparing the Records at Issue) that have been reproduced onto the copy for some pages. Does the information contained in these handwritten comments form part of the Records at Issue? If the information in the comments are considered to form part of the record on the pages where they are found, are the exceptions already claimed for those pages meant to be applied?*

6. *In the 2017 Index for #F6749, the Public Body has added footnotes adding or changing exceptions to those that have been written on the face of some of the pages of records. This includes references to Non-Responsive for some pages where an exception has also been claimed. By way of example, for pages 215-217, the footnote states that the record should also be exempt under s. 4(1)(a) and Non-Responsive, in addition to the s. 29(1) exception. It is important to note that the list of Issues contained in the 2014 Notice of Inquiry makes no reference to s. 4(1)(a).*

To be fair to both the Public Body and the Applicant, ***I have provided the summary above to enable the parties to consider and address these matters in their Rebuttal Submissions.*** *Also there may be some outstanding issues from the Issues outlined in the 2014 Notice of Inquiry. By way of example: the Applicant did not provide any submissions with respect to Issue #6: Public Interest, for which the Applicant bears the burden; in its 2014 Initial Submission, the Public Body did not address Issue #5 in the 2014 Notice of Inquiry: Non-Responsive.*

With respect to evidence already submitted in the Inquiry with respect to the applicability of legal privilege, the Public Body has provided a detailed affidavit of the FOIP Coordinator for Alberta Health. While this is useful evidence, the Public Body is reminded that it bears the burden to provide sufficient evidence to support its claim of any legal privilege exception pursuant to s. 27, particularly, as here, when the Public Body has chosen not to provide the Records at Issue over which it has claimed legal privilege.

In regard to the Public Body's reliance on s. 27 legal privilege exceptions, I advise as follows:

1. *On December 15, 2016 the Commissioner developed, and made public, a Privilege Practice Note [PPN] to replace its former Solicitor-Client Privilege Adjudication Protocol following the Supreme Court of Canada U of C decision, a copy of which PPN is attached. In this Inquiry, the Public Body continues to object to the production of all of the Records at Issue over which it has claimed any legal privilege pursuant to s. 27. Therefore, it is of particular importance for the Public Body to heed the contents of the PPN to ensure it provides sufficient evidence to support all claims of privilege. In anticipation of a possible response that the PPN is a mere practice note and has no legal authority, I would remind the Public Body that the PPN is based on the Alberta Rules of Court requirements to which the Supreme Court of Canada referred in the U of C decision. On that basis, I request the Public Body to provide the following evidence:*

A. *An affidavit or affidavits of the Records at Issue over which any legal privilege has been claimed from **any in-house counsel** in the recovery of health care costs associated with tobacco litigation;*

B. *An affidavit or affidavits of the Records at Issue over which any legal privilege has been claimed **from any individuals identified as senior government employees, who may be lawyers but are not identified as such;***

C. *For the most part, the description of the records in the 2017 Indices continue to take a minimalist approach. Descriptions should go beyond simply stating the type of record: document, email, briefing note. Each affidavit, therefore, needs to include a Schedule in which the Public Body lists the records or bundle of records for which privilege is claimed along with a description, even if brief, for each record or bundle. In other words, **a brief description, which will suffice, or a more thorough description, which would be preferred.** Simply referring to any record by type, for example "Email", will not be adequate. The record must be described in sufficient detail to enable those who do not have access to the page or bundle of records to understand what it contains, **without revealing any information that is privileged.** Examples of the kind of details to provide: the type of record contained on each page, the relevant dates for each page, the correspondents involved, including to whom the information was forwarded or copied, and their position or role, whether the record is marked draft or final, where legal advice was given or sought, and where the legal advice given was later discussed. **Without these kinds of details, in the absence of having the opportunity to review the records themselves, it will be very difficult, if not impossible, to make a decision as to whether the s. 27 legal exceptions have been properly relied on and applied;***

D. *The requirements set out above are consistent with the Pritchard v. Ontario (Human Rights Commission) [Pritchard] ruling in the Supreme Court of Canada. In the Pritchard decision, the Court addressed the issue of government lawyers working within government from whom advice is often sought but which does not always give rise to legal privilege. The Pritchard decision is clear that **more evidence is required to support a claim of legal privilege to distinguish from when policy advice is being given.***

2. *Should the Public Body attempt to continue to rely on the letter report [dated July 2, 2014] held to be inadmissible evidence in the PEI and/or fail to comply with the evidentiary requirements outlined above, I propose to add the following as Issue #7 in the Inquiry:*

Whether the release of a complete unprotected copy of the Records at Issue by the Public Body to a third party (former judge), without any legislative or contractual protection of the Records at Issue, in order to submit a non-legal opinion, unsworn letter report "as to the nature of documents which the Province says are privileged", which third party the Public Body did not proffer or qualify as an expert, constitutes waiver by the Public Body of the legal privilege it has claimed over the majority of pages of the Records at Issue.

I provide the above information to give the parties the opportunity to address all issues in their respective Rebuttal Submission. If it proves necessary, I will give the parties the opportunity to exchange Supplementary Rebuttal Submissions before concluding the Inquiry. I reserve the right to raise any new issues and make further requests of the parties, as required. …
[Emphasis in original]

[para 11] The remainder of the 2017 Notice discussed procedural matters including the schedule for the parties' submissions. The *OIPC Privilege Practice Note* issued by the Commissioner's Office in December 2016 was attached to the 2017 Notice.

[para 12] On September 13, 2017, I received correspondence advising me that the Public Body had retained new counsel, which read as follows:

> *Re: Inquiry #F6748/#F6749*
>
> *Further to your letter of September 6, 2017, please be advised that [*name of former lawyer*] is stepping aside as counsel for the Minister and I will be taking on that role going forward. Please address all further correspondence to the undersigned.*
>
> *While I will require some reasonable amount of time to familiarize myself with the status of these matters, I am instructed to provide a present response to your letter.*
>
> *At the outset, it is the Minister's position that the External Adjudicator is not, pursuant to s. 74(4), of the statute, in a position to continue the Inquiry because of the outstanding application for judicial review in Court File No. 1503-01393.*
>
> *Nevertheless, and without prejudice to that position, the Minister has the following proposal:*
>
> 1. *The Minister will review the Records at Issue and provide further evidence respecting any legal privilege which is claimed over the Records at Issue. The evidence will include description of the records in accordance with the decision in CNRL v. ShawCor Ltd, 2014 ABCA 289.*
>
> 2. *Such further evidence will be tendered to the External Adjudicator and the Applicants* [sic] *by November 15, 2017.*
>
> 3. *The Applicants'* [sic] *Rebuttal Submissions to the Public Body be tendered some reasonable time thereafter and the Public Body will provide its Rebuttal Submissions some reasonable time following. We suggest December 15, 2017 and January 15, 2018 respectively.*
>
> 4. *The outstanding application for judicial review will remain adjourned sine die pending this process.*
>
> *I look forward to your response.*

[para 13] In response to the letter from the Public Body's new counsel, I issued an AMENDED Schedule for Submissions [2017 Amended Notice], on September 15, 2017, granting the Public Body a time extension, which read as follows:

> *Re: Inquiry #F6748/#F6749: AMENDED Notice of Continuation of Inquiry and Extension of Anticipated Completion Date*
>
> *I acknowledge receipt of [*name of new lawyer*]'s correspondence dated September 13, 2017 advising me that [*s/he*] is replacing [*name of former lawyer*] as counsel of record in the subject Inquiry. In addition to this notification, I request that [*name of new lawyer*] provide the Office of the Information and Privacy Commissioner of Alberta [*Commissioner*] with a completed Change of Contact and/or Address for Service form available on our website. For your convenience, I have enclosed a copy of the form.*
>
> *I am delegated by the Commissioner to hear this Inquiry as an External Adjudicator. My delegation under the Freedom of Information and Protection of Privacy Act does not give me the authority to be involved in Applications for Judicial Review; only the Commissioner has that authority. Therefore, please contact Registrar [*name*], who will be able to apprise you of how to contact counsel in the Judicial Review.*

*[*Name of new lawyer], *your introductory letter was in response to my letter dated September 6, 2017 providing the parties with a Notice of Continuation of the Inquiry. The Notice of Continuation, which was shared with the Ministry's former counsel and the Applicant, was in response to the Public Body providing me with a portion of the Records at Issue and the Applicant and me with two updated Indices for the Records at Issue. As I stated in my September 6, 2017 correspondence:*

> *In partial compliance with my Decision F2014-D-05/Order F2014-52 [2014 Decision/Order], the Public Body has provided me with a portion of the Records at Issue in this Inquiry. On January 19, 2017 the Public Body provided two updated Indices and two copies of some of the pages of the responsive Records at Issue, the latter being produced to the Office of the Information and Privacy Commissioner [Commissioner] in the subject Inquiry. On March 8, 2017 I confirmed that the provision of this portion of the Records at Issue complies, in part, with my 2014 Decision/Order. The portion of the records provided excluded any pages of records where the Public Body has claimed a legal privilege exception. While the Applicant received a copy of the updated 2017 Indices, the Public Body did not disclose any records to the Applicant.*

I recognize that you will require some time to familiarize yourself with this file and certainly appreciate you responding promptly to my September 6, 2017 letter. That being said, I also need to balance your needs as new counsel for the Public Body with the interests of the Applicant whose access to information request[s] dates back to 2012. At pages 4-5 of the Notice of Continuation, I laid out specific demands for evidence in line with the ShawCor decision, which I appreciate may require some time and is, therefore, another factor for me to consider.

In that regard, ***I am heartened at the news that you, [*name of new lawyer*], will be reviewing the Records at Issue and propose to provide evidence respecting any legal privilege exception, which the Public Body intends to continue to claim. I can assure you that I have no interest in injuring or compromising valid claims to legal privilege. To date, however, the submissions from the Public Body have been deplete leaving me, as the ShawCor Court of Appeal of Alberta put it "blindfolded": inadequate description of each page or bundle of records [though notably the descriptors in Alberta Health's FOIP Coordinator's affidavit provided some information], unclear link between the particular grounds of legal privilege being claimed for each page or bundle of records, and insufficient information/evidence to assist me (without the Records at Issue over which legal privilege has been claimed being available to me) in assessing the validity of the claimed privilege. I encourage you, [*name of new lawyer*], to put your attention to all these aspects during your review of the records and preparation of the relevant affidavit evidence.***

*[*Name of new lawyer*], should you, on your review of the Records at Issue, discover that some of the pages of records do not fit within any legal privilege exception, I urge you to provide those pages to me, making clear any other exceptions on which you are continuing to rely for those pages. Your proposal to tender this evidence, which I will refer to as the Public Body Supplementary Initial Submission, as a first step is, in my opinion, a sound one, subject to any objections the Applicant may have. This step will be followed by the Applicant having ample time to respond to the Public Body's newly tendered evidence in [*his/her*] Rebuttal Submission. The typical time to provide an Initial Submission is 4 weeks and a Rebuttal Submission, 2 weeks. These customary times had already been extended, as outlined in my September 6, 2017 correspondence. The new schedule, outlined below, however, modifies this further.*

*Weighing the relevant considerations, I propose to modify both my September 6, 2017 timeline and [*name of new lawyer*]'s suggested timeline as follows, subject to any objections the Applicant may have:*

…

[Emphasis added]

[para 14] The remainder of the 2017 Amended Notice discussed procedural matters including the schedule for the parties' submissions.

[para 15] On September 22, 2017, the Applicant wrote to confirm s/he had no objection to the 2017 amended schedule as set out in the September 15, 2017 correspondence. Thereafter, there was a further exchange of correspondence between the parties and the External Adjudicator with respect to re-setting the Schedule to respond to the Public Body's new counsel who indicated s/he required more time to prepare, which exchange culminated in my follow-up letter to the Public Body dated October 23, 2017, shared with the Applicant, which read as follows:

> *Re: Inquiry #F6748/#F6749: AMENDED Schedule for Submissions*
>
> *As I indicated in earlier correspondence. I am heartened by the Public Body's decisions to have you take a fresh look in all respects, including narrowing the issues. Given the complexity and variation in these matters, I acknowledge that it will require the serious effort to which you make reference.*
>
> *My decision to agree to the further extension, subject to any objection, is based on my hope that your having a November 15, 2017 due date for Supplementary Initial Submissions and January 17, 2018 for Rebuttal Submissions will benefit both the Applicant and myself in completing the Inquiry.*
>
> *Accordingly, the Applicant's due date for [*his/her*] Rebuttal Submissions is hereby extended to December 20, 2017. If the Applicant objects to your extension request, [*s/he*] has 3 days to notify me and the Public Body.*
>
> *In keeping with the spirit of cooperation to which you refer, I advise that I am in Edmonton and available over the next three weeks if the Public Body is open to permitting me to view the large majority of the Records at Issue at the Public Body's office (no copies to be taken away) as proposed in my Order F2014-52.*
>
> *I look forward to hearing from you.*

[para 16] The submissions from the parties were received in accordance with the revised Schedule to the 2017 Amended Notice, as modified, and will be discussed in detail *infra.*

[para 17] After an initial review of the submissions, an issue arose with respect to there being two separate Exhibited Indices attached to the 2017 Affidavit of Records provided by the Public Body with its submission, which required clarification. This will be discussed under Records at Issue, *infra.*

II. RECORDS AT ISSUE

[para 18] The Public Body produced separate Exception Sheets for each of the access to information requests (Case File #F6748 and Case File #F6749), which were provided with its 2012 decision letters to the Applicant. The total pages for the former Case File was 114 pages and for the latter was 1,004 pages. When the Inquiry was being set up by the Commissioner's Office, the Public Body confirmed that the Records at Issue listed in the Index for Case File #F6748 were included within the Records at Issue in the Index for Case File #F6749. Of what the Public Body represented was the total for the Records at Issue (1,004 pages), none were disclosed to the Applicant.

[para 19] On January 19, 2017, in partial compliance with the 2014 Decision/Order, the Public Body provided me, as the External Adjudicator, with 150 pages of the Records at Issue. The portion of records provided excluded all pages or records over which the Public Body had claimed any legal privilege exception, pursuant to s. 27(1)(a) of the *FOIP Act.*

[para 20] The Public Body continued to produce two Indices, as it had in January 2017. In the 2017 Notice, I requested the Public Body provide a Table of Concordance to enable me to determine where the pages in the Case File #F6748 Index were located within the pages in the Case File #F6749 Index. The Public Body did not reply to my request to provide a Table of Concordance in its 2017 PBSS.

[para 21] As a result of the Public Body's continued reliance on two Indices, with no Table of Concordance as requested in the 2017 Notice, I was unable to identify where the Case File #F6748 records coincided with records in the Case File #F6749 Index. This was significant because the Public Body's Supplementary (Initial) Submissions [2017 PBSS] included the 2017 Affidavit of Records, sworn testimony. The 2017 Affidavit of Records had two separate Indices attached as Exhibit A and Exhibit B but no Table of Concordance. After receiving this evidence, I communicated to the Public Body on January 31, 2018 to make a second inquiry, which correspondence read as follows:

> *Re: Inquiry #F6748/#F6749: Request for Clarification with Respect to the Records at Issue*
>
> *Further to the Registrar's email dated January 26, 2018, I make the following request of the Public Body.*
>
> *By letter dated November 21, 2013, the Public Body indicated that the records listed in the Index for #F6748 are included in the records listed in the Index for #F6749, which letter stated, in part:*
>
> > *The Department agrees with your suggestion that there be an inquiry only in Case File F6749. I confirm that this inquiry would involve the same records with respect to Case File F6748.*
>
> *Unfortunately, the Public Body has not provided any further information in this regard.*
>
> *Because the majority of the Records at Issue have not been provided for my review including all of the pages in #F6748, the task of locating the pages assigned to one case file in another case file is impossible. That is made all the more difficult given the following.*
>
> *In its 2014 Initial Submission, at paras. 4-5, the Public Body it stated the following:*
>
> > *Tab 1 contains the Index of the 114 records which relate to OIPC #F6748.*
> > *Tab 2 contains the Index of the 1004 records which relate to OIPC #F6748.*
>
> *It was assumed that the Tab 2 reference to #F6748 was a typographical error and was intended to read #F6749 as this file number is indicated on the Index itself, which accompanied the 2014 Initial Submission. Notably neither of the 2014 Indices identifies the name of the Public Body as Alberta Health. The numbering in the Tab 1 and Tab 2 Indices referred to in the 2014 Initial Submission makes no reference to Alberta Health, ABJ or JSG designating the records as those of Alberta Health, Alberta Justice or Justice and Solicitor General.*
>
> *In the 2017 Indices, however, the one for #F6748 prefixes the record numbers with ABJ while the one for #F6749 prefixes the record numbers with JSG, with no mention of Alberta Health, which is the Public Body in this Inquiry.*
>
> *Simply relying on the numbers assigned to each page, it is impossible to reconcile which pages in the #F6748 Index are the ones that the Public Body has given assurances are the same as pages included in the #F6749 Index. This cannot be reconciled by simply referring to the numbers themselves. An example to demonstrate the point:*
>
> > *Record #1 in #F6748 - ABJ000001-ABJ000002 cites s. 24(1) and s. 27(1) described as Letter (*name of law firm*) dated 7/19/2010*

> *Record #1 in #F6749 - JSG000001-JSG000034 cites s. 27(1) described as Court Document (Statement of Claim) dated 3/13/2008*

*The difficulties in sorting this out has been compounded by references in the recently provided [*name of in-house counsel*] Affidavit, at Tab A of its 2017 Public Body Supplementary Initial Submission [PBSS]. At paras. 7-13, the affiant continues to treat each of the Indices (Exhibit A and Exhibit B) as separate Indices for each "set of records", underscoring the need for clarification. Given the Public Body's November 21, 2013 correspondence supra, I anticipated that the affiant would reference the fact that the records in #F6748 are included within #F6749, if that in fact remains the case, but [*s/he*] referenced them as separate sets of records.*

In addition, matching the other criteria set out in the respective Indices does not facilitate an easy match record to record. Presumably we can eliminate the 150 pages I received that are included in the #F6749 Index but could not be part of #F6748 where all the records have had s. 27(1) applied. We may also be able to exclude pages in the #F6749 Index that are marked as REDACTED as there are no such demarcations in the #F6748 Index.

Because all of the records in #F6748 have had s. 27(1) applied and, therefore, none of these records are available for my review, and because of the difference in the designation of the Document Id (ABJ v JSG), the Public Body is asked to provide the following:

> *Please provide a list for all the records in #F6748 listed in the Count Column number as 1 - 16 (Document Id ABJ00001-ABJ000114) with the corresponding Count Column number and JSG Document Id number in the #F6749 Index (essentially a table of concordance), which information will allow me (and the Applicant) to see where the #F6748 Records at Issue appear in the #F6749 Records at Issue Index. In compiling the information requested, should you discover that there is a discrepancy between how the records have been described between the respective Indices, given the importance of the Index (as the schedule to an affidavit) where legal privilege is at issue, please clarify any discrepancies.*

*Also as this information was not included in the [*name of in-house counsel*] Affidavit and because none of the withheld pages under s. 27(1) are available for my review (all the pages in #F6748), please provide an undertaking (or a supplementary affidavit) that the records, reported as duplicated in #F6749, are, in fact, an identical record to the record previously listed in the #F6748 Index and are included in the total page count in #F6749 of 1,004.*

*And one final question: what does [HC] in the title of two columns in #F6748 and one column in #F6749 stand for? I was assuming it is an abbreviation for the HCCR Litigation but it appears in both Indices. In that regard, the [*name of in-house counsel*] Affidavit states that Records in Exhibit B generally concern the HCCR Litigation (#F6749), thus my assumption as to what HC stood for seemed correct. But HC also appears in the column title of Exhibit A, which the [*name of in-house counsel*] Affidavit states generally concerns the Contingency Fee Agreement [CFA]. If you could please advise me as to what HC stands for that would be helpful.*

Your prompt response in this regard, with a copy to the Applicant, will be appreciated.

[para 22] On February 9, 2018, in response, the Public Body provided the following response:

RE: Inquiry #F6748/#F6749: Request for clarification with respect to the records at issue

We have your letter dated January 30, 2018, outlining your request for further clarification with respect to the Index of Records provided by the Public Body in the above noted Inquiry.

*It would appear the confusion regarding the Index of Records relates to your interpretation of [*name of lawyer*'s letter from November 21, 2013, which states that the inquiry in F6749 would*

*involve the same records with respect to case F6748. We note that [*his/her*] letter does not indicate that the records are identical. We further note that in [*his/her*] other correspondence to you regarding the other Inquiries, [*s/he*] was clear in confirming that the records in question in those inquiries were identical. As such, only one Index of Records was provided in those Inquiries.*

*As that was not the case here, the Public Body has provided two Indexes, one for F6748 and one for F6749. The updated Index of Records are located at Tabs A and B to [*name of in-house counsel*] November 2017 Affidavit.*

***We have reviewed the updated Index of Records and can confirm that the records at Tab A are not the same as the records in Tab B,** except for a copy of the draft Contingency Fee Agreement. This draft is found at JSG000974 in F6749 and at ABJ000072 and ABJ000087 in F6748. As set out in the updated Index of Records, the Public Body maintains these records are protected by solicitor client and litigation privilege.*

Given that the records in F6749 and F6748 are not the same, there is no need to provide a chart cross-referencing the documents.

We note that the prefixes used in describing the records under the column document ID in both Indexes merely reflect preferences of the paralegals that prepared these materials and are not intended to be substantive in any way. We also note that "HC" in the column "Doc Date" refers to "Hard Copy". This is not a reference to anything substantive but merely reflects a designation for scanned records in the software, which populates automatically when the schedules are prepared by the paralegals.

We hope the forgoing has provided you with the clarification you requested. Given that the Public Body has now provided an updated Index* [sic] *of Records in this Inquiry, we encourage you to refer to and rely on these materials (rather than previous Indexes) going forward.
[Emphasis added]

[para 23] The information in the February 9, 2018 correspondence that the records listed in #F6748 were not the same as some of the records listed in #F6749 came as a surprise. The revelation contained in the correspondence dated February 9, 2018 that the records are not the same was totally unexpected and meant the basis for the consolidation into one inquiry was not as represented by the Public Body to the Commissioner or to the Applicant (a step taken prior to the commencement of the Inquiry and my appointment). This issue goes beyond my delegated authority as an External Adjudicator and will not form part of this Order.

[para 24] With respect to the impact of the new information regarding the Records at Issue on the Inquiry, on February 14, 2018, I corresponded with the Public Body, copied to the Applicant, which letter read as follows:

Re: Inquiry #F6748/#F6749 Response regarding Affidavit of Records Indices

I acknowledge receipt of your letter dated February 9, 2018.

My letter to you dated January 30, 2018 repeated my earlier request in the Notice of Continuation for you to provide a Table of Concordance with respect to the two Indices, which request was not addressed in the Public Body Supplementary (Initial) Submission.

That letter asked you to identify where the #F6748 records were located amongst the records listed in the #F6749 index. With the greatest of respect, given the differential in the number of pages between the records in the respective Indices, it was obvious the total Records at Issue in each of the two Case Files were not identical. I needed to know where each individual record in

the #F6748 index, which had been reported as the same as records included in #F6749, lined up with the same record in the #F6749 index.

*The Commissioner's letter to the Minister of Health dated February 27, 2014, confirmed there would be one inquiry for Case Files #F6748 and #F6749 and the basis for that decision. The Commissioner refers to the Applicant being clear that [*s/he*] was willing to agree to the consolidation of his two Requests for Inquiry on the following basis:*

> *In response to my question about consolidating the case files for inquiry, [*name of Applicant*] stated that [*s/he*] agreed with consolidation, provided that all the records were accounted for and included in the inquiry. [*His/her*] agreement on consolidation was contingent on receiving assurances of same. [*Name of lawyer*], legal counsel to Alberta Health, provided those assurances in a November 21, 2013 letter to me, which was copied to [*name of Applicant*]. Therefore, there will be one inquiry for Case Files F6748 and F6749.*

*It was on that basis that the Public Body's former counsel provided [*his/her*] letter of November 21, 2013, to which you refer. In that letter, [*s/he*] stated, in part:*

> *The Department agrees with your suggestion that there be an inquiry only in Case F6749. I confirm that this inquiry would involve the same records with respect to Case File F6748.*

In your response dated February 9, 2018, you stated the following:

> *We have reviewed the updated Index of Records and can confirm that the records at Tab A are not the same as the records in Tab B except for a copy of the draft Contingency Fee Agreement. This draft is found at JSG000974 in F6749 and at ABJ000072 and ABJ000087 in F6748. [Emphasis added; Exhibit A and Exhibit B to the 2017 Affidavit of Records are located at Tab A and Tab B respectively.]*

In response, I advise as follows:

1. *First, the revelation contained in your correspondence dated February 9, 2018 that the records are not the same was totally unexpected and means the basis for the consolidation into one inquiry was not as represented. As a result, a separate decision will be issued with respect to each set of records in my Order for this Inquiry.*

2. *You describe the one record that is included in both Indices (according to your letter, appearing twice in #F6748 and once in #F6749) as draft Contingency Fee Agreement. I conclude that only 28 (of 110) pages in #F6748 are records listed in #F6749.*

3. *I am sure you can appreciate the significance of the need for accuracy in a Schedule attached to an Affidavit of Records to satisfy the evidence test, which a public body must meet to satisfy its claim to any exception, but particularly with respect to legal privilege where the records are not available for review. In access to information matters, drafts and completed/executed documents may be treated differently with respect to whether they have been properly withheld by a public body under a number of the statutory exceptions (though less so with legal privilege). For that reason, in the Notice of Continuation (at para. 1, part C), I set out the details you needed to provide in describing each record, including designating if a record was a draft. The one record that appears in both Indices is described by you as a copy of the draft Contingency Fee Agreement. This is not, however, how this record is described in Exhibits A and B of the [*2017*] Affidavit of Records, where the record is described as "Retainer and Contingency Fee Agreement." There is no reference to draft in any of the three places where you've indicated this record can be found.*

4. *Again, with respect to accuracy in a Schedule attached to an Affidavit of Records (evidence under oath), there is a discrepancy between the exceptions to disclosure claimed for record JSG000974 in #F6749 and records ABJ000072 and ABJ000087 in #F6748 which you pointed out are the same records in your February 9, 2018 letter. Specifically, s. 24(1) and s. 27(1) exceptions have been claimed for JSG000974 whereas only s. 27(1) has been claimed for ABJ000072 and ABJ000087. If s. 27(1) is found to apply, this is inconsequential. However, if that is not the case, at this point, s. 24(1) will not be considered in the decision regarding #F6748.*

5. *I note that "Retainer and Contingency Fee Agreement" also appears at records ABJ000056 and ABJ000101 in #F6748. As you have not matched these, I will assume that these records do not match the records at ABJ000072 and ABJ000087 in #F6748 (which you indicated in your February 9, 2018 letter are copies of the draft Contingency Fee Agreement), nor do they match any record in #F6749 (i.e. JSG000974 or any other record).*

*As the next and, hopefully, the final steps for the parties in the Inquiry, should the Public Body wish to provide any clarification (copied to the Applicant), it has until February 22, 2018 to provide that information. If the Applicant elects to do so, [*s/he*] is invited to provide a representation to me (copied to the Public Body) in this regard on or before March 1, 2018.*

[para 25] As scheduled, on February 22, 2018, the Public Body provided its response to my correspondence, copied to the Applicant, which read as follows:

RE: Inquiry #F6748/#F6749: Request for clarification with respect to the records at issue

We acknowledge receipt of your letter dated February 14, 2018.

To the extent that you now express surprise that the records in each inquiry are not the "same" (although you acknowledge that you always understood the records were not "identical"), and believe it is necessary to now issue a separate decision for each of F6748 and F6749, the Public Body takes no position, other than to point out that the concern expressed by the Applicant regarding consolidation was whether all of the records were accounted for and included in the Inquiry. The Public Body is not aware of any allegation by the Applicant or the Office of the Information and Privacy Commissioner that the updated Index [sic] *of Records in this Inquiry excludes or fails to identify responsive records, or that the responsive records are not accounted for in both F6748 and F6749.*

However, to the extent that any confusion remains, it would appear to arise out your interpretation of correspondence exchanged between your office and counsel (prior to your appointment or our retainer), which we do not believe has any impact on the substantive issues in this Inquiry.

With respect to your views regarding ***draft documents,*** *given that the dominant issue in this Inquiry is privilege, the Public Body maintains that it has provided the updated Index* [sic] *of Records in accordance with the guidance from the Court of Appeal and the OIPC Practice Note regarding privilege. In any event,* ***the Public Body has described the records in the updated Index*** [sic] ***of Records with as much detail as is possible,*** *being careful not to disclose otherwise privileged information,* ***and is well aware of its obligations to provide accurate evidence.***

In response to paragraph 4 of your letter, the Public Body states (without waiving privilege) that the application of s. 24(1) to JSG000974 is entirely appropriate, as this was an occasion where a privileged record (in this case, the draft Contingency Fee Agreement) is properly categorized as privileged, as well as advice from an official.

Finally, in response to paragraph 5 of your letter, the Public Body confirms that ABJ000056 and ABJ000101 in F6748 do not match ABJ000072 and ABJ00087 in F6748, nor do they match any record in F6749.

We trust the forgoing addresses your concerns and concludes your queries with respect to the contents of the updated Index [sic] *of Records. As set out in our earlier correspondence, we recognize there was some confusion over the years with regards to the various Indexes produced in this Inquiry.* ***However, we encourage you to refer to the updated Index*** [sic] ***of Records submitted in November,*** *and we look forward to receipt of your decision with respect to this Inquiry.*
[Emphasis added]

[para 26] With respect to the Public Body's correspondence, there has never been any assertion that the Public Body has not compiled a complete set of responsive Records at Issue for the two access to information requests. The only issue with respect to responsiveness is whether the Public Body has properly identified any Record at Issue as Non-Responsive [NR].

[para 27] As scheduled, on March 1, 2018, the Applicant provided its representation in response to my February 14, 2018 correspondence, which read as follows:

Re: Inquiries #F6748 and #F6749: Request for clarification with respect to the records at issue

*We write further to your February 14, 2018 letter concerning the Public Body's Indices of records in these inquiries, and to respond to the issues raised in [*name of lawyer*] February 9 and 22, 2018 letters.*

Overview

The Public Body has not proven its privilege claims in these inquiries. There are serious gaps in and concerns about the Public Body's evidence, which the Public Body has failed to fill in and to answer.

As set out in your February 14, 2018 letter, the Public Body has provided conflicting accounts about the nature of the records in the Indices for inquiries #F6749 and #F6748. The Public Body's counsel has attempted to clarify the confusion through correspondence, but the Public Body has declined to provide an undertaking or a supplementary affidavit to address these evidentiary deficiencies. You specifically requested an undertaking or supplementary affidavit in your January 30, 2018 correspondence.

The Public Body bears the burden of proof. It must show that its privilege claims are valid and that the Applicant has no right of access. ***To discharge its burden, the Public Body can elect to provide the relevant records as evidence in camera. Where it elects not to do so, the Public Body must provide an affidavit of records that is sufficiently specific to allow the External Adjudicator to assess the validity of the privilege claims.***

The OIPC's Privilege Practice Note suggests that the civil litigation standard for disclosure of information about privileged records should inform the approach to privilege claims in the context of access requests. The civil standard is flexible, depending on the circumstances of a given case. But the Public Body's evidence falls short of even the minimum required under that flexible standard. For example, on the Public Body's evidence, it is not possible even to account for all the records in these inquiries and to understand which records are duplicates as between the inquiries, let alone to determine whether the descriptions are sufficient.

Finally, the Applicant supports the proposal to bifurcate the proceedings into two separate inquiries following inconsistent statements by the Public Body's counsel about whether the records in inquiries #F6749 and #F6748 are "the same" or "identical".

Facts

The Applicant does not dispute the facts set out in the External Adjudicator's letters of January 30 and February 14, 2018. Since November 2013, there has been serious confusion or miscommunication about the nature of the records at issue in inquiries #F6749 and #F6748, and whether the records in these inquiries overlap.

The Public Body has attempted to clarify the issue through correspondence authored by counsel. But it has not provided a Table of Concordance, a solicitor's undertaking, or further affidavit evidence to address the issues raised in the External Adjudicator's letters, despite specific requests for the same. The back-and-forth between the Public Body and the External Adjudicator about whether the records are "the same", "not the same" or "identical" has not been particularly helpful.

The Public Body maintains that it has complied with guidance from the Court of Appeal and the OIPC's Privilege Practice Note. This is not borne out by the Public Body's Indices and subsequent correspondence. In fact, the Public Body has not complied with even the most minimum imaginable requirements. The circumstances warrant clarity about the number and nature of the records, and complete and coherent descriptions of the records. The Public Body has provided neither.

Legal Analysis

The Public Body bears the burden of proof. Subsection 71(1) of the Freedom of Information and Protection of Privacy Act requires the public body to prove that an applicant has no right of access. At common law, the onus is on the party claiming privilege to establish that the privilege exists.

The OIPC's Privilege Practice Note suggests that the civil litigation standards should inform practice in these inquiries. The civil litigation standard is flexible. What is required in a given case will depend on the circumstances. In Canadian Natural Resources Ltd. v. ShawCor Ltd., 2014 ABCA 289, the Court explained as follows (at para. 42):

> *Therefore, in explaining the grounds for claiming privilege over a specific record, a party will necessarily need to provide sufficient information about that record that, short of disclosing privileged information, shows why the claimed privilege is applicable to it. Depending on the circumstances, this may require more or less than the "brief description" contemplated under Rule 5.7(1)(b) although we expect that oftentimes the brief description will suffice.*

An accurate listing with complete and coherent descriptions is warranted in the context of these inquiries, because the burden rests with the Public Body, and because the privilege question is central to the inquiries-unlike in civil litigation, the question of whether documents are privileged is not an incidental question arising in the context of litigation centered around other issues. Further, complete and coherent descriptions are important in this context because government lawyers may be called upon to give policy advice, as well as legal advice, and any privilege assessment in these inquiries must be made with these dual roles in mind: Pritchard v. Ontario (Human Rights Commission), 2004 SCC 31.

As set out in the External Adjudicator's correspondence, the Public Body here has failed to comply with even the most basic requirements, namely, that all privileged documents be listed and properly accounted for. In Canadian Natural Resources, the Court of Appeal held (at para. 43) that "all relevant and material records must be numbered and, at a minimum, briefly described, including those records for which privilege is claimed".

In light of the foregoing, the Applicant submits that the Public Body has not discharged its burden of establishing privilege.

[Emphasis added]

[para 28] That completed the exchange of correspondence between the External Adjudicator and the parties.

[para 29] To summarize, the following is my best attempt to summarize the count for the Records at Issue based on information provided by the Public Body, without having the majority of the records available to me:

> FOIP Coordinator Exception Sheets:
> #F6748: 114 pages
> #F6749: 1,004 pages
> [The total page count up until 2018 was 1,004 as the Public Body had indicated that #F6748 records were the same as those within #F6749.]
>
> 2017 Affidavit of Records:
> #F6748: 114 pages [last record count is 16 shown as ABJ000101; Public Body has not included number of pages for each record.]
> #F6749: 1,004 pages [may be 1,002 pages because last record count is 605 shown as ABJ001900 with two pages. Public Body has included number of pages for each record.]
>
> [By letter dated February 9, 2018, the Public Body indicated that the records in #F6748 were not all the same as records in #F6749 (and confirmed it had never represented the records were identical) but provided two examples of overlap.]
>
> Public Body Letter dated February 9, 2018:
> In #F6749 JSG000974 (14 pages) (Doc Count 255) is the same as the record in two locations in #F6748 ABJ000072 (14 pages) (Doc Count 13) and ABJ000087 (14 pages) (Doc Count 15).
>
> In the result, the total pages within the Records at Issue: (1,004 plus 114 less 28 pages) is 1,090 pages. Without the complete set of Records at Issue for the Case Files being available to me to compare, the total number of responsive records is difficult to know for certain, particularly where the Public Body has not provided the same information for the Records at Issue throughout.

[para 30] A review of the above clearly points to some of the other difficulties associated with pinning down the parameters of the Records at Issue. I consider it to be a basic and essential requirement of the Public Body's duty to meet its burden of proof to provide an accurate description of the responsive Records at Issue, particularly for Records at Issue made up of 1,090 pages, only 150 pages [53 Records at Issue] of which have been available to the decision-maker for review, and that are listed in two separate Exhibited Indices.

III. ISSUES IN THE INQUIRY

[para 31] The following are the issues in the Inquiry, as set out in the 2014 Notice and reproduced in the 2017 Notice:

1. *Whether the Public Body properly relied on and applied s. 4(1)(q) of the FOIP Act [records excluded under the FOIP Act] to the information in the records.*

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

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

4. *Whether the Public Body properly relied on and applied s. 29 [information that is or will be available to the public] to the information in the records.*

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

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

[para 32] In its 2017 PBSS, the Public Body submitted the following were the only remaining issues in the Inquiry;

(a) *Has the Public Body provided sufficient evidence to discharge its burden under section 71 of the Act with respect to the privileges claimed over the records listed in the updated Index [*sic*] of Records?*

(b) *Has the Public Body provided sufficient evidence to discharge its burden under section 71 of the Act with respect to sections 16, 21, 24, 25, and 27(1)(b) and 27(1)(c) of the Act, as identified in the updated Index* [sic] *of Records?*

[para 33] I begin by disposing of the exceptions listed by the Public Body that have *never* been Issues in this Inquiry. Sections 16, s. 21, and s. 25 of the *FOIP Act* are not at issue in this Inquiry. Some of these exceptions have been referred to by the parties in their respective submission but they are *not* issues in this Inquiry. The Issues in this Inquiry are as outlined in the 2014 Notice and the 2017 Amended Notice *supra*.

[para 34] With respect to s. 27(1), in one Column [Section(s) of the Act] the Public Body lists s. 27(1). In a separate Column [Privilege] the Public Body has described the Records at Issue as *"Litigation Privilege Solicitor/Client Privilege"* for all but 8 records where the Public Body lists those records as *"Litigation Privilege."* The combined effect of populating the Exhibited Indices in this way is that the Public Body has only demonstrated that its claim to solicitor client privilege and/or litigation privilege under s 27(1)(a) and that no other exceptions under s. 27(1). This is consistent with its 2017 PBSS in which it only refers to s. 27(1)(a). While in its earlier 2014 PBIS the Public Body provides general submissions regarding these two non-legal subsections of s. 27(1), which will be discussed *infra,* it failed to reference the s. 27(1)(b) and s. 27(1)(c) exceptions as required: *"limited and specific exceptions."* Neither the Exhibited Indices attached to the 2017 Affidavit of Records nor the 2017 PBSS make any specific reference to s. 27(1)(b) or s. 27(1)(c) of the *FOIP Act.* These exceptions, therefore, will not be considered to be at issue in this Inquiry (discussed *infra*).

[para 35] The Applicant did not take issue with respect to those records listed as NR by the Public Body. However, on examination of the Records at Issue provided to me, there is one instance where NR has been claimed but the record appears responsive to the access to information request in Case File #F6749. Other than to make a finding with respect to that one record *infra*, NR is not an issue that requires further discussion in this Order.

[para 36] On that basis, I find the following to be the issues in the Inquiry: s. 4(1)(q) (records excluded under the *FOIP Act*), s. 24(1)(a), s. 24(1)(c), s. 27(1)(a) solicitor client privilege, s. 27(1)(a) litigation privilege, s. 29(1), and s. 32 public interest. What follows is a detailed restatement of all of the submissions and evidence provided by the Public Body and the Applicant.

IV. SUBMISSIONS FROM THE PARTIES

[Throughout the review of all of the parties' submissions, where I consider it would be helpful to clarify, information will be placed in parentheses and marked by **NOTE**.]

A. APPLICANT INITIAL SUBMISSION [2014 AIS]

[para 37] In accordance with the 2014 Notice of Inquiry, the Applicant provided his/her Initial Submission [2014 AIS] dated July 8, 2014.

SUMMARY OF SUBMISSION

1. The Applicant submits that the Inquiry arises out of the Public Body's refusal to disclose agreements and records related to the agreements and news release regarding the HCCR Litigation, which refusal was based on s. 4(1)(q), s. 24, s. 27 and s. 29 of the *FOIP Act.*

2. Because s. 71(1) places the onus on the Public Body to prove the Applicant has no right to access the requested records [Records at Issue], the Applicant submits s/he will rely on his/her Requests for Inquiry and their attachments for his/her initial submission, which s/he attaches [attached as Schedule A #F6748 Request for Inquiry (including Tabs 1-4) and Schedule B #F6749 Request for Inquiry (including Tabs 1-4)].

FACTS

3. The Applicant submits the essential facts are set out in the 2014 Notice.

ARGUMENT

4. For the reasons set out above, the Applicant reserves the bulk of his/her argument for his/her Rebuttal Submission.

NATURE OF ORDER SOUGHT

5. The Applicant seeks an order under s. 72(2)(a) of the *FOIP Act* requiring the Public Body to provide access to all the Records at Issue or, alternatively, access to those portions of the Records at Issue not subject to s. 4(1)(q), s. 24, s. 27 and s. 29 of the *FOIP Act*.

i. SCHEDULE A: APPLICANT REQUEST FOR INQUIRY #F6748

[para 38] As the Applicant referentially incorporates his/her #F6748 Request for Inquiry as part of his/her 2014 AIS, the following portions are highlighted, as they relate to the Issues in this Inquiry:

1. The Applicant states s/he has asked for an Inquiry seeking both an Order for the Public Body to provide details of the records in relation to the access request, including the number of pages located and an Order for disclosure of the requested records or portions thereof.

2. The Applicant says the following in relation to the decision letter received from the FOIP Coordinator:

> *Unfortunately, [*name of FOIP Coordinator*]'s letter does not indicate how many records were located in relation to our request. In addition, [*name of FOIP Coordinator*] does not provide a description of the records, and does not explain how or why they might be subject to the disclosure exceptions [*s/he*] cites. [*Name of FOIP Coordinator*] also cites the sections of the Act on which [*s/he*] relies, without specifying which paragraph(s) or subsection(s) are said to apply. This makes it very difficult for us to assess whether and to what extent the Ministry is justified in withholding the requested records. We do not understand why [*name of FOIP Coordinator*]'s letter is as opaque and conclusory as it is, given that, pursuant to section 71 of the Act, the Ministry will bear the burden of proving that we have no right of access to these records in any future inquiry by the Commissioner.*

Section 24

3. The Applicant outlines his/her concerns regarding the Public Body's reliance on s. 24, which s/he submits is an exception intended to foster a candid exchange of views in the deliberative process involving and among senior officials, heads of public bodies and their staff. The Applicant states his/her concern is based on the fact that his/her access request is for executed agreements not on

the decision making process that preceded their execution. Citing the language contained in s. 24 of the categories of documents enumerated therein, the Applicant argues that the executed agreements do not fit within any of the categories and, therefore, the Public Body cannot rely on s. 24.

4. The Applicant refers to the Alberta Government *FOIP Guidelines and Practices (2009) [FOIP Guidelines]* and submits the Public Body must demonstrate two prerequisites before the issue of exercise of discretion is relevant: first, that the information sought falls within one of the categories in s. 24 and second, that the disclosure would affect deliberative processes in the future.

Section 27

5. The Applicant cites the *Solicitor-Client [*Privilege*] Adjudication Protocol (2008)* which, at the time of his/her Request for Inquiry, was in place.

6. With respect to reliance on s. 27, the Applicant submits:

    1. Part of his/her request is for *"all agreements between Alberta and any other province or territory concerning lawsuits against tobacco manufacturers",* which agreements cannot meet two of the three pre-conditions for solicitor client privilege set out in *Solosky*: the agreements are not communications between a lawyer and client and do not entail seeking or giving of legal advice. Therefore, it is wrong to refuse the access request under s. 27(1)(a).

    2. Part of the access request is for *"all agreements between [*name of law firm*], or any member of that [*name of law firm*]."* Relying on *Imperial Tobacco* and *Cunningham* in the SCC, the Applicant argues that the Public Body's response to the access request does not demonstrate that disclosure of the agreements would involve disclosure of information on which legal advice could be based or the legal advice itself or could reasonably lead to the discovery thereof. Further, the Applicant submits, based on common sense, many terms of such agreements (such as resolution of disputes) could not possibly touch on legal advice.

    3. In respect of all the requested records, any legal privilege that may have existed has been waived by virtue of public statements, including news releases, an example dated May 30, 2012, which is attached at Tab 1 of Schedule A (of the #F6748 Request for Inquiry).

ii. SCHEDULE A: APPLICANT REQUEST FOR INQUIRY #F6749

[para 39] As the Applicant referentially incorporates his/her #F6749 Request for Inquiry into his/her 2014 AIS, the following portions are highlighted, as they relate to the Issues in this Inquiry:

1. The Applicant states s/he has asked for an Inquiry seeking both an Order for the Public Body to provide details of the records in relation to the access request, including the number of pages located, and an Order for disclosure of the requested records or portions thereof.

2. The Applicant says the following in relation to the decision letter received from the FOIP Coordinator:

    *Unfortunately, [*name of FOIP Coordinator*]'s letter does not indicate how many records were located in relation to our request. In addition, [*name of FOIP Coordinator*] does not provide a description of the records, and does not explain how or why they might be subject to the disclosure exceptions [*s/he*] cites. [*Name of FOIP Coordinator*] also cites the sections of the Act on which [*s/he*] relies, without specifying which paragraph(s) or subsection(s) are said to apply. This makes it very difficult for us to assess whether and to what extent the Ministry is justified in withholding the requested records. We do not understand why [*name of FOIP Coordinator*]'s letter is as opaque and conclusory as it is, given that, pursuant to section 71 of the Act, the Ministry will bear the burden of proving that we have no right of access to these records in any future inquiry by the Commissioner.*

3. With respect to s. 4(1)(q) which excludes classes of records from the scope of the *FOIP Act,* the Applicant submits:

    1. The FOIP Coordinator does not indicate which classes of records described in s. 4(1)(q) are found in the Records at Issue.

    2. The FOIP Coordinator also does not provide a description of the Records at Issue said to fall outside the scope as an excluded record, which under the *FOIP Guidelines* it is required to provide.

    3. The Applicant argues that there is no indication that the Public Body considered following the *FOIP Guidelines,* which provide that a public body should consider accommodating a request for records thought to be excluded from the scope of the *FOIP Act,* outside the FOIP process.

Section 24

4. The Applicant outlines his/her concerns regarding the Public Body's reliance on s. 24, which s/he submits is an exception intended to foster candid exchange of views in the deliberative process involving and among senior officials, heads of public bodies and their staff.

5. The Applicant states that the Public Body has failed to discharge its responsibility under the legislation; that is, the FOIP Coordinator has failed to describe the responsive records and to provide information about what class of records under s. 24 they fall into. The Applicant submits that this vague and conclusory approach suggests the Public Body has failed to thoroughly consider which records or portion thereof can properly be withheld under s. 24. This blanket reliance on s. 24 over the varied classes of documents in such a broad access request is insufficient to meet its statutory responsibility.

6. The Applicant submits the Public Body must demonstrate two prerequisites before the issue of exercise of discretion is relevant: first, that the information sought falls within one of the categories in s. 24 and second, relying on the government's *FOIP Guidelines,* that the disclosure would affect deliberative processes in the future.

7. The Applicant states it is difficult to conceive how many of the types of records requested (such as diaries and travel claims) could possibly constitute "advice from officials" under s. 24, the disclosure of which would hamper candid exchange of views.

Section 27

8. The Applicant cites the *Solicitor-Client Adjudication [*Privilege*] Protocol (2008)* which, at the time of his/her Request for Inquiry, was in place.

9. With respect to reliance on s. 27, the Applicant submits:

    1. Part of his/her request is for *"all agreements between Alberta and any other province or territory concerning lawsuits against tobacco manufacturers",* which agreements cannot meet two of the three pre-conditions for solicitor client privilege set out in *Solosky*: the agreements are not communications between a lawyer and client and do not entail seeking or giving of legal advice. Therefore, it is wrong to refuse the access request under s. 27(1)(a).

    2. Part of the access request is for *"all agreements between [*name of law firm*], or any member of that [*name of law firm*]."* Relying on *Imperial Tobacco* and *Cunningham,* decisions from the SCC, the Applicant argues that the Public Body's response to the access request does not demonstrate that disclosure of the agreements would involve disclosure of information on which legal advice could be based or the legal advice itself or could reasonably lead to the discovery thereof. Further, the Applicant submits, based on common sense, many terms of such agreements (such as resolution of disputes) could not possibly touch on legal advice.

3. In respect of all the requested records, any legal privilege that may have existed has been waived by virtue of public statements, including news releases, an example dated May 30, 2012, which is attached at Tab 1 of Schedule A (of the #F6749 Request for Inquiry).

Section 29

10. Section 29 exempts from disclosure any information that is or will be available to the public. The Public Body's decision is deficient as it failed to provide any information to the Applicant as to how or when the information it was refusing could be accessed by him/her. [**NOTE:** The Public Body's decision in response to the Applicant's second access to information request read, in part, as follows: *Access to all of the information that you requested is denied under … and section 29 (information that is or will be available to the public.) The information on pages 138-171 can be accessed at http://www.qp.alberta.ca/ (Crown's Right of Recovery Act Chapter C-35).*]

B. PUBLIC BODY INITIAL SUBMISSION [2014 PBIS]

[para 40] At para. 4 of its 2017 PBSS, the Public Body refers back to its 2014 PBIS that included the FOIP Coordinator Affidavit dated July 31, 2014 (*infra)*. At para. 28 of its 2017 PBSS, the Public Body states it *"continues to rely on its submissions dated August 6, 2014 with respect to the other sections of FOIPP..."* At para. 27 of its 2017 PBSS, the Public Body makes it clear it continues to rely on the FOIP Coordinator's 2014 Affidavit and the retired judge report [Opinion Letter] notwithstanding the latter evidence has been ruled inadmissible, which ruling is under judicial review. With a view to considering all of the evidence before me, what follows is a detailed overview of the 2014 PBIS, dated and received August 6, 2014 (excluding the Opinion Letter about which I have already made an Order):

1. The Public Body lays out the two access to information requests made by the Applicant it refers to as *"Agreements"* and *"Related Records"* [Records at Issue], the latter referring to all records related to the agreements in addition to a news release dated May 30, 2012.

Index of Records

2. The Public Body describes Tab 1: 114 records for #F6748 and Tab 2: 1,004 records for #F6748 [sic], submitting that the Index specifies the sections relied upon by the Public Body: s. 27(1), s. 24(1), s. 29(1) and s. 4(1)(q). [**NOTE:** The error with respect to the Case File number associated with the second index is repeated in the Public Body's Table of Authorities and is considered a typographical error.]

Issue

3. The Public Body submits that the issue is the Public Body's decision [sic] not to disclose the requested Records at Issue all of which relate to the ongoing HCCR Litigation. [**NOTE:** In the Inquiry, while there is only one Applicant, s/he made two access to information requests for which the Public Body issued two separate decisions.]

Evidence

4. The Public Body relies on the following:

    1. Material contained in the Notice of Inquiry dated June 6, 2014
    2. The Index [sic] at Tabs 1 and 2 of the 2014 PBIS
    3. Affidavit of the FOIP Coordinator dated July 31, 2014
    4. Letter [Opinion Letter] from retired judge [attached at Tab 4 of the 2014 PBIS]. [**NOTE:** The Opinion Letter was the subject of a preliminary evidentiary issue [PEI] raised by the External Adjudicator, which was ruled inadmissible in Decision F2014-D-05/Order F2014-52 [2014 Decision/Order].]

Structure of the Act

5. The Public Body states that while *"section 6(1) of the Act provides an applicant with the right to access records in the custody and control of a public body, section 6(2)* [sic] *does not extend to*

information excepted from disclosure under Division 2 of Part 1 of the Act." [**NOTE:** The reference to Division 2 of Part 1 is correct, which division is made up of the ss. 16 - 29 exceptions to disclosure: some mandatory where the Public Body must refuse access and others discretionary where a public body may refuse access. As a point of clarification, the Public Body's first reference to s. 6(1) as providing a right of access is correct but its reference to s. 6(2) is incorrect. Section 6(2) provides that the right of access provided for in s. 6(1) does not extend to information excepted under Division 2 of Part 1 unless that information can reasonably be redacted.]

6. In the case of discretionary exceptions, the Public Body submits that all final decisions remain with the head of the Public Body, and the Commissioner (or her delegate) pursuant to s. 72(2)(b) of the *FOIP Act* is only authorized to require the Public Body to reconsider its exercise of discretion.

Section 27: Information subject to Legal Privilege or relating to the provision of Legal Services

7. The Public Body reproduces s. 27(1)(a), s. (27(1)(b) and s. 27(1)(c), which it states permits the non-disclosure of information in the circumstances laid out in the statute.

Section 27(1)(a): Legal Privilege

8. The Public Body submits that all the Records at Issue are subject to legal privilege, which includes solicitor client privilege, litigation privilege, common interest privilege and various other forms of privilege that exist at common law.

9. What constitutes any type of legal privilege under s. 27(1)(a) of the *FOIP Act*, the Public Body submits, must be determined by reference to the meaning of those terms in the common law, citing *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner),* 2014 ABCA 231 *[Imperial Oil]*, at para. 37, attached at Tab 5 of the 2014 PBIS, and arguing that these terms do not have a different meaning under the *FOIP Act*.

Solicitor Client Privilege

10. In similar proceedings involving related litigation in NB and BC, retainer agreements were found to be subject to solicitor client privilege, referring to a decision from the NBQB *[Hayes v. New Brunswick (Minister of Justice and Consumer Affairs),* 2008 NBQB 112 *[Hayes]* and Order F13-15 from the BC Information and Privacy Commissioner, attached at Tabs 6 and 7 of the 2014 PBIS, respectively. Both of these decisions, the Public Body points out, were decided after the *Imperial Tobacco* decision from the NLTD referred to by the Applicant in his/her 2014 AIS.

11. After speculating about what a court knew or did not know about the *Imperial Tobacco* decision, the Public Body returns to the *Hayes* decision, which it states *"unequivocally held that the contingency fee agreement was subject to solicitor-client privilege."* Turning next to the BC case, the Public Body cites it as saying, *"[t]he law in BC clearly provides that the terms of … a solicitor-client relationship contained in a retainer or contingency fee agreement - including information relating to financial arrangements - relate directly to the seeking, formulating or giving of legal advice and are privileged."* The Public Body states these two decisions are consistent with a leading case *Descôteaux* from the SCC.

12. The Public Body submits that privilege protects everything involved in a communication between the lawyer and the client and not just the words containing legal advice, which is why the concept of severing unprivileged materials does not apply. So long as the confidential communication between the client and the lawyer relate to the provision of confidential legal advice, all the information is privileged. Thus, the Public Body argues *"all parts of the Agreements are privileged in their entirety. Severance is inapplicable because no part of the communication is unprivileged."*

13. The Public Body argues that agreements between the client, the Province of Alberta, and any of the lawyers acting for it, (and records related to the agreements) are communications between solicitors and their client, which are excepted under s. 27(1)(a) as subject to solicitor client privilege.

Litigation and Common Interest Privilege

14. The Public Body submits that because of *"any legal privilege"* in the language in s. 27(1)(a), it is unnecessary to determine whether solicitor client privilege encompasses litigation privilege and/or common interest privilege. [**NOTE:** It is only fair to mention that these submissions were prepared several years before the most recent decisions from the SCC in 2016 that provided further understanding and clarification of solicitor client privilege and litigation privilege, which will be discussed *infra.*]

15. The Public Body cites two decisions regarding litigation and common interest privilege, attached at Tab 10 and Tab 11: *"[l]itigation privilege encompasses all communications between the client and his or her solicitor on the one hand, and third parties on the other hand, which are made for the purpose of pending or contemplated litigation"* and *"[*c*]ommon interest privilege applies where several persons have a common interest in pending or anticipated litigation, whether or not they are all parties to the litigation (or the same litigation)."*

Legal Privilege is categorical and not weighed against other interests

16. The Public Body submits that legal privilege is not a harm-based exception as it is a class privilege that does not require a case-by-case balancing of competing interests or weighing of harm that may result from disclosure.

17. Quoting from a BCSC decision, the Public Body submits that the legal privilege exception is *"paramount to the provisions of the statute that prescribe the access to records that government agencies and other public bodies must afford. It was enacted to ensure that that [*which*] would at common law be the subject of solicitor-client privilege remained privileged. There is absolutely no room for compromise …The objective of s. 14 is one of preserving a fundamental right that has always been essential to the administration of justice and it must be applied accordingly."*

18. As such, the Public Body submits that the inclusion of s. 27 in the statute, is the embodiment of the public interest and "*[t]here is no room for finding that legal privilege does not exist because of some other value contained in FOIPP (such as any perceived "public policy of openness")*."

19. The Public Body submits that on this basis all the Records at Issue are protected by legal privilege, a conclusion confirmed by the report of the retired judge [Opinion Letter]. [**NOTE:** At the time the Public Body provided its 2014 PBIS, the issue regarding the admissibility of the Opinion Letter, to which the Public Body refers, had not been decided.]

Legal Privilege has not been waived

20. The Public Body argues that various statements made by the Minister of Justice and other government representatives do not evince an intention to waive solicitor client privilege for any of the Records at Issue. At para. 32, the Public Body cites a passage from Alberta Hansard as follows:

> *Well, Mr. Speaker, I am rather surprised to get this information because I know this member is a lawyer of many years, If he doesn't believe me that's fine. But I'm going to quote the former president of the Law Society who sent me an e-mail today. [*His/her*] name is [*name*]. [*S/he*] indicated:*
>
> > *The disclosure of such information can be expected to be of benefit to the opposing litigants, in this case to tobacco companies … Disclosure of the contingency [fee] agreement would almost certainly assist the defendants in fighting the case. Releasing that type of information while the lawsuit is ongoing would be unusual and ill advised.*
>
> [**NOTE:** The Alberta Hansard transcript is dated December 4, 2012, shortly after the access to information decisions were made by the Public Body. The FOIP Coordinator, in his/her 2014 Affidavit, also references this passage from Alberta Hansard *infra* and, like the FOIP Coordinator, the Public Body, in its submission, does not provide any explanation as to how the Alberta Hansard transcript is evidence for the statement it purports to support; that there has been no

intention to waive legal privilege. Rather, the passage does appear to be evidence regarding a factor the Public Body considered in making its decisions to deny access.]

21. The Public Body states that other BC decisions have held that similar (public) statements by members of other provincial governments *"were not sufficient to constitute an intention to waive the respective contingency fee agreements"* and that there is nothing in the present Inquiry justifying coming to a different conclusion. [**NOTE:** It is assumed the Public Body meant waiver of privilege not waiver of the contingency fee agreements.]

22. The Public Body then addresses the issue with respect to whether some public comments made by the Government, which may have disclosed parts of the CFA, constituted waiver. The Public Body submits that even if disclosure of some aspects of the CFA constitutes partial waiver to the extent of that information, that does not justify disclosure of any other information about the CFA. Stating there is nothing in this case to justify a different conclusion, again relying on the NB and BC decisions, the Public Body states that public statements about aspects of the contingency fee agreement are *"not misleading or unfair, and did not justify extinguishing privilege."*

Summary of Legal Privilege under s. 27(1)(a)

23. In summarizing, the Public Body submits that the Records at Issue are excepted from disclosure because they are subject to legal privilege, partial waiver of which relates only to that information, while the remainder remains privileged.

[**NOTE:** The Public Body has claimed s. 27(1) in the Exhibited Indices to the 2017 Affidavit of Records but has failed to specify on which paragraph under the subsection it is relying. With respect to s. 27(1)(a), the Public Body has populated the Privilege Column with both solicitor client privilege and litigation privilege.]

Section 27(1)(b): Information in relation to the provision of Legal Services

24. This part of s. 27, the Public Body submits, relates to the provision of legal services, which Alberta Justice provides to all departments, including the Public Body.

25. The Public Body submits that *"it is patently evident that section 27(1)(b) squarely and literally describes the information in the Agreements and Related Records which the applicant seeks to access - namely, information about the provision of legal services."*

26. The Public Body points out that legal privilege is not referred to in s. 27(1)(b) and that *"it is irrelevant and immaterial whether the information relating to the provision of legal services would otherwise be subject to any legal privilege."* The Public Body goes on to submit that this also means the doctrine of waiver plays no role in under s. 27(1)(b).

27. The Public Body submits that the Legislature intended for s. 27(1)(a) and s. 27(1)(b) to be distinct in meaning from each other, the latter not referring to the substance of the legal services provided, and that the previous decisions by the Commissioner restricting s. 27(1)(b) to information about the substance of legal services are incorrect in law.

28. The Public Body submits that s. 27(1)(b) is sufficient to justify its refusal to disclose the Agreements and Related Records.

[**NOTE:** The Public Body has claimed s. 27(1) in the Exhibited Indices but has failed to specify paragraph (b).]

Section 27(1)(c): Information in Correspondence between Alberta Justice lawyers and any other person in relation to the provision of Legal Services

29. In addition to what it submits *supra,* the Public Body submits that s. 27(1)(c) excepts from disclosure any information in *"correspondence"* between Alberta Justice lawyers and any other person in relation to a matter involving the provision of legal services but does not require the information to be subject to legal privilege.

30. The Public Body submits s. 27(1)(c) requires the correspondence be between an Alberta Justice lawyer (or agent) and *"any other person",* which includes clients, other government employees or public bodies, prospective and retained outside legal counsel, opposing counsel, that relates to the provision of legal advice or other services by the Alberta Justice lawyer (or agent).

31. As noted with respect to s. 27(1)(b), the exception in s. 27(1)(c) but does not require the information to be subject to legal privilege. The only requirement, the Public Body argues, is for there to be correspondence between a lawyer or agent of the Public Body and any other person about the provision of legal services, with no reference to the *substance* of those legal services, as that would fall to s. 27(1)(a). As noted with respect to s. 27(1)(b), the Public Body states that this also means the doctrine of waiver has no role to play in s. 27(1)(c). The Public Body submits that s. 27(1)(c) is sufficient to justify its refusal to disclose any information in the Records at Issue relating to the provision of advice or other services by Alberta Justice lawyers (or agents).

[**NOTE:** The Public Body has claimed s. 27(1) in the Exhibited Indices but has failed to specify paragraph (c).]

Summary about s. 27(1)

32. The Public Body submits each of the submissions *supra* is sufficient in and by itself to dismiss the Applicant's access to information requests. If any part of s. 27 applies to any record, it is unnecessary to consider any other exceptions. In the interest of completeness, however, the Public Body continues its submissions with respect to the other exceptions on which it has relied.

Section 24: Disclosure of Advice from Officials

33. After reproducing the s. 24(1) statutory provision in full, the Public Body states that in addition to the legal privilege exception, s. 24 applies to many of the Records at Issue, which are identified in the FOIP Coordinator's 2014 Affidavit as information s/he has determined are described in s. 24(1), discussed *infra*.

Section 4(1)(q): Records not covered by FOIP

34. The Public Body submits that the Applicant has no right to access one Record (Doc Count 418) to which it has applied s. 4(1)(q), which provides where the *FOIP Act* does not apply to a record. The Public Body claims that the Applicant has not raised an issue about whether this record is properly excluded. [**NOTE:** A problem arises as it appears the Public Body has referred to the wrong record. In the Index for Case File #F6749 attached to the 2017 Affidavit of Records; s. 4(1)(q) has not been applied to JSG000418 but has been applied to JSG000218. This matches where it has been applied in the Index for Case File #F6749 Index of Records, at Tab 2 of the 2014 PBIS.]

Section 29(1): Information Readily Available to the Public

35. After reproducing the s. 29(1) statutory provision in full, the Public Body states that it has applied s. 29(1) to those Records at Issue that are readily available to the public and states that the Applicant has not raised an issue about its application of s. 29(1).

Section 32: Information to be Released in the Public Interest

36. Responding to an issue raised by the External Adjudicator, the Public Body responds that s. 32 is not relevant. [**NOTE:** The issue raised by the External Adjudicator in the 2014 Notice was as follows: *Whether public interest under s. 32 of the FOIP Act is an issue in the inquiry*.]

37. After reproducing the s. 32 statutory provision in full, the Public Body submits that when read in context including the title, it is plain s. 32 deals with situations where there is *"an urgent need to disclose information about an emergency involving a risk of significant harm to the environment or health or safety."*

38. Relying on *IMS Health (Canada) v. Alberta (Information and Privacy Commissioner),* 2008 ABQB 213*,* attached at Tab 13*,* the Public Body argues that s. 32 must be read as a whole as dealing with

emergencies involving risk of significant harm and that s. 32(1)(b) *"cannot be read as* a *disembodied, stand-alone provision."*

39. The Public Body remakes its earlier submission (see para. 16 *supra*) and refers to case law to support its argument that legal privilege is a class privilege and does not require case-by-case balancing of interests and that including s. 27 in the *FOIP Act "is the embodiment of the public interest."* Short of an emergency of the type referred to in s. 32(1)(a), the remaining part of s. 32 does not provide the basis for weighing public interest in disclosure against the public body of rigorously protecting legal privilege.

40. Section 32, the Public Body submits,*"does not mean "where the public is interested", but rather means "where it is in their best interests" in some emergent and potentially harmful situation that would justify an override of other exceptions to disclosure in the Act."* If s. 32(1)(b) had any application, it would allow a public body or the Commissioner to override both mandatory and discretionary exceptions to disclosure. Referring to the *Imperial Oil* decision in the Alberta Court of Appeal, the Public Body submits that *"the Commissioner does not have any authority to override privilege by consideration of public policy, such as any perceived "public policy of openness"."* [**NOTE:** There are no mandatory exceptions at issue in this Inquiry.]

Summary

41. The Public Body submits that the Records at Issue are excepted from disclosure by one or more parts of s. 27(1), s. 24, and s. 29(1), and that the *FOIP Act* does not apply to one record by virtue of s. 4(1)(q). [**NOTE:** To be clear, I will repeat what I said *supra.* A problem arises as it appears the Public Body has referred to the wrong record. In the Index for Case File #F6749 attached to the 2017 Affidavit of Records; s. 4(1)(q) has not been applied to JSG000418 but has been applied to JSG000218. This matches where it has been applied in the Index for Case File #F6749, at Tab 2 of the 2014 PBIS.]

i. TAB 3 OF 2014 PBIS: FOIP COORDINATOR AFFIDAVIT [2014 AFFIDAVIT]

[para 41] At Tab 3 of its 2014 PBIS, the Public Body attached the FOIP Coordinator's 2014 Affidavit, sworn July 31, 2014. The Public Body states in its 2017 PBSS that it continues to rely on this evidence. It is important, therefore, to review the 2014 Affidavit in detail. I do so now:

1. The affiant states s/he employed by the Public Body as the FOIP/HIA Coordinator.

2. As part of his/her duties, the FOIP Coordinator states s/he received two access requests (from one Applicant). S/he summarizes the text of the access to information requests, indicating that all the requested information related to the HCCR Litigation, *"a claim against the tobacco companies for the* [sic] *all the health care costs attributable to smoking which were caused by the tobacco company's wrongful acts."*

3. Exhibit A to the 2014 Affidavit is the May 30, 2012 News Release announcing the Public Body had retained [name of law firm] to file a $10 Billion lawsuit, joining other provinces with similar litigation against tobacco manufacturers. Exhibit B to the 2014 Affidavit is a copy of the Statement of Claim filed by the Public Body on June 8, 2012, initiating the HCCR (CRA) Litigation.

4. The affiant swears s/he collected and reviewed the responsive records to the Applicant's two access to information requests: 114 responsive records for #F6748 and 1,004 for #F6749, attesting that, while doing so, s/he was aware of the ongoing HCCR Litigation and the need to be cognizant of possible legal privilege and other exemptions.

5. The FOIP Coordinator outlines his/her understanding of privilege, which s/he indicates was the basis on which s/he reviewed the responsive Records at Issue. S/he paraphrases (without referring to it as

such, the *Solosky* test) for solicitor client privilege and the dominant purpose test for litigation privilege. S/he also states, in part, as follows:

> *It is my understanding that legal privilege as described in s. 27(1)(a) of the Freedom of Information and Protection of Privacy Act includes solicitor-client privilege and other forms of legal privilege under the common law such as litigation privilege and settlement privilege. Sections 27(1)(b) and (c) include other types of exemptions which may be different than legal privilege under the common law.*

6. From his/her review of the responsive records, the affiant found the large majority are privileged and lists the key indicators present in the records suggesting privilege: correspondence to and from the Public Body lawyers and lawyers at Alberta Justice and Solicitor General; records attached to correspondence to or from a lawyer; communication between employees of a public body quoting legal advice given by a lawyer; information relating to an existing or contemplated lawsuit.

7. The affiant points to Exhibit C for #F6748 and Exhibit D for #F6749 of his/her affidavit, which s/he indicates are the Exception Sheets setting out which documents (records) are subject to legal privilege or are exempted by s. 27(1)(b) or s. 27(1)(c). S/he collectively describes these as the "Privileged Records." [**NOTE:** The two Exception Sheets that are exhibits to the affiant's 2014 Affidavit are in addition to the two Indices at Tab 1 and Tab 2 of the 2014 PBIS. The former Exception Sheets do not provide *any* description of the records. The affiant does provide some description of the records at para. 13 of his/her affidavit. The Indices at Tab 1 and Tab 2 were not in affidavit form and are undated. The documents outlining the Records at Issue are ***not*** identical with respect to the descriptions (including those at para. 13 of the FOIP Coordinator's 2014 Affidavit) and the sequence of numbers for the records do not match. The exceptions claimed, if reviewed page-by-page, appear to match. It is important to note that the FOIP Coordinator's 2014 Affidavit did *not* follow the Record Form in the *Solicitor-Client Privilege Adjudication Protocol*, the predecessor to the *OIPC Privilege Practice Note*. The Record Form laid out the questions to be answered by an affiant/respondent as to how the record is subject to privilege without revealing any information over which solicitor client privilege had been claimed. The Protocol was not followed.]

8. The affiant goes on to state the *"[p]rivileged Records all relate to the tobacco litigation, and were meant to be confidential"* continuing on to provide a description and/or comment for each sequence of pages for pages 1-1004 inclusive, corresponding to Exhibit D (for #F6749 only). [**NOTE:** To be fair, the FOIP Coordinator may have only provided one Index for #F6749 as s/he may also have also been relying on the fact that the two access to information requests had been consolidated into one Inquiry.]

9. A sample of the descriptions provided by the affiant, based on *"understanding"* and *"belief"* are as follows:

> [at para. 7]
> *It is my understanding that legal privilege as described in s. 27(1)(a) of Freedom of Information and Protection of Privacy Act includes solicitor-client privilege and other forms of legal privilege under the common law such as litigation privilege …*
>
> [at para. 8]
> *It is my understanding that solicitor-client privilege applies where …*
>
> [at para. 9]
> *It is my understanding that litigation privilege applies where documents were created for the dominant purpose of furthering litigation …*
>
> [at para. 13]
> *In particular, from my review of the privileged records, I believe that:*
> *[Page No.] 1-126 Are records prepared for* [sic] *dominant purpose of HCCR litigation …*

[Page No.] 127-130 Are solicitor client records and/or are records prepared for the dominant purpose of HCCR litigation.
[Page No.] 131-137 … Includes correspondence to and from legal counsel.
…
[at para. 14]
I believe that the agreements being sought by the applicant would be privileged. It would be a record of communication between a solicitor and a client, it relates to the seeking of legal advice, and it is intended to be confidential. A fee agreement, such as an agreement between Alberta and its legal counsel, could form the basis for future legal advice or general strategy as the claim progresses - thus this agreement would be privileged.

10. Based on his/her belief, the affiant states, the agreements sought by the Applicant would be privileged. In that regard, s/he states, at para. 14:

    A fee agreement, such as an agreement between Alberta and its legal counsel, could form the basis for future legal advice or general strategy as the claim progresses - thus this agreement would be privileged.

11. The affiant swears the *"Public Body continues to assert privilege over the fee agreement, and has not waived this right."* In support of that submission, the affiant attaches Exhibit E, a transcript of a response the Minister of Justice gave in reply to an MLA, from Alberta Hansard, where the Minister quoted an email that he reported he had received, which reads as follows:

    *Well, Mr. Speaker, I am rather surprised to get this information because I know this member is a lawyer of many years, If he doesn't believe me that's fine. But I'm going to quote the former president of the Law Society who sent me an e-mail today. [*His/her*] name is [*name*]. [*S/he*] indicated:*

    > *The disclosure of such information can be expected to be of benefit to the opposing litigants, in this case to tobacco companies … Disclosure of the contingency [fee] agreement would almost certainly assist the defendants in fighting the case. Releasing that type of information while the lawsuit is ongoing would be unusual and ill advised.*

    [**NOTE:** The Alberta Hansard transcript at Exhibit E is dated December 4, 2012, shortly after the access to information decisions were made by the Public Body. The FOIP Coordinator, in his/her Affidavit, like the Public Body in its submission, does not provide any explanation as to how the Alberta Hansard transcript is evidence for the statement it purports to support; that there has been no intention to waive legal privilege. Rather, the passage does appear to be evidence regarding a factor the Public Body considered it making its decisions to deny access.]

12. The FOIP Coordinator states that from his/her review s/he also found what s/he refers to as *"Related Records"* contain advice, recommendations, analyses or policy options developed for the Public Body and positions, plans, procedures, criteria or instructions developed for the purpose of contractual negotiations, all of which have been withheld under s. 24 of the *FOIP Act*.

13. The FOIP Coordinator concludes his/her affidavit by confirming that the affidavit is made in support of the Public Body's decision not to disclose the records in dispute pursuant to s. 4, s. 24. s. 27(1) and s. 29 of the *FOIP Act.* [**NOTE:** The exceptions referred to by the FOIP Coordinator are correct and match those referred to in the Public Body's access to information decisions and in the 2014 Notice of Inquiry and 2017 Notice of Continuation. The FOIP Coordinator swore his/her affidavit before in-house counsel on July 31, 2014.]

C. PUBLIC BODY SUPPLEMENTARY (INITIAL) SUBMISSION [2017 PBSS]

[para 42] After receiving a portion of the Records at Issue from the Public Body on January 19, 2017 over which legal privilege had not been claimed, I issued the 2017 Notice. In that Notice, I laid out specific evidentiary requirements for the Public Body to meet in order to meet the standard in the Alberta Rules of Court (as approved in *ShawCor*) that are required to demonstrate the applicability of the legal privilege exception, as the records over which it had been claimed had not been provided to me. What follows is a detailed overview of the Public Body's Supplementary (Initial) Submission [2017 PBSS], referred to by the Public Body as its Supplemental Submission(s), dated and received November 15, 2017.

Introduction

1. The Public Body states the Inquiry arises out of two requests for records from one Applicant that pertain to the recovery of tobacco related health care costs that are in the custody of Alberta Health. The Public Body identifies the Applicant by first and last name, by the firm with which s/he is associated and by the fact that his/her firm is one of the defendants in the *"HCCR Litigation."*

2. The Public Body reproduces the information sought by the Applicant in his/her access to information requests for both Case Files [**NOTE:** Access requests reproduced *supra* in the 2014 Notice].

3. The Public Body states it *"withheld a number of records from* (name of the Applicant) *on the basis of sections 16, 17, 24, 25 and 27 of the Act",* a decision the Applicant disagreed with resulting in this Inquiry. [**NOTE:** It is important to note that the s. 16, s. 17 and s. 25 exceptions in the *FOIP Act* are *not* listed in the 2014 Notice, nor in the 2017 Notice nor are they discussed by the Public Body in its 2014 PBIS. These exceptions are *not* Issues in this Inquiry.]

4. The Public Body refers to its 2014 PBIS along with the FOIP Coordinator's 2014 Affidavit. The Public Body states in a footnote to this submission:

   > *Alberta Health continues to rely on those submissions in this inquiry and provides these supplemental submissions to address recent guidance from the Supreme Court of Canada regarding the law of solicitor-client and litigation privilege, and to provide an updated Index* [sic] *of Records (discussed below).* [**NOTE:** The Public Body provided two Indices of records for each Case File, not one consolidated Index.]

5. The Public Body refers to the Decision 2014-D-05/Order F2014-52 in this Inquiry, wherein the Opinion Letter was ruled inadmissible and the Public Body was ordered to produce records for inspection, which the Public Body indicates is under Judicial Review.

6. The Public Body states *"[o]n September 6, 2017, the External Adjudicator wrote to the parties setting out her intention to continue with this Inquiry."* [**NOTE:** The 2017 Notice that was sent out to the parties notifying them that the Inquiry was continuing was as a direct result of the Public Body providing the External Adjudicator with a portion of the Records at Issue, in partial compliance with the 2014 Decision/Order.]

7. The Public Body cites s. 74(4) of the *FOIP Act* submitting that once a decision of the Commissioner is made the subject of a Judicial Review application, the inquiry process is stayed. The Public Body submits that notwithstanding that this Inquiry has been stayed, acknowledging that the application has been adjourned *sine die,* it has undertaken to provide further evidence in support of the refusal to disclose records on the basis of privilege as well as providing an updated Index [sic] or schedule of records in line with current state of Alberta law.

The Supreme Court of Canada on Solicitor Client Privilege and Litigation Privilege

8. The Public Body provides a general overview of solicitor client privilege and litigation privilege: the former applying to communications that entail the seeking or giving of legal advice which are intended

to be confidential by the parties and the latter protecting information from compulsory disclosure of communications and documents whose dominant purpose is for the conduct of litigation.

9. The Public Body submits that the cardinal importance of both types of privileges (both class privileges not to be determined on a case-by-case basis) has been underscored in two recent decisions of the SCC, which ruled that solicitor client privilege is a substantive rule that *"must remain as close to absolute as possible and should not be interfered with unless absolutely necessary"* [*U of C*] and that litigation privilege is likewise *"a fundamental principle of the administration of justice that cannot be abrogated by legislation absent clear, explicit and unequivocal language"* [*Lizotte*]

10. The Public Body goes on to cite additional decisions:

    1. The *British Columbia (Attorney General) v. Lee,* 2017 BCCA 219 *[Lee]* decision found that once the solicitor client relationship is established then privilege applies to *"all communications made within the framework of the solicitor-client relationship."*

    2. The *Pritchard* decision in which the SCC noted that when solicitor client privilege is found it applies to a broad range of communications between lawyer and client and applies in equal force to in-house counsel and private practice lawyers. Relying on the *U of C* decision, the Public Body submits that the fact a lawyer is in-house does not remove the privilege or change its nature.

11. The Public Body confirms that almost all of the information withheld has been done on the basis of s. 27(1)(a) of the *FOIP Act* as information subject to any type of legal privilege. As set out in the 2017 Affidavit of Records (discussed in detail *infra)*, which includes an updated Index [sic] of Records, the large majority of the records have been withheld on the basis of legal privilege, both solicitor client and litigation privilege. The communications, the Public Body submits, entail seeking or giving legal advice intended to be confidential by the parties and *"all of which were prepared for the dominant purpose of prosecuting the CRRA Litigation."* [**NOTE:** The Public Body refers to the CRRA Litigation. CRRA refers to the *Crown's Right of Recovery Act* and is another way of referring to the HCCR Litigation. In this Order, CRA Litigation is used throughout except where a party refers to the HCCR Litigation or CRRA Litigation.]

12. The Public Body cites two decisions from the SCC (*U of C* and *Lizotte*) where the Court decided that the *FOIP Act* does not confer upon the Commissioner the power to compel, review and rule upon assertions of solicitor client privilege and that, therefore, records over which a public body asserts legal privilege, the records are not compellable or reviewable by the Commissioner.

Issues

13. The Public Body asserts there are only two remaining issues before the External Adjudicator, which it states are as follows:

    (a) Has the Public Body provided sufficient evidence to discharge its burden under section 71 of the Act with respect to the privileges claimed over the records listed in the updated Index [sic] *of Records?*

    *(b) Has the Public Body provided sufficient evidence to discharge its burden under section 71 of the Act with respect to sections 16, 24, 25, and 27(1)(b) and 27(1)(c) of the Act, as identified in the updated Index [*sic*] of Records?*

    [**NOTE:** The Public Body's list of issues is silent on s. 29(1) and s. 4(1)(q) even though these sections are Issues in this Inquiry. As noted *infra,* the Applicant also refers to exceptions not Issues in this Inquiry: s. 16, s. 21 and s. 25. The exceptions cited by the Public Body do not line up with para. 6 of the 2014 PBIS that clearly states that the Index [sic] specifies that the Public Body has relied on the following provisions: s. 27(1), 24(1), 29(1), s. 4(1)(q). The 2014 Notice and the 2017 Notice both stipulated these same exceptions. But the Public Body, in paras. 3 and 13 of its 2017 PBSS, refers to the s. 16, s. 24, s. 25, s. 27(1)(b) and s. 27(1)(c) exceptions as issues but provides no further

submission or evidence. In para. 28 *infra* the Public Body states it relies on its 2014 PBIS with respect to other exceptions "*as set out in the updated Index* [sic] *of Records."* The Exhibited Indices of Records *make no reference to any of these exceptions*.]

The Affidavit of [name of in-house Counsel] [2017 Affidavit of Records]

14. The Public Body submits that it provided the Index [sic] of Records attached to the FOIP Coordinator's Affidavit in lieu of providing the documents to the Commissioner to review. [**NOTE:** There were two Indices attached to the FOIP Coordinator's 2014 Affidavit. There were two different Indices at Tabs 1 and 2 of the 2014 PBIS that did not form part of any affidavit. At the time the 2014 Affidavit was prepared and sworn, the OIPC had the *Solicitor Client Privilege Adjudication Protocol* in place recommending a format for an affidavit in lieu of having to provide records over which privilege had been claimed. The FOIP Coordinator's 2014 Affidavit did not follow the format, which recommended attaching an Index or Schedule of Records to the affidavit.]

15. As well as listing the basis on which the records were being withheld in the Index [sic] of Records, the Public Body adds that the FOIP Coordinator's 2014 Affidavit also *"described in general terms why the records were privileged."*

16. Due to recent legal developments, the Public Body indicates it has provided an updated Index [sic] of Records (two Exhibited Indices attached to the 2017 Affidavit of Records) to reflect current practice for dealing with privileged records in an Affidavit of Records, citing the *ShawCor* decision, which the Public Body cites as follows:

> *In summary, records where privilege is asserted must now be dealt with individually. Each record must be numbered in a convenient order and briefly described, short of disclosing privileged information. Records may be bundled where privilege is being asserted providing that the bundled record otherwise meets the requirements of Rule 5.7. In accordance with Rule 5.8, a party must also identify the grounds for claiming privilege with respect to each record in order to assist other parties in assessing the validity of the claim. This latter requirement means that, for each record, a party must state the particular privilege being asserted and describe the record in a way, again without revealing information that is privileged, that indicates how the record fits within the claimed privilege …*

17. The Public Body asserts that its updated Index [sic] of Records conforms with the *OIPC Privilege Practice Note* released by the Commissioner after the SCC decision in *U of C.* [**NOTE:** The Public Body refers to an Index of Records. The Public Body is not correct. There is, in fact, a separate Exhibited Index for each of the two Case Files in the consolidated Inquiry, attached as Exhibits A and B to the 2017 Affidavit of Records, at Tabs A and B.]

18. The Public Body indicates that certain information has been redacted from the updated Index [sic] of Records because it would allow a party to ascertain the content of privileged information. [**NOTE:** The redactions only appear in the Index for Case File #F6749. The Public Body has not provided an explanation as to why the contents of this Index of Records attached to the 2017 Affidavit of Records have been REDACTED other than to indicate that the redactions are to shield information that could reveal privileged information. The Public Body's redactions of the 2017 Affidavit of Records will be discussed *infra*.]

19. The Public Body states that at no point has it provided copies of any records over which it has claimed privilege for review by the External Adjudicator or the Commissioner as part of this Inquiry. The Public Body asserts it has not waived privilege over any of the information in the Records at Issue. [**NOTE:** In the 2014 Decision/Order dealing with the PEI, the issue of waiver or partial waiver was discussed briefly by the External Adjudicator but no decision was made in that regard. Waiver is not an issue in this Inquiry.]

Section 27(1)(a) - Legal Privilege

20. The 2017 Affidavit of Records points to the fact that most of the records in the updated Index [sic] of Records have been withheld on the basis of s. 27(1)(a), the majority of those subject to, the Public Body submits, both solicitor client and litigation privilege. [**NOTE:** The two Exhibited Indices show that all of the Records at Issue over which legal privilege has been claimed list s. 27(1) and both types of privilege are named (except for 8 Records at Issue where only litigation privilege is named in the Privilege Column. However, the Public Body has not indicated on which paragraph under s. 27(1) it is relying.]

21. The Public Body devotes paras. 21-23 to the issue of whether it was appropriate for the Public Body to withhold the Records at Issue from the External Adjudicator. [**NOTE:** The issue of providing the Records at Issue claimed to be subject to legal privilege to the External Adjudicator is not an issue in this Inquiry. The Public Body states: *"… solicitor client privilege may be lost if records were provided to the External Adjudicator as a party to this Inquiry."* To be clear, the External Adjudicator is not a party to the Inquiry.]

22. The Public Body submits that the 2017 Affidavit of Records is evidence that *"the records over which solicitor-client privilege have been claimed in this inquiry all involve communications where legal advice was either sought or given, in circumstances where the communication was intended to remain confidential."* [**NOTE:** The 2017 Affidavit of Records does not have any instance where solicitor client privilege alone has been claimed for a record. There are 8 records where litigation privilege alone has been named. All of the remaining records show s. 27(1) as the exception claimed, along with listing both litigation privilege and solicitor client privilege under the Privilege Column in the Exhibited Indices.]

23. In that regard, the Public Body submits that each record is adequately described to allow for a determination whether a claim for privilege is appropriate. The descriptions are titled by column, which provide the following information:

    - *Page numbers;*
    - *Dates(s)* [sic] *of the records;*
    - *Parties to the communications:* [sic]
    - *Description of the type of document:* [sic]
    - *The section of the Act applied to withhold the information; and*
    - *The type of privilege claimed.*

    [**NOTE:** As discussed *infra,* the column headings for the descriptions differ between the two Exhibited Indices for the two Case Files.]

24. The Public Body submits that *"*[t]*his type of information was more than sufficient for adjudicators in both Alberta and British Columbia … where they were able to make a determination about privilege, without reviewing the documents at issue."* [**NOTE:** The details of these decisions will be discussed *infra.*]

25. The Public Body submits that in the *U of C* decision the SCC confirmed that the burden or standard for it to assert legal privilege is no higher than what is required in civil litigation practice, which it asserts the 2017 Index [sic] of Records meets: the burden is a balance of probabilities, not absolute certainty under s. 71 of the *FOIP Act.*

26. The Public Body states that, in addition to the 2014 Affidavit of the FOIP Coordinator, it continues to rely on the report from the retired judge [Opinion Letter] and its submission from September 12, 2014 [2014 PBIS] indicating that the 2014 Order regarding the report is stayed. [**NOTE:** The 2014 Decision/Order held the Opinion Letter to be inadmissible.]

Other Sections of FOIPP

27. The Public Body indicates that it continues to rely on its 2014 PBIS with respect to the other sections of the *FOIP Act,* as set out in the updated 2017 Index [sic] of Records. [**NOTE:** The Public Body does not list the specific exceptions in its 2014 PBIS. Nor does it make reference to the 2017 Affidavit of Records, which also provides testimony with respect to the s. 24 exception. This general reference to previous submissions also did not assist in clarifying the discrepancies between the exceptions the Public Body refers to in para. 3 of the 2017 PBSS when compared with the exceptions listed in the 2014 Notice and the 2017 Notice.]

Conclusion and Summary

28. The Public Body concludes by submitting that based on the 2017 Index [sic] of Records attached to the 2017 Affidavit of Records, both of which are in accordance with the law and practice in Alberta, demonstrate the basis for withholding records on the grounds described therein. On this basis, it submits, the function of the Commissioner through its External Adjudicator should be concluded.

i. TAB A OF 2017 PBSS: AFFIDAVIT OF IN-HOUSE COUNSEL [2017 AFFIDAVIT OF RECORDS]

[para 43] The 2017 Affidavit of Records, sworn November 15, 2017 by in-house counsel, was attached as Exhibit A to the 2017 PBSS and provided the following evidence:

1. The affiant identifies him/herself as the lawyer, employed by Alberta Justice and Solicitor General, who is responsible for supervising and instructing counsel in the HCCR litigation under the *Crown's Right of Recovery Act* and as such has personal knowledge of the facts and matters deposed in his/her affidavit, except where stated to be based on information and belief and, in that case, s/he states s/he verily believes them to be true.

2. The affiant swears that his/her affidavit is supplemental to the 2014 Affidavit of the FOIP Coordinator, which the Public Body submitted as part of the 2014 PBIS and that the 2014 Affidavit sets out the basis upon which the Public Body has refused to provide access to certain records in response to the requests by the Applicants [sic] for information related to the HCCR Litigation. [**NOTE:** There is only one Applicant in this Inquiry. The 2014 Affidavit was discussed *supra.*]

3. Referring to the FOIP Coordinator's 2014 Affidavit, the affiant states the affidavit sets out the basis on which the Public Body refused to provide records in response to two access requests related information pertaining to the HCCR Litigation. The Public Body identifies the requester - the Applicant - by first and last name, profession as a lawyer, the name of the lawyer's law firm and the fact that the named firm represents one of the defendants in the HCCR litigation. [**NOTE:** The Public Body's evidence referencing the identity of the Applicant will be discussed *infra.*]

4. The affiant confirms that after the Minister of Justice's decision to retain the CRA Litigation law firm, it retained another law firm to assist in negotiating and drafting the CFA. This was done, s/he attests, as a result of the fact Justice and Solicitor General rarely utilize CFAs and required legal advice on the agreement it was negotiating with the CRA Litigation law firm. [**NOTE:** The affiant provides the names of the two law firms but does not provide the names of individual lawyers within the two firms.]

5. The communications between lawyers from the outside firm and employees of Justice and Solicitor General were all privileged and confidential communications and all contained legal advice. [**NOTE:** The affiant does not identify the employees of Alberta Justice and Solicitor General to whom s/he is referring who may have been involved in discussions about legal advice.]

Privileged Records

6. The affiant indicates s/he has reviewed all of the records in the Exhibited Indices marked as Exhibit A and Exhibit B (Tab A Index and Tab B Index respectively) attached to his/her Affidavit and states that

the Public Body objects to producing the records listed as solicitor client privilege, litigation privilege, or both.

7. The affiant states that *"[g]enerally, solicitor client privilege is claimed by the Public Body as client over records that are"*:

    (a) Records, email or other correspondence to and from Alberta Health lawyers and lawyers at Alberta Justice and Solicitor General;

    (b) Records that are attached to correspondence to or from a lawyer;

    (c) Records of communications between employees of the Public Body quoting referencing [sic] legal advice given by a lawyer; and

    (d) Records documenting legal advice provided by a lawyer.

8. Separate from solicitor client privilege, the affiant swears the Public Body also claims litigation privilege. The affiant states all of the records identified as litigation privilege *"were created for the dominant purpose of facilitating, furthering and/or dealing with the contemplated or ongoing HCCR litigation."*

9. Records found in the Exhibit A Index *generally* concern the negotiations of the CFA with the [name of law firm]. The affiant states that records marked as privileged in the Exhibit A Index are *generally*:

    *(a) Records describing legal advice between lawyers from [*name of law firm*] and the Public Body regarding the terms of CFA,*

    (b) Records describing legal advice from Alberta Health lawyers and lawyers at Alberta Justice and Solicitor General regarding the terms of the CFA, and the HCCR litigation generally,

    *(c) Records describing communications between the Public Body and [*name of law firm*] regarding the CFA or the HCCR litigation.*

10. The affiant states further that the records marked as privileged in this set of records "*all involve legal counsel, were all meant to be confidential, and all were for the purpose of giving or receiving legal advice. All of the records identified as litigation privilege were also created for the dominant purpose of facilitating, furthering and/or dealing with the contemplated or ongoing HCCR litigation."*

11. The affiant swears that the records marked as privileged in the Tab B Index *generally* all describe legal advice from the Public Body's lawyers and the Alberta Justice and Solicitor General lawyers regarding the CFA with [name of law firm], the May 31, 2012 News Release and the HCCR Litigation *generally.*

Section 24 Records

12. The affiant states s/he also found from his/her review of the records in the Exhibit A and Exhibit B identified by s. 24, are records that contain *"advice, proposals, recommendations, analyses or policy options developed for Alberta Health"* and *"contain positions, plans, procedures, criteria or instructions developed for the purpose of contractual negotiations by Alberta Health, or considerations that relate to those negotiations."*

13. The affiant attests that *"[n]othing in this affidavit should be taken as a waiver or partial waiver of any form of privilege including solicitor client and litigation privilege which has been claimed over the records or any portion thereof. All such forms of privilege continue to be claimed and maintained over the records."*

14. The affiant concludes by stating that s/he has sworn the 2017 Affidavit of Records for consideration by the Information and Privacy Commissioner in this Inquiry. [**NOTE:** The 2017 Affidavit of Records was provided to the External Adjudicator as the Commissioner's official delegate in the Inquiry and has not been shared with the Commissioner.]

D. APPLICANT REBUTTAL SUBMISSION [2017 ARS]

[para 44] Complying with the Schedule set out in the 2017 Notice, on December 20, 2017, the Applicant provided his/her Rebuttal Submission [2017 ARS], referred to by the Applicant as a Supplemental Submission. What follows is a detailed overview of the 2017 ARS.

Part 1: Summary of submission

1. In paras. 1-6, the Applicant provides a summary that included the following:

- The Inquiry arises out of the Public Body's refusal, based primarily on the s. 27 solicitor client privilege exception, to disclose records regarding the HCCR Litigation. The Public Body has not discharged its burden pursuant to s. 71(1) of the *FOIP Act* to prove that the sweeping access refusals are necessary and appropriate. The Applicant, whose identity is not a relevant consideration, submits that the 2017 Affidavit of Records has not established that solicitor client privilege applies to the records requested by the Applicant and, that, at the very least, s/he is entitled to access to some of the records, albeit in redacted format.

- Even if some of the statutory exceptions apply, the records should be disclosed to the Applicant because disclosure is clearly in the public interest, pursuant to s. 32(1)(b), which overrides all other sections of the *FOIP Act.* Public interest applies in the circumstances of this case, which involves *"Tobaccogate"*, the biggest public corruption scandal in recent memory in Alberta. Widely publicized in the media, the scandal relates to the process used by government with respect to retaining counsel in the HCCR Litigation, to which the Records at Issue relate. The public interest in the *"Tobaccogate"* "corruption was sufficiently significant to result in three separate, publicly-funded, independent investigations/inquiries between 2013-2017, one of which concluded that the government failed to disclose relevant information to the Ethics Commissioner. The s. 32(1)(b) test has been met and, therefore, the public interest in disclosure of the Records at Issue, which will shed light on the issues, outweighs the public interest in maintaining solicitor client privilege.

[**NOTE:** In support of these submissions, the Applicant provides an Affidavit of a legal assistant, to which is attached four exhibits, including the three public reports to which s/he refers: Exhibit A: Ethics Commissioner Wilkinson's Report; Exhibit B: The Iacobucci Report; Exhibit C: Acting Ethics Commissioner Fraser's Report; and Exhibit D: CBC News Article dated April 3, 2017.]

Part 2: Facts

2. The Applicant submits that the essential facts are set out in the 2014 Notice.

Part 3: Argument - The Applicant's identity is not relevant

3. In paras. 8-9 the Applicant argues in its submissions and evidence, the Public Body highlighted his/her identity as a lawyer representing one of the defendants in the HCCR Litigation. S/he submits that the identity of an applicant is not a relevant consideration for any of the statutory tests for non-disclosure under the *FOIP Act.*

4. The Applicant uses the s. 27 exception as an example: a Record at Issue is either privileged or not. The Applicant's identity has nothing to do with the legal test for establishing privilege. In other words, the status of a document as privileged or not does not turn on who has made the access request (citing Order F2009-007, at para. 43).

Part 3: Argument - Privilege

5. The Applicant does not take issue with the Public Body's submission on the law of privilege but contends that it has not provided sufficient information to the External Adjudicator in order for her to make a determination as to whether the Records at Issue are, in fact, privileged.

6. The Applicant states that it appears the Public Body is claiming both solicitor client and litigation privilege over all the records where privilege has been claimed. Citing record ABJ000743 [sic] as an example, which is described as *"Appendix A - Law Society of New Brunswick - Code of Professional Conduct"*, the Applicant submits the descriptions of the records are not sufficiently detailed to allow for an analysis of how or why either of the two types of privilege apply to any given record. [**NOTE:** The Applicant cites the incorrect Doc Id for the Record *"Appendix A - Law Society of New Brunswick - Code of Professional Conduct."* The correct Doc Id is ABJ000043, which is Doc Count 3 in Case File #F6748.]

7. The Applicant points out that the Public Body has failed to provide any explanation as to why no Records at Issue over which it has claimed privilege can be disclosed in redacted form.

Part 3: Argument - Section 32(1)(b): Disclosure of the Requested Records is Clearly in the Public Interest

8. Regardless of what statutory exceptions may apply, the Applicant submits the Records at Issue should be disclosed where, citing s. 32(1)(b) of the *FOIP Act*, it is clearly in the public interest to do so.

9. Relying on the s. 32(1)(b) test summarized in Order 97-018, the Applicant acknowledges s/he bears the burden of proof to meet the pre-condition that disclosure of information is *"clearly a matter of public interest."* The Applicant states, relying on Order 2000-003, that s/he must show that disclosure is a matter of compelling public interest, not mere interest or curiosity, and relying on Order F2006-010, the Applicant submits that *"the benefits of disclosure to the public interest will override any of the public and private interests that the Act has created exceptions to preserve."*

10. Relying on Order F2007-014, the Applicant submits that s.32(1) overrides all sections of the *FOIP Act,* including s. 27. This means, the Applicant argues, even privileged records must be disclosed if it is clearly in the public interest to do so.

11. The Applicant refers to the Alberta government *FOIP Guidelines* that lists information *"about corruption or serious misuse of public funds"* as one example where disclosure may be clearly in the public interest.

12. The Applicant submits that the Records at Issue relate to the procurement process in awarding the contract for legal services in the HCCR Litigation, a scandal dubbed *"Tobaccogate"* after the media raised concerns about a conflict of interest and the firm which was awarded the contract. The serious public concerns about (potential) corruption in the procurement process resulted in three independent investigations/inquiries, which the Applicant lists [2013 Ethics Commissioner Wilkinson Inquiry; 2015 Iacobucci Review Report and 2016 re-investigation by Acting Ethics Commissioner Fraser] and attaches their respective reports as Exhibits A, B and C to an Affidavit (Legal Assistant).

13. The Applicant stresses the significance on a number of matters involving access to information:

    - the original inquiry before Ethics Commissioner Wilkinson was initiated as a result of information made public under access to information

    - media reports on *"Tobaccogate"* and in the Acting Ethics Commissioner Fraser report reference *"leaked"* documents purportedly emanating from the Public Body

    - non-disclosure is a recurring theme through all three investigations/inquiries into the *"Tobaccogate"* scandal, using Iacobucci's investigation, as an example, who found government

"failed to adequately disclose information to the very individual that had been tasked with investigation the Tobaccogate scandal at taxpayers' expense."

14. The Applicant states s/he is unaware of any case where disclosure has been ordered based on s. 32(1)(b) and submits that in order for the section to have any meaning, there must be some circumstances where it would apply. The Applicant argues, at para. 23, that: *"[o]ne would be hard pressed to think of more compelling circumstances creating a public interest in disclosure of privileged information than the present: the Requested Records relate to the biggest government corruption scandal in recent memory, and publicly-funded investigations into that scandal have been vexed by the inadequate disclosure of relevant information by government.*"

15. The Applicant concludes by stating that public interest in disclosure rises above mere curiosity or interest because Government accountability and transparency are at issue and at stake. In the unique circumstances of this case, public interest in disclosure outweighs the public interest in maintaining legal privilege, if any, over them.

Part 4: Nature of order sought

16. The Applicant seeks an Order pursuant to s. 72(2)(a) of the *FOIP Act* requiring the Public Body to provide access to all the Records at Issue, or, alternatively, an Order requiring the Public Body to provide access to those portions of the Records at Issue not subject to the exceptions claimed: s. 16, s. 21, s. 24, s. 25 or s. 27. [**NOTE:** The Applicant has referred to some exceptions not at issue in this Inquiry (s. 16, s. 21 and s. 25) and has failed to refer to the section excluding records and another discretionary exception that are at issue (s. 4(1)(q), s. 29].

E. PUBLIC BODY REBUTTAL SUBMISSION [2017 PBRS]

[para 45] Complying with the Schedule set out in the 2017 Amended Notice, as subsequently modified, the Public Body, on January 17, 2018, provided its Rebuttal Submission [PBRS], which it referred to as its Reply to Rebuttal Submissions of the Applicant. What follows is a detailed overview of the 2017 PBRS:

Identity of the Applicant

1. The Public Body submits that the Applicant has suggested that the Public Body "*has placed inappropriate emphasis on the identity of the Applicant and that this was somehow a deciding factor with respect to the exercise of discretion that was made to withhold the records*" and "*wishes to clarify that no decisions with respect to exemptions were ever made with regard to the identity of the Applicant.*"

2. The Public Body agrees that the identity of an applicant is not a relevant factor. Instead, it argues, the relevant analysis is whether any of the Records at Issue fall under the exceptions set out in the statute, in this case, primarily exempted on the basis of legal privilege — both solicitor client and litigation — given that the Records at Issue relate to ongoing tobacco litigation in Alberta.

Section 32 - Public Interest Override

3. The Public Body submits that the Applicant has suggested that the accountability and transparency of the Government are at issue, such that the Applicant argues public interest in disclosure outweighs the public interest in maintaining legal privilege, noting the Applicant attached reports from the three public investigations/inquiries that have been conducted with respect to the alleged conflict of interest of a former premier.

4. The Public Body submits that the outcome of the three reports, on which the Applicant relies, is that there was no evidence of wronging or impropriety regarding the selection of the HCCR Litigation counsel by the former Premier. To the extent there may be lingering public interest in the outcome of the probes, it would be insufficient to meet the test under s. 32 as, based on the evidence submitted by the Applicant, the Public Body argues, there is no *"Tobaccogate."*

5. Even if the issues remain newsworthy, the Public Body, relying on Order 2001-028 at paras. 20-22 (and Order 96-011), submits that in order for s. 32 to be triggered, *"there must be a risk of significant harm."* The Public Body argues that s. 32 imposes a duty on a public body to release information of certain risks under *"emergency-like"* circumstances.

6. Relying on a comment in a 2010 SCC decision, the Public Body states *"the Applicants* [sic] *are clearly incorrect in stating that s. 32 would override a claim of solicitor-client privilege"* because, as the SCC found, *"[*g*]iven the near-absolute nature of solicitor-client privilege, it is difficult to see how the s. 23 public interest override could ever operate to require disclosure of a protected document."* [**NOTE:** Section 23 is the Ontario legislation's comparable section to Alberta's s. 32.]

7. The Public Body submits that this comment is consistent with recent SCC decisions (*U of C* and *Lizotte*) in which the SCC held that solicitor client and litigation privilege may only be abrogated with express statutory language. Section 32 has no such language, the only provision coming close is the language in s. 56, which the SCC held was insufficient.

Insufficient Evidence

8. The Public Body refers to the three affidavits it has provided, in addition to the Opinion Letter from a former judge (admissibility it notes is currently in dispute), all of which it submits, *"provide ample additional information and context regarding the background for how the Refused Records [*Records at Issue*] were created, and why privilege has been claimed."* [**NOTE:** To clarify, the Public Body has *not* provided three, but rather two affidavits in this Inquiry. In 2014 the Public Body provided one affidavit from the FOIP Coordinator, referred to herein as the 2014 Affidavit, and in 2017 it submitted a second affidavit from in-house counsel, referred to herein as the 2017 Affidavit of Records.]

9. This evidence, along with the updated Index [sic] of Records, which meets the criteria set out in *ShawCor,* Alberta Rules of Court and the *OIPC Privilege Practice Note*, would be sufficient, the Public Body argues, to establish a claim of privilege in any civil litigation matter.

10. The Public Body states that caution must be exercised when deciding whether to provide records in redacted form where records have been withheld on the basis of legal privilege. The Public Body cites the *Lee* decision from the BCCA and several other cases referred to in that decision, and submits that:

    - once privilege is established it applies to all communications made within the framework of the solicitor client relationship

    - severances within the continuum may be appropriate when advice is given by lawyers outside the framework, which is not protected and can be severed

    - severances should only be considered when it can be accomplished without any risk of revealing legal advice or any erosion of legal privilege.

11. The Public Body asserts that it is not possible to sever any records without compromising the integrity of the privileged information and thus providing redacted records is not a viable alternative.

Exercise of Discretion

12. The Public Body states, in conclusion, that *"it is important to keep in mind that the primary issue in this Inquiry is whether the Public Body properly exercised its discretion in deciding not to release the Refused Records [*Records at Issue*] by relying on s. 27(a)* [sic] *of the Act."*

13. The Public Body submits that the fact that the large majority of the Records at Issue have been withheld on the basis of legal privilege should not be lost in considering whether the exercise of discretion was proper. Referring to Order F2010-007, at paras. 30-32, the Public Body argues that where information is withheld based on solicitor client privilege *"then that is reason enough to*

establish that discretion was exercised appropriately. With solicitor-client privilege, the purpose for applying discretion to withhold the information is inherent in the privilege itself."

14. In conclusion, the Public Body submits it has properly exercised its discretion to withhold the Records at Issue.

[para 46] This completes the overview of all of the parties' submissions in this Inquiry. I turn now to a Discussion of the Issues.

V. DISCUSSION OF ISSUES

[para 47] In the preceding portion of this Interim Decision/Order, I reviewed, in detail, the submissions of both parties. I did this in order to clearly document that I have thoroughly examined all of the evidence and submissions provided by the Public Body and the Applicant. What follows is my evaluation and assessment of that evidence and those submissions. The evidentiary standard I have employed throughout is a balance of probabilities in deciding whether either the Public Body or the Applicant have met their respective burdens of proof under the *FOIP Act. [*Refer to *FH v. McDougall,* 2008 SCC 38*]*

[para 48] The Public Body relied on three discretionary exceptions when it rendered its decision to refuse to disclose any of the Records at Issue to the Applicant. The three discretionary exceptions are s. 24(1), s. 27(1) (though there are three exceptions under this provision) and s. 29(1). For each, the questions are twofold. First, has the Public Body demonstrated that it *properly relied* on the exception and, second, has the Public Body demonstrated that it *properly applied* the exception?

[para 49] Section 27(1), with the Privilege Column populated, has been claimed for all Records at Issue in #F6748 and all Records at Issue in #F6749 except for a small number of records [53] where the Public Body has relied solely on s. 24(1) or s. 29(1). Where the Public Body meets its burden to demonstrate that it has *properly relied* on and *properly applied* the legal privilege exception in s. 27(1)(a) to the Records at Issue and that it has properly exercised its discretion to refuse access, it will be unnecessary for me to go on to consider the other discretionary exceptions claimed. In its reply, the Public Body submitted that the primary issue in the Inquiry is whether it has properly exercised its discretion under s. 27(1)(a) [Refer to 2017 PBRS, at para. 14]. That is only part of the question before me with respect to legal privilege. An essential pre-requisite to examining the issue of the Public Body's exercise of discretion under s. 27(1)(a) is to determine, based on the evidence provided, whether the Public Body has met its burden of proof that it *properly relied* on s. 27(1)(a), which the Public Body has acknowledged [Refer to 2017 PBSS, at para. 13(a)]. In other words, on a balance of probabilities, has the Public Body provided *sufficiently* clear, convincing, and cogent evidence that s. 27(1)(a) has been properly claimed for each specific Record at Issue. I begin the Discussion with Issue #3 with respect to s. 27(1).

A. Issue #3: Section 27(1)

ISSUE #3. Whether the Public Body properly relied on and applied s. 27 of the *FOIP Act* [privileged information] to the information in the records.

[para 50] Under s. 71(1) of the *FOIP Act,* the Public Body has the burden to prove the Applicant has no right of access to the information that it withheld under s. 27(1). Section 71(1) reads as follows:

> *If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 51] In the Exhibited Indices, the Public Body has cited s. 27(1) for the majority of the Records at Issue and has done so without indicating the subparagraph on which it is relying. For the majority of

these records, however, the Public Body has populated the Privilege Column with either litigation privilege or with both litigation privilege and solicitor client privilege and by doing so establishes its reliance on s. 27(1)(a). I begin, therefore, with a discussion of s. 27(1)(a). The exception in s. 27(1)(a) of the *FOIP Act* reads as follows:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*

[para 52] The *FOIP Act* was structured in a way that anticipated that the Commissioner, or her delegate, would have the Records at Issue at her/his disposal to review. This was in order to enable the Commissioner or her delegate to review the records to make a determination as to whether a public body had properly relied on and applied the exceptions it claimed in making its decision to disclose or refuse records that were the subject of an access to information request.

[para 53] The timeline between these access to information requests in 2012 and the Inquiry beginning in 2014 and reactivated after the Public Body provided the first copies of any Records at Issue in January 2017 spans a period during which the requirements for how a public body meets its burden of proof to establish legal privilege have evolved and been clarified by the courts. Recognizing that reality, it is important to review the details of the decisions reached by the Public Body to withhold the complete sets of Records at Issue beginning with its decisions in response to the Applicant's access to information requests.

[para 54] In the case of the s. 27(1)(a) regarding a public body's reliance on solicitor client privilege and litigation privilege exceptions, access to information and protection of privacy commissioners across Canada have, historically, made attempts to balance the unequivocal need to respect and protect legally privileged information while at the same time fulfill their statutory oversight mandate by not always requiring the production of records over which privilege had been claimed. The Supreme Court of Canada [SCC] in two recent decisions made it clear that the present legislation in Alberta does not empower the Commissioner or her delegate to compel a public body to produce records, over which legal privilege has been claimed, for examination. As a result, the Public Body is required, in the absence of it exercising its discretion to produce some or all of the Records at Issue to the decision-maker on a non-waiver basis (*in camera*), to provide direct evidence to meet its burden pursuant to s. 71 of the *FOIP Act.* The onus on the Public Body is to identify the grounds for claiming privilege with respect to each record to assist the decision-maker in assessing the validity of that claim and, also, to describe the record in a way, without revealing any privileged information, that indicates how, on a balance of probabilities, the record fits within the claimed solicitor client privilege and/or litigation privilege. [Refer to *Alberta (Information and Privacy Commissioner) v. University of Calgary* 2016 SCC 63 *[U of C]* and *Lizotte v. Aviva Insurance Company of Canada,* 2016 SCC 52 *[Lizotte].*]

[para 55] At paras. 8 and 10 of its 2017 PBSS, the Public Body submits, in part, as follows:

> *It is well established that solicitor client privilege arises when there are communications between solicitor and client, which entails the seeking or giving of legal advice, which is intended to be confidential by the parties[2]. Litigation privilege protects against the compulsory disclosure of communications and documents whose dominant purpose and preparation is for the conduct of litigation[3].*
>
> *…*
>
> *The British Columbia Court of Appeal recently noted that once the solicitor-client relationship is established, then the privilege applies to "all communications made within the framework of the solicitor-client relationship."*
>
> [*Lizotte,* at para. 1; *British Columbia (Attorney General) v. Lee,* 2017 BCCA 219, at para. 32]

[para 56] The Public Body lays out the law regarding legal privilege and, in doing so refers to the leading decisions (*Solosky, Pritchard* and *Lizotte)* from the SCC. The Applicant does not take issue with

the Public Body's presentation of the law of privilege detailed *supra*. Nor do I. For the purpose of examining the evidence provided, however, I highlight the following cases with respect to issues regarding a claim of legal privilege.

[para 57] In *Solosky v. The Queen,* the SCC confirmed the *basic and essential* criteria for solicitor client privilege as follows:

> *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.*
> [*Solosky v. The Queen*, [1980] 1 SCR 821, at p. 838]
> [Emphasis added]

[para 58] The SCC has made it clear that while the two legal privileges, both solicitor client privilege and litigation privilege, serve a common cause, they are separate genres. The *Lizotte* decision discusses the privileges, in part, as follows:

> *Litigation privilege protects against the compulsory disclosure of communications and documents whose dominant purpose is preparation for litigation. Although it differs from the professional secrecy of lawyers (solicitor-client privilege) in several respects, the two concepts do overlap to some extent. Since Canada (Privacy Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44 (CanLII), [2008] 2 S.C.R. 574, it has been settled law that any legislative provision capable of interfering with solicitor-client privilege must be read narrowly and that a legislature may not abrogate that privilege by inference, but may only do so using clear, explicit and unequivocal language. The issue in this appeal is whether this principle also applies to litigation privilege.*
> *…*
> *A. Characteristics of Litigation Privilege*
>
> *Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts: J.-C. Royer and S. Lavallée, La preuve civile (4th ed. 2008), at pp. 1009-10.*
> *…*
> *Because of these origins, litigation privilege has sometimes been confused with solicitor‑client privilege, both at common law and in Quebec law: Royer and Lavallée, at pp. 1003‑4; N. J. Williams, "Discovery of Civil Litigation Trial Preparation in Canada" (1980), 58 Can. Bar Rev. 1, at pp. 37‑38.*
>
> *However, since Blank was rendered in 2006, it has been settled law that solicitor‑client privilege and litigation privilege are distinguishable. In Blank, the Court stated that "[t]hey often co-exist and [that] one is sometimes mistakenly called by the other's name, but [that] they are not coterminous in space, time or meaning" (para. 1). It identified the following differences between them:*
>
> - *The purpose of solicitor-client privilege is to protect a relationship, while that of litigation privilege is to ensure the efficacy of the adversarial process (para. 27);*
> - *Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends (paras. 34 and 36);*

- *Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services (para. 32);*
- *Litigation privilege applies to non-confidential documents (para. 28), quoting R. J. Sharpe, "Claiming Privilege in the Discovery Process", in Special Lectures in the Law Society of Upper Canada (1984), 163, at PP. 164-65);*
- *Litigation privilege is not directed at communications between solicitors and clients as such (para. 27).*

> *The Court also stated that litigation privilege, "unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration" (Blank, at para. 37). Moreover, the Court confirmed* ***that only those documents whose "dominant purpose" is litigation (and not those for which litigation is a "substantial purpose") are covered by the privilege*** *(para. 60). It noted that the concept of "related litigation", which concerns different proceedings that are brought after the litigation that gave rise to the privilege, may extend the privilege's effect (paras. 38-41).*
>
> *While it is true that in Blank, the Court thus identified clear differences between litigation privilege and solicitor-client privilege, it also recognized that they have some characteristics in common. For instance, it noted that the two privileges* ***"serve a common cause: The secure and effective administration of justice according to law"*** *(para. 31). More specifically, litigation privilege serves that cause by "ensur[ing] the efficacy of the adversarial process" (para. 27) and maintaining a "protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (para. 40, quoting Sharpe, at p. 165).*
> [*Lizotte,* 2016 SCC 52, at paras.1,19, 21-24]
> [Emphasis added]

[para 59] The Public Body has applied *both* solicitor client privilege and litigation privilege to the majority of the Records at Issue. This in and of itself is not necessarily a problem. It is completely conceivable that any specific record could legitimately contain information protected by both solicitor client privilege and litigation privilege. The descriptions provided in this case, however, pay limited attention to making any distinction as to what information falls under which legal privilege and, importantly, how the information in each specific record fits under either privilege.

> ***Suncor cannot, merely by having legal counsel declare that an investigation has commenced, throw a blanket over all materials "created and/or collected during the internal investigation" or "derived from" the internal investigation, and thereby extend solicitor-client privilege or litigation privilege over them.*** *This Court stated in ShawCor, at para 84, that "[b]ecause the question is the purpose for which the record was originally brought into existence,* ***the mere fact that a lawyer became involved is not automatically controlling.****" And further, at para 87, the Court stated that "the purpose behind the creation of a record does not change* ***simply because the record is forwarded to, or through, in-house counsel,*** *or because in-house counsel directs that all further investigation records should come to him or her."*
> [*Alberta v. Suncor Inc,* 2017 ABCA 221, at para. 34]
> [Emphasis added]

[para 60] In this Inquiry, the 2017 Affidavit of Records was sworn by in-house counsel, a Justice and Solicitor General government lawyer, who attested to being tasked with providing advice to public bodies. The descriptions of the Records at Issue in the 2017 Affidavit of Records and the Exhibited Indices fall short with respect to making a distinction as to the two possible roles for the affiant as in-house counsel: legal advisor or policy advisor. A careful review of the descriptions of the Records at Issue reveals a gap in the evidence of when the affiant is providing *policy advice* versus *legal advice* to the Public Body or to any public body. In the *Pritchard* decision, the SCC held as follows:

> *Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency: see R. v. Campbell, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, at para. 49. In Campbell, the appellant police officers sought access to the legal*

advice provided to the RCMP by the Department of Justice and on which the RCMP claimed to have placed good faith reliance. In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply. ***However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.***

Owing to the nature of the work of in-house counsel, often having both legal and nonlegal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered*: Campbell, supra, at para. 50.*
[*Pritchard v. Ontario (Human Rights Commission),* [2004] 1 SCR 809, at paras. 19-20]
[Emphasis added]

[para 61] In the *Campbell* decision to which the Court referred to in *Pritchard,* the SCC 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 *[…].*
[*R. v. Campbell,* [1999] 1 SCR 565, at para. 50]
[Emphasis added]

[para 62] While s/he does not take issue with the law regarding the test for solicitor client privilege as stated by the Public Body and is not seeking information about the process leading up to the agreements, the Applicant does submit that one of the access to information requests is for all agreements concerning lawsuits against tobacco manufacturers, including the Contingency Fee Agreement [CFA]. As such, the Applicant submits that the agreements cannot meet two of the three *Solosky* criteria to establish solicitor client privilege: the agreements are neither a communication between a lawyer and a client nor do they entail seeking or giving legal advice.

[para 63] Further to the terms of this Interim Decision outlined *infra*, the Public Body will have the opportunity to make a decision for those Records at Issue where, based on the evidence (or lack thereof) submitted by the Public Body, I have been unable to decide if either or both legal privileges apply, which in some cases, the record is as an agreement. Because the Applicant's access to information requests were about agreements or information related to those agreements, and because a significant part of the Public Body's evidence and submissions were devoted to the CFA, I turn now to a brief discussion of the case law related to this genre of record.

[para 64] With respect to similar proceedings involving related litigation, in its 2014 PBIS, the Public Body relied on the *Hayes v. New Brunswick (Minister of Justice and Consumer Affairs)* 2008 NBQB 112 [*Hayes*] decision and Order F13-15 from BC. The *Hayes* Court found that the agreement was protected by privilege because in that case, it found that the *Solosky* criteria had been met. In relying on *Descôteaux v. Mierzwinski* [1982] 1 S.C.R. 860 *[Descôteaux]*, the Public Body argued that where legal advice of any kind is sought from a legal adviser in his/her capacity as such, a communication related to that purpose, made in confidence, will be protected by privilege.

[para 65] The Public Body also relied on a FOIP decision from BC that declined to follow *Imperial Tobacco Co v. Newfoundland and Labrador (Attorney General),* 2007 NLTD 172 *[Imperial Tobacco]* choosing instead to rely on what the adjudicator referred to as the *"law in BC."* The most important distinguishing feature regarding Order F13-15 becomes obvious when reviewing the adjudicator's conclusion, which states, in part, as follows:

> ***I have carefully reviewed the requested records****, and I find that the BHT Retainer, the Side Letter and the CFA are protected by legal advice privilege. They are confidential, written communications between the Province and its lawyers, and they are directly related to the seeking, formulating and giving of legal advice.*
> …
> ***I am restricted in what I can say here regarding the Province's submissions relating to this record as they are appropriately <u>in camera</u>.***
> [Order F13-15, at paras. 19-20]
> [Emphasis added and <u>in original</u>]

[para 66] In that case, the decision-maker had the records at issue available *in camera* in order to make a determination. Regarding the *Hayes* decision on which the Public Body also relied, the Court was less clear in its reasoning as to how the agreement met the *Solosky* criteria when it stated:

> *In my view the subject matter of the agreement is not determinative of whether or not it is a solicitor and client communication. Rather, what is important is whether or not the agreement meets the criteria. I find that it is clearly a communication between solicitors acting in their professional capacity and their client, the Province of New Brunswick.*
> [*Hayes,* at para. 10]

[para 67] By providing minimal or bare descriptions, other than to describe them as contingency fee agreements, the Public Body seems to be taking the position that the CFA is to be automatically classified as legally privileged. There are, in fact, competing authorities with respect to lawyer's bills, retainers, and contingency fee agreements. What appears to be clear is that disclosure can only be permitted where there is no reasonable possibility that the disclosure of a document will directly or indirectly reveal a communication protected by legal privilege. When it has not made the records or detailed descriptions of the records available *in camera,* the burden on the Public Body is to provide descriptions that adequately satisfy its burden of proof to establish the record as subject to legal privilege without revealing that privilege.

[para 68] Each case involving these kinds of documents appear to vary on their facts. In Order F2007-014 where the issue was regarding bills of account, the Alberta Adjudicator, after reviewing the records, stated:

> ***Having reviewed the information*** *in the bills of account, I am satisfied that disclosing the total amount due, the firm letterhead, and the name and address of the Public Body from each bill of account would not enable the Applicant to acquire privileged communications.*
> [Order F2007-014, at para. 54]
> [Emphasis added]

[para 69] Once again, the decision-maker had the information to review in order to make a determination. *[For a different outcome regarding where a lump sum payment is considered a privileged communication: British Columbia v. British Columbia (Information and Privacy Commissioner),* [1996] BCJ No. 2534, at Tab 9 of the 2014 PBIS*]*

[para 70] With respect to similar proceedings involving related litigation, in his/her 2017 ARS, the Applicant relied on the *Imperial Tobacco* decision. The Court, in that case, stated:

> ***No direct evidence was presented as to nature of the agreement****, the types of matters dealt with therein or even whether there was any specific legal advice or communication of legal information contained in its provisions.*
> [*Imperial Tobacco*, at para. 9; See also *R. v. Cunningham,* 1 SCR 331, at para. 30]
> [Emphasis added]

[para 71] The Court went on to address the issue of when assertions of legal privilege may lack specificity, as follows:

> *Once it is established that the information sought is covered by the Act and prima facie subject to disclosure under s. 4, the onus of establishing that access to that information should be refused rests on the head of the department or agency concerned. Section 14 provides:*
>
> > *"14. In a proceeding under this Act this burden of establishing that access to information requested under this Act may or shall be refused shall be on the head concerned."*
>
> *Thus, in Industrial Union of Marine and General Workers of Canada, Local 20 v. Marystown Shipyard Ltd. (1988), 1988 CanLII 5412 (NL SC), 72 Nfld. & P.E.I.R. 145; 223 A.P.R. 145 (Nfld.T.D.),* ***where vague assertions in affidavits attempting to justify refusal of access were not considered specific enough to bring the type of information within the statutory exemptions, the court, applying s. 14, held that the onus had not been discharged and therefore ordered access.***
>
> *The same approach applies to claims to refuse access on grounds of solicitor-client privilege under s. 11 (d) …*
> [*Imperial Tobacco*, at paras. 34-35]
> [Emphasis added]

[para 72] For many of the Records at Issue, including some described by the Public Body as *"Retainer and Contingency Fee Agreement",* I have not been provided with any further details in order to establish the criteria for legal privilege. The Court in the *Imperial Tobacco* decision acknowledged the fundamental nature of solicitor client privilege but went on to make the point that privilege still had to be established.

> *Generally, each communication must meet three criteria for the privilege to exist: (i) there must be a communication between a solicitor, acting in his or her professional capacity, and the client; (ii) the communication must entail the seeking or giving of legal advice; and (iii) the communication must be intended to be confidential by the parties. See Solosky, at p. 837; R. v. B.B. [2001] N.J. No. 203, at para. [26].*

If the Minister is able to demonstrate that each of those characteristics applies to the information contained in or disclosed by the documents in question in this case, they will be protected from disclosure.

The Characterization of the Contingency Fee Agreement

A document is not automatically privileged just because it is entered into between a lawyer and his or her client. It must meet the criteria outlined above before it will attract the special status of privilege.

The Minister claims that inasmuch as a contingency fee agreement is a document that involves the engagement of legal counsel for purposes of litigation, an activity that of necessity would involve the giving of legal advice, its terms, including its financial terms, are protected by the privilege.

Imperial, on the other hand, argues that from the limited amount we know about it, ***the agreement was essentially a commercial agreement entered into for the purchase of legal services in exercise of the government's general procurement function. As such, its disclosure would not necessarily reveal anything about the nature of the legal advice that was, or was to be in the future, provided by the government's contracted legal advisors; nor would the type of information contained in such an agreement be the type that would be needed for the lawyer to know to be able to provide the legal advice.***
[*Imperial Tobacco*, at paras. 46-50]
[Emphasis added]

[para 73] The Court held that the contingency fee agreement was a communication between the government, as a client, and a lawyer but held the government had failed to demonstrate that disclosure of the agreement could reasonably lead to the discovery of legal advice passing between a lawyer and client thus eroding the fundamental purpose of solicitor client privilege. As is the case in this Inquiry, the Court did not review the documents over which privilege had been claimed.

[para 74] At para. 17 of its 2014 PBIS, the Public Body stated that *"it would strain credulity to think that the New Brunswick Court would not have been acutely aware of Imperial Tobacco"* because, it submitted, the same lawyer acted for the applicants in both cases, using that for the basis of its submission to dismiss the fact that the *Imperial Tobacco* decision had not been referred to in the *Hayes* decision. For our purposes in this Inquiry, I prefer an approach that relies on the precedents, rather than speculation, that, on their facts, most resemble this Inquiry with respect to the circumstances of the case or as the SCC stated, *"[u]nder the established rules on solicitor-client privilege, and based on the facts and interests at stake before us."* [Refer to *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23, at para. 75]

[para 75] The evidentiary requirements for an Affidavit of Records as laid out in the *ShawCor* decision (reflecting the Alberta Rules of Court and adopted in the *OIPC Privilege Practice Note*), referred to by the Public Body in its 2017 PBSS, are as follows:

In summary, ***records where privilege is asserted must now be dealt with individually. Each record*** *must be numbered in a convenient order and briefly described, short of disclosing privileged information. Records may be bundled where privilege is being asserted providing that the bundled record otherwise meets the requirements of Rule 5.7. In accordance with Rule 5.8, a party must* ***also identify the grounds for claiming privilege with respect to each record in order to assist other parties in assessing the validity of the claim. This latter requirement means that, for each record, a party must state the particular privilege being asserted and describe the record in a way, again without revealing information that is privileged, that indicates how the record fits within the claimed privilege …***
[*Canadian Natural Resources Ltd. v. ShawCor Ltd.,* 2014 ABCA 289, at para. 72]
[Emphasis added]

[para 76] The result of the evidentiary requirements being met is significant because once a public body has established, on a balance of probabilities, that any record is subject to solicitor client privilege, *"it will only yield in certain clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis."* [*R. v. Lavallee* [2002] 3 SCR 209, at para. 36]

[para 77] In the 2017 Notice, I impressed upon the Public Body the importance of providing affidavit evidence from lawyers who had knowledge about the information over which it was claiming legal privilege. If one or more of the affiants was in-house counsel, I urged the Public Body to provide robust evidence regarding the potential for his/her duplicate roles. This would enable me to measure if the communications met the criteria for the solicitor client framework, as set out by the SCC in the *Solosky, Pritchard* and *Campbell* decisions. That is, whether or not solicitor client privilege can be applied is dependent on the Public Body providing evidence as to the nature of the relationship, the subject matter of the advice (legal or policy) and the circumstances in which it is sought or rendered without revealing any privileged information.

[para 78] The primary question in this Inquiry is whether the Public Body has provided *sufficiently* clear, convincing, and cogent evidence to discharge its burden of proof under the *FOIP Act* to support its claims of either or both legal privileges. In January 2017, the Public Body provided me with 150 pages (from Case File #F6749 only) of the Records at Issue where legal privilege had not been claimed. Given that the Records at Issue where legal privilege has been claimed were neither available for me to review nor were they described as to how legal privilege applied by way of *in camera* evidence, it was incumbent on me to thoroughly scrutinize the evidence that was submitted by the Public Body in order to determine if I was able to decide if the Public Body has met its burden of proof by providing what is required by the *ShawCor* decision (reflecting the Alberta Rules of Court and adopted in the *OIPC Privilege Practice Note*). I do so now.

Access to Information Decisions

[para 79] I begin with the information provided by the Public Body at the time of making its decisions in response to the access to information requests. Section 12(1)(c)(i) directs that *"the applicant must be told the reasons for the refusal and the provision of this Act on which the refusal is based."* What reasons were given by the Public Body for its access to information decisions?

[para 80] In its two 2012 access to information decisions to the Applicant dated November 16, 2012, the Public Body withheld all of the Records at Issue in their entirety. This included all the Records at Issue where it claimed s. 4(1)(q), s. 24, s. 27 and/or s. 29. The Public Body's access to information decisions, which were released on November 16, 2012, cited the exceptions upon which it was relying and indicated that the decision was accompanied by Explanatory Notes, which decisions read as follows:

> (Decision for Case File #F6748)
> *Access to all of the information that you requested is denied under section 24 (Advice from Officials) and section 27 (Privileged information). The sections of the Act used to remove records have been noted on the attached exception sheet, as well as copies of the Explanatory Notes for the FOIP provisions.*
> *…*
> (Decision for Case File #F6749)
> *Access to all of the information that you requested is denied under section 24 (Advice from Officials), section 27 (Privileged information), and section 29 (information that is or will be available to the public.) The information on pages 138-171 can be accessed at http://www.qp.alberta.ca/ (Crown's Right of Recovery Act Chapter C-35)*
>
> *In addition, some documents have been excluded from the scope of the FOIP Act under section 4(1)(q). The sections of the Act used to remove records have been noted on the attached exception sheet, as well as copies of the Explanatory Notes for the FOIP provisions. Please note we have removed some information as non-responsive (N/R.)*

[para 81] Both decisions refer to an Index for each Case File and a sheet with *"Explanatory Notes",* said to detail the reasons for denying access. After a thorough search of all the documentation from the Public Body, no explanatory notes were located.

[para 82] In his/her #F6749 Request for Inquiry (attached to his/her 2014 AIS), the Applicant stated the following with respect to the Public Body's decisions:

> *Unfortunately, [*name of FOIP Coordinator*]'s letter does not indicate how many records were located in relation to our request. In addition, [*name of FOIP Coordinator*] does not provide a description of the records, and does not explain how or why they might be subject to the disclosure exceptions* [s/he] *cites. [*Name of FOIP Coordinator*] also cites the sections of the Act on which* [s/he] *relies, without specifying which paragraph(s) or subsection(s) are said to apply. This makes it very difficult for us to assess whether and to what extent the Ministry is justified in withholding the requested records. We do not understand why [*name of FOIP Coordinator*]'s letter is as opaque and conclusory as it is, given that, pursuant to section 71 of the Act, the Ministry will bear the burden of proving that we have no right of access to these records in any future inquiry by the Commissioner.*

[para 83] The FOIP Coordinator's decisions were referred to in his/her 2014 Affidavit, to which I now turn.

2014 Affidavit

[para 84] At para. 14 of its 2017 PBSS, the Public Body stated:

> *In lieu of providing the documents to the Commissioner to review, Alberta Health provided an Index* [sic] *of Records in the affidavit of [*name of FOIP Coordinator*], sworn July 31, 2014, listing the basis upon which the records were being withheld. [*Name of FOIP Coordinator*]'s affidavit also described* ***in general terms*** *why the records were privileged.*
> [Emphasis added]

[para 85] When the Inquiry began in 2014, the Public Body included the 2014 Affidavit from the FOIP Coordinator with its 2014 PBIS that attest to privilege in *"general terms."* It is only fair to mention that the 2014 Affidavit was prepared in advance of the 2016 SCC decisions, which provided further explanation regarding both legal privileges, and before the *ShawCor* decision (reflecting the Alberta Rules of Court and adopted in the *OIPC Privilege Practice Note*).

[para 86] Equally important to note, however, is the fact that the 2014 Affidavit was not provided in the Record Form format recommended in the Commissioner's *Solicitor-Client Privilege Adjudication Protocol* [*Protocol*]. The *Protocol,* the predecessor to the Commissioner's *2016 Privilege Practice Note,* was developed by the Commissioner after the *Canada (Privacy Commissioner) v. Blood Tribe Department of Health,* 2008 SCC 44 [*Blood Tribe*]. It was designed to assist public bodies in meeting their burden to demonstrate that legal privilege had been properly claimed without necessarily providing the records, over which privilege had been claimed, to the Commissioner or her delegate.

[para 87] In the FOIP Coordinator's 2014 Affidavit, the affiant attached Exception Sheets at Tab C and Tab D but did not attach any substantive indices or schedules in the Record Form format recommended by the *Protocol*. In the 2014 Affidavit itself, sworn before in-house counsel but not a lawyer him/herself, the FOIP Coordinator did provide a listing of the Records at Issue by page reference with a general and repeated descriptor of the legal privileges relied on in making the decisions, examples of which are described at para. 38 *supra.*

[para 88] This evidence is based on information and belief from a non-lawyer and, as such, is not direct evidence of either of the legal privileges claimed.

[para 89] On January 19, 2017 the Public Body sent 150 pages of the Records at Issue to me prompting the continuation of the Inquiry. For the records provided there was no claim of legal privilege. The Public Body had withheld the 150 pages based on s. 4(1)(q), s. 24(1), and/or s. 29(1) of the *FOIP Act*.

[para 90] In the updated Index of Records that accompanied the package of records provided in January 2017, the Public Body, for the first time, applied s. 27(1) to an additional 18 pages of the Records at Issue for Case File #F6749 for records where, in its original access to information decisions, it had only relied on s. 24(1): (JSG000563-JSG000565, JSG000771-JSG000774, JSG000826-JSG000828, JSG000836, JSG000990-JSG000996). These Records at Issue were not provided to the External Adjudicator. I note this fact because it means the evidence from the affiant of the 2014 Affidavit with respect to legal privilege would not include those Records at Issue where s. 27(1) was added as an exception when the pages of the Records at Issue were provided in January 2017.

[para 91] I turn now to the second and final affidavit submitted by the Public Body.

2017 Affidavit of Records

[para 92] At paras. 15-18 of its 2017 PBSS, the Public Body submitted:

> *Given recent developments in the law, an updated Index* [sic] *of Records has been prepared to reflect the current practice in Alberta for dealing with privileged records in an Affidavit of Records, as set out in …ShawCor …*
>
> *Since the Supreme Court of Canada's decision in U of C, the Office of the Information and Privacy Commissioner has released a Practice Note, similarly adapting the guidance from the Court of Appeal. The updated Index* [sic] *of Records also conforms with this Practice Note on Privilege.*
>
> *The updated Index* [sic] *of Records is attached to the affidavit of [*name of in-house counsel*], located at Tab A to these submissions.*
>
> *Certain information in the updated Index* [sic] *of Records has been redacted because it would allow a party to ascertain the content of privileged information.*

[para 93] The 2017 Affidavit of Records, in fact, includes two, not one, updated Exhibited Indices, which are attached as Exhibit A and Exhibit B, for #F6748 and #F6749 respectively.

[para 94] At para. 24 of its 2017 PBSS, the Public Body submitted:

> *As evidenced in the affidavit of [*name of in-house counsel*], the records over which solicitor-client privilege have* [sic] *been claimed in this inquiry all involve communications where legal advice was either sought or given, in circumstances where the communication was intended to remain confidential. Each record is adequately described to allow the External Adjudicator to make at* [sic] *determination whether a claim for privilege is appropriate, and includes the following information:*
>
> - *Page numbers;*
> - *Dates(s)* [sic] *of the records;*
> - *Parties to the communications:*
> - *Description of the type of document:*
> - *The section of the Act applied to withhold the information; and*
> - *The type of privilege claimed.*

[para 95] On careful inspection of both of the Exhibited Indices, each, in fact, contain the following Columns of information:

F6748	F6749
Count	*Count*
Document Id	*Document Id*
Section(s) of the Act	*FOIPNo*
[HC] Doc Date	*[HC] Doc Date*
[HC] Doc Type (General)	*Document Type*
Title	*Title*
People/Organizations From	*People/Organizations From*
People/Organizations To	*People/OrganizationsTo*
People/Organizations CC	*People/Organizations CC*
People/Organizations Between	*People/Organizations Between*
Privilege	*Privilege*

[**NOTE:** The Public Body has advised that HC indicates 'hard copy.']

[para 96] In the 2017 Affidavit of Records, the affiant attests to having reviewed all of the Records at Issue listed in the two Exhibited Indices attached as Exhibit A and Exhibit B, and that the Public Body objects to produce the records listed as solicitor client privilege or litigation privilege or both. For example, at paras. 8-12, the affiant states, in part:

> ***Generally**, solicitor client privilege is claimed by the Public Body as client over records that are:*
>
> *(a) Records, email or other correspondence to and from Alberta Health lawyers and lawyers at Alberta Justice and Solicitor General;*
> *(b) Records that are attached to correspondence to or from a lawyer;*
> *(c) Records of communications between employees of the Public Body quoting referencing* [sic] *legal advice given by a lawyer; and*
> *(d) Records documenting legal advice provided by a lawyer.*
>
> *Separate from solicitor client privilege claimed over the records, the Public Body also claims litigation privilege. All of the records identified as litigation privilege were created for the dominant purpose of facilitating, furthering and/or dealing with the contemplated or ongoing HCCR litigation.*
>
> *Records found in **Exhibit "A" generally** concern the negotiations of the CFA with the [*name of law firm*]. The records marked as privileged in this set are **generally**:*
>
> *(a) Records describing legal advice between lawyers from [*name of law firm*] and the Public Body regarding the terms of CFA,*
> *(b) Records describing legal advice from Alberta Health lawyers and lawyers at Alberta Justice and Solicitor General regarding the terms of the CFA, and the HCCR litigation **generally**,*
> *(c) Records describing communications between the Public Body and [*name of law firm*] regarding the CFA or the HCCR litigation.*

> *The records marked as privileged in this set of records all involved legal counsel, were all meant to be confidential, and all were for the purpose of giving or receiving legal advice. All of the records identified as litigation privilege were also created for the dominant purpose of facilitating, furthering and/or dealing with the contemplated or ongoing HCCR litigation.*
>
> *Records found in* ***Exhibit "B", generally*** *all concern the HCCR litigation, the contingency fee agreement with [*name of law firm*] and the drafting of the May 31, 2012 New Release. The records marked as privileged in this set are* ***generally*** *records describing legal advice from Alberta Health lawyers and lawyers at Alberta Justice and Solicitor General regarding the terms of the CFA, the May 31, 2012 News Release, and the HCCR litigation* ***generally****.*
> [Emphasis in original and added]

[para 97] While this affidavit evidence describes the records as legal advice between lawyers and public bodies, the information in the Exhibited Indices for many of the records where the Public Body has applied s. 27(1) cannot be described in this way. The generalities attested to *supra* are distinguishable from other instances where some of the descriptions provided are substantive. For example, the reference to seeking legal advice from outside counsel (name of firm provided) regarding the agreement being negotiated with [name of law firm] is the subject of specific evidence from the affiant in the 2017 Affidavit of Records, which states:

> *Following the Minister of Justice's December 14, 2010 decision to retain [*name of law firm*], the firm [*name of law firm*] was retained to assist in the negotiations and drafting of a contingency fee agreement. [*Name of law firm*] was retained as Justice and Solicitor General rarely utilizes contingency fee agreements, and as such required legal advice on the agreement it was negotiating with [*name of law firm*].*
>
> *All of the communications between lawyers from [*name of law firm*] and employees of Justice and Solicitor General were privileged and confidential communications and all contained legal advice.*
> [2017 Affidavit of Records, at paras. 5-6]

[para 98] Accordingly, I have found the Public Body has properly claimed solicitor client privilege and/or litigation privilege under s. 27(1)(a) for some of the Records at Issue, where the Privilege Column has been populated, because the evidence provided by the Public Body was substantive enough to meet its burden of proof. This approach of providing substantive evidence, however, has not been adopted by the Public Body throughout.

[para 99] As I stated earlier, sufficient evidence is essential to meet the *Solosky* criteria, which points to a need for specificity in the evidence provided by the Public Body to establish legal privilege. While *ShawCor* indicates the description need only be brief, the Public Body must provide *sufficiently* clear, convincing, and cogent evidence as to how each record fits within the legal privilege(s) claimed to meet its burden of proof.

[para 100] Before providing my findings on what evidence is lacking, a few general observations about the 2017 Affidavit of Records and its Exhibited Indices is warranted.

[para 101] I begin by noting that there are instances in Case File #F6749 where the information provided is incorrect. For example, for Doc Count 201, 202, 203 and 205 (JSG000833-JSG000835, JSG000837), the FOIPNo Column lists the s. 24(1) exception in the FOIPNo Column, while the Privilege Column lists Litigation Privilege and Solicitor/Client Privilege for all of these records. This misinformation also applies in the case of Doc Count 230-232 (JSG000886, JSG000888, JSG000890).

[para 102] Second, I note that the affiant in the 2017 Affidavit of Records uses the word *"generally"* frequently when referring to the Records at Issue. This would not necessarily prove to be problematic were the attached Exhibited Indices themselves populated with *sufficiently* clear, convincing, and cogent

evidence to describe each record specifically. In other words, descriptions that indicated how the record fits within the claimed legal privilege(s): solicitor client privilege, litigation privilege or both.

[para 103] Third, with respect to the duplicate pages for the two Case Files, this is another example of where there is an error in the information populating the two respective Exhibited Indices. In the case of Case File #F6748 for ABJ000072 (Doc Count 13) and ABJ000087 (Doc Count 15), the Public Body has claimed the s. 27(1) exception while for Case File #F6749 for JSG000974 (Doc Count 255), which the Public Body recently advised are the same records, the Public Body has claimed both s. 24(1) and s. 27(1) exceptions. By correspondence on February 14, 2018, I inquired about this discrepancy, to which the Public Body responded on February 22, 2018, as follows:

> *In response to paragraph 4 of your letter, the Public Body states (without waiving privilege) that the application of s. 24(1) to JSG000974 is entirely appropriate, as this was an occasion where a privileged record (in this case, the draft Contingency Fee Agreement)* ***is properly categorized as privileged, as well as advice from an official.***
> [Emphasis added]

[para 104] In the case of the duplicate records, the disposition of these Records at Issue may not be the same as the exceptions claimed differed. While it substantiated its reliance on s. 24(1) for JSG000974 in Case File #F6749, the Public Body made no submission that it was adding reliance on s. 24(1) for the 'same' record ABJ000072 or ABJ000087 in the case of #F6748. Upon learning from the Public Body in February 2018 that the records in Case File #F6748 were not all included within those for Case File #F6749, I advised the Public Body that there would be two Orders in this Inquiry to differentiate between the two Case Files.

[para 105] Finally, and importantly, the Public Body has not provided sufficient evidence in the Affidavit of Records and Exhibited Indices *vis a vis* legal privilege because not all of the Columns for each Record are populated, in other words, some are blank. This has been compounded by the Public Body's decision to populate many of the Columns in the Exhibited Index for Case File #F6749 with the word "REDACTED". At para. 18 of its 2017 PBSS, the Public Body submits:

> *Certain information in the updated Index of Records has been redacted because it would allow a party to ascertain the content of privileged information.*

[para 106] Redaction is an effective method of managing information in processing access to information requests, particularly given s. 6(2) of the *FOIP Act* that provides if *"information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record."* This provision obliges public bodies to redact records to withhold properly severed information while at the same time maximizing the amount of information that can be disclosed to an applicant in accordance with s. 6(2) and the purpose of the statute set out in s. 2(a) of the *FOIP Act* though it is acknowledged that caution is necessary when legal privilege is an issue. [Refer to *British Columbia (Attorney General) v. Lee,* 2017 BCCA 219]

[para 107] The Public Body's use of REDACTED in one of the Exhibited Indices to the 2017 Affidavit of Records is not a technique used by public bodies in preparing evidence it submits to adjudicators. In the 2017 Affidavit of Records, the affiant fails to provide a full explanation as to why some of the descriptions of some of the Records at Issue have been REDACTED (other than to state it was to shield legally privileged information) and how the redactions were intended to serve in relation to the Public Body meeting its evidentiary burden of proof. There are 11 Records at Issue (Doc Counts: 24, 78, 79, 80, 102, 116, 141, 142, 237, 238, and 239) in Case File #F6749 where the affiant has populated the Title Column with the word "REDACTED" and has provided no other information in this Exhibited Index. In most instances, the affiant has provided some information in other Columns such as the date of the document, the People/Organization who are the authors/senders, and the People/Organization who are the recipients and for some has included information for the people or organizations copied on the communique. The affiant has provided the names of two law firms but not the names of the lawyers within those firms. While in other cases, a name has been provided, but the professional title or role of

that person is not included. Clarity as to who the person is and what their role is in the communication can be important in identifying it as a legally privileged communication. [Refer to *Descôteaux,* at p. 873]

[para 108] With respect to the use of REDACTED, the Public Body, in its submissions, provides no explanation as to why the contents of the Index of Records for Case File #F6749 attached to the 2017 Affidavit of Records have been REDACTED, again to say, other than to indicate that the redactions are to shield information that could reveal privileged information. It is not known if the REDACTED information is itself the privileged information or a description that could potentially reveal such communications. It is trite to state that a public body would *never* be expected to include anything in the evidence it submits that is protected by privilege or that would reveal privileged information (other than *in camera*). The required content of an Affidavit of Records, as stipulated by *ShawCor* (reflecting the Alberta Rules of Court and adopted in the *OIPC Privilege Practice Note*), would not, of course, contemplate the inclusion of privileged information. Indeed, the decision specifically provides that the description should be done without revealing information that is privileged. *ShawCor* stipulates, however, that each record be described in a way that indicates how the record fits within the privilege or privileges in order to assist other parties (and, in this case, the decision-maker) in assessing the validity of the claim. By choosing to populate a key Column in one of the Exhibited Indices with information that the Public Body believes may reveal legally privileged information and then turn around and redact that information defeats the whole purpose of the requisite Affidavit of Records. This approach has left the descriptions for some of the Records at Issue deplete, providing insufficient evidence to meet the *ShawCor* evidentiary requirements, resulting in my being unable to decide if the records are protected by legal privilege. The specific Records at Issue describing legal advice with outside counsel will be detailed under Findings *infra.*

[para 109] The Public Body could have considered using this kind of evidence in a different way. The Public Body could have made an *in camera* application to enable it to provide me with an unredacted version of the redacted Index attached to the 2017 Affidavit of Records. The Applicant made it clear that s/he considered this approach a possibility the Public Body may explore, inferring s/he would not object, when s/he stated in his/her March 1, 2018 correspondence: *"To discharge its burden, the Public Body can elect to provide the relevant records as evidence in camera. Where it elects not to do so, the Public Body must provide an affidavit of records that is sufficiently specific to allow the External Adjudicator to assess the validity of the privilege claims."* It appears that the Public Body chose not to do so, even though, this would have been more consistent with the approach in Order F2017-28, a case relied on by the Public Body. The Public Body argued the case is an example of where privilege can be decided in the absence of the documents to review. That submission is not wholly accurate.

[para 110] At para. 25 of its 2017 PBSS, the Public Body, relying on Order F2017-28, submits as follows:

> *This type of information was more than sufficient for adjudicators in both Alberta and British Columbia in recent Information and Privacy Commission decisions where they were able to make a determination about privilege,* ***without reviewing the documents at issue.***
> [Emphasis added]

[para 111] In Order F2017-28, the Adjudicator details, in her decision, the evidence the Public Body provided to her in that case, which reads, in part, as follows:

> *With its initial submission, the Public Body provided an* ***in camera affidavit and a copy of some of the responsive records that left more information unsevered so that I could review more of the information to which the Public Body has applied section 27*** *in conjunction with the CYEA (Child, Youth and Family Enhancement Act).*
>
> *…*
>
> *While the Public Body's submission has addressed some of the above points, the test above must be met on a record-by-record basis. For example, it would be instructive to know the job duties of the author and recipient(s) of information over which privilege is claimed, in each case. Further, it would be helpful if the Public Body can tell me the context of the legal advice without revealing the advice itself. The Public Body's submissions have already provided me*

with some general context for the advice; however, I must be satisfied that the Solosky test has been met on a record-by-record basis.

*The Public Body responded with an **in camera affidavit sworn** by an employee of the Public Body's FOIP office, as well as a response exchanged with the Applicant. In the exchanged submissions, the Public Body says that the emails are between solicitor and client, or Public Body employees discussing those emails.*

As noted above, the Public Body also provided a chart, in camera, listing:

- *each page of records containing information over which solicitor-client privilege had been claimed,*
- *the type of record contained on each page,*
- *the relevant dates for each page, and*
- *the correspondents involved, including to whom the information was forwarded or copied.*

The chart was accompanied by a list of the individuals named in the chart, along with their position titles. The chart also notes the difference between instances where legal advice was given or sought, and where the legal advice given was later discussed.

In most cases, the Public Body has redacted only small portions of a page under section 27(1)(a), citing solicitor-client privilege. The remaining information in the records afforded context for the Public Body's claim of privilege. That context, along with the additional evidence provided by the Public Body, satisfies me that the Public Body has met the test for solicitor-client privilege. Having the relevant dates for the correspondence and the position titles of the correspondents was helpful, especially in making a determination about emails between Public Body employees who are not counsel (i.e. determining the likelihood that those Public Body employees were discussing legal advice that was provided by counsel).

…

For the reasons given, the evidence provided by the Public Body in this case was sufficient for me to make a determination on a balance of probabilities that section 27(1)(a) applies to the information.

[Order F2017-28, at paras. 118, 131-135, 137]
[Emphasis added]

[para 112] The Public Body in this Inquiry appears to have elected *not* to submit *in camera* evidence as a means to either provide a copy of the unredacted version of the Exhibited Indices in Exhibits A and B of the 2017 Affidavit of Records to the External Adjudicator or as a means to provide a sample of the records to demonstrate how s. 27(1)(a) had been applied. In his/her March 1, 2018 correspondence, the Applicant acknowledged that *in camera* evidence was a possibility the Public Body may rely on in order to meet its burden of proof. The Public Body also did not provide me with any REDACTED pages for those Records at Issue where it claimed both s. 24(1) (or any other exception) and s. 27(1), which would have afforded me with the opportunity to see context of the record over which it had claimed legal privilege. Order F2017-28, discussed *supra* and *infra,* comments on the utility or helpfulness of disclosing information in a record, after redacting the privileged information, to aid in providing context to the privileged information that has been withheld.

[para 113] The Public Body, in this case, took a different and uncustomary approach. Rather than find a means to provide meaningful descriptions to establish proper reliance on either legal privilege exception, it chose to *redact* information from a key Column or Columns in the Index for Case File #F6749. Redacting information from this Exhibited Index to the 2017 Affidavit of Records has proven to be unhelpful to the Public Body in meeting its burden of proof. It is unclear what the Public Body thought the redactions would achieve, particularly given that *there is not one example* of where the affiant of the 2017 Affidavit of Records refers to a *specific* Record at Issue (by either reference to its JSG or Doc Count number) in his/her affidavit: notably s/he makes no reference to any Record at Issue where the

descriptors have been REDACTED. In fact, as will be discussed *infra*, the redacted format has proven to compromise the Public Body's ability to meet its burden under the *FOIP Act* and to meet the evidentiary standard set by *ShawCor* for some of the Records at Issue over which it has claimed legal privilege. The approach taken by the public body in Order F2017-28, cited *supra,* would have been (and will be under the Interim Decision) one worth emulating.

[para 114] I turn now to consider whether the Public Body has met its burden of proof to provide *sufficiently* clear, convincing, and cogent evidence to support its claim of legal privilege. I begin with the relevant Alberta Rules of Court, which provide as follows:

> ***Producible records***
> *5.7(1) Each producible record in an affidavit of records must*
> *(a) be numbered in a convenient order, and*
> *(b) be briefly described.*
>
> *(2) A group of records may be bundled and treated as a single record if*
> *(a) the records are all of the same nature, and*
> *(b) the bundle is described in sufficient detail to enable another party to understand what it contains.*
>
> ***Records for which there is an objection to produce***
> *5.8 Each record in an affidavit of records that a party objects to produce must be numbered in a convenient order, and the affidavit must identify the grounds for the objection in respect of each record.*
> [Emphasis in original]

[para 115] I turn next to the *OIPC Privilege Practice Note,* which reads, in part, as follows:

> *In Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53 (CanLII), the Supreme Court of Canada (SCC) suggested that the rules applicable to claims of solicitor-client privilege in the context of civil litigation apply to privilege claims in the context of access requests. The SCC also cited Canadian Natural Resources Ltd. v. ShawCor Ltd., 2014 ABCA 289 (CanLII), 580 A.R. 265 as the relevant authority in Alberta. In this case, the Alberta Court of Appeal discussed the application of Rules 5.7 and 5.8 of the Rules of Court (producible records, and records for which there is an objection to produce). The Court stated (at paras. 42-43):*
>
> > *…Therefore, in explaining the grounds for claiming privilege over a specific record, a party will necessarily need to provide sufficient information about that record that, short of disclosing privileged information, shows why the claimed privilege is applicable to it. Depending on the circumstances, this may require more or less than the "brief description" contemplated under Rule 5.7(1)(b) although we expect that oftentimes the brief description will suffice.*
> >
> > *Accordingly, under either interpretation of the relevant Rules, a party must provide a sufficient description of a record claimed to be privileged to assist other parties in assessing the validity of that claim. From this, it follows that all relevant and material records must be numbered and, at a minimum, briefly described, including those records for which privilege is claimed. As noted, though, this is subject to the proviso that the description need not reveal any information that is privileged.*
>
> *This is the basis for the practice note for the provision of evidence by Respondents claiming solicitor client privilege over records. The practice note also applies to litigation privilege on the basis of the significance attributed to that privilege by the SCC in Lizotte v. Aviva Insurance Company of Canada, 2016 SCC 52.*

[para 116] The *OIPC Privilege Practice Note* also lays out what is required for the Schedule, Index or Exhibit attached to the Affidavit of Records, which reads, in part, as follows:

> (*PAGE NUMBER COLUMN)*
> *A group of records may be numbered and treated as a single record if the records are all of the same nature and the bundle is described in sufficient detail to enable the Commissioner to understand what it contains.*
>
> *(DESCRIPTION COLUMN)*
> *The description of the record or bundle of records must provide sufficient information about the records that, short of disclosing privileged information, shows why the claimed privilege applies to them.*
>
> *For claims of solicitor-client privilege, the Respondent should provide:*
>
> - *Information about the relationship between the Respondent and the lawyer in the context of the relevant communication*
> - *Information about the circumstances to establish that the record was created in the course of requesting or providing legal advice or is a record revealing such a request or advice*
> - *Information about the confidentiality of the communication*
>
> *For claims of litigation privilege, the Respondent should provide:*
>
> - *Information establishing that the record was created for the dominant purpose of litigation*
> - *Information establishing that the litigation has not ended*

[para 117] When the 2017 Affidavit of Records and its Exhibited Indices are read and reviewed together and these are measured against the backdrop of the legal requirements discussed *supra*, I find that there are notable gaps and/or deficiencies in the kind of descriptive information provided by the Public Body as follows:

1. Some of the descriptions fall short in demonstrating *how* a particular Record at Issue fits within either or both of the two legal privileges applied. Specifically, some descriptions fail to indicate *how* litigation privilege applies and *how* solicitor client privilege applies respectively and, where the Public Body has claimed both in the Privilege Column, *how* each legal privilege applies to each specific record.

2. Where legal privilege is claimed for a record, in one Column [Section(s) of the Act] for Case File #F6748 the Public Body lists s. 27(1). In a separate Column titled Privilege, the Public Body has listed both *"Litigation Privilege Solicitor/Client Privilege"* for all but eight records where the Public Body has listed only *"Litigation Privilege"* for Case File #F6749. The result is that for the majority of the Records at Issue, the particular legal privilege has not been specified unless, in fact, both privileges do apply, which then leads to the question of whether that claim is supported by the evidence provided by the Public Body.

3. A description of who is the client seeking legal advice *and* who is acting as the solicitor giving legal advice in the solicitor client relationship is not specified in all the Records at Issue where s. 27(1) has been claimed.

4. Where the client is the Public Body, the identity of the person acting as the representative of the Public Body in that context is not specified, such as where non-lawyer employees may be discussing legal advice or where senior government officials are acting in the role of solicitor versus as the client representative.

5. If the privileged information is part of a communication exchange that is ongoing and involves multiple participants, the descriptions do not reveal this fact. This is very important to capture all communications that fall within the framework of the solicitor client relationship and/or the continuum of communications and/or information the dominant purpose of which is the pursuit of pending or ongoing litigation.

6. For eight Records at Issue, the Public Body has cited s. 29(1) in the Section(s) of the Act/FOIPNo Column and Litigation Privilege and Solicitor/Client Privilege in the Privilege Column, without referring to s. 27(1) anywhere for these records.

7. For seven Records at Issue, the Public Body has cited s. 24(1) in the Section(s) of the Act/FOIPNo Column 3 and Litigation Privilege and Solicitor/Client Privilege in the Privilege Column, without referring to s. 27(1) anywhere for these records.

8. Where an employee of the Public Body is shown to have legal credentials, such as a Deputy Minister (Q.C. following his/her name), there is no information describing if or when s/he is acting as a lawyer providing legal advice or acting as a senior government official providing policy advice.

9. Information is not provided as to when a lawyer who is in-house counsel is acting as a solicitor in the solicitor client relationship to distinguish from where that person is acting in his/her other potential role as policy advisor.

10. While there is a general statement in the 2017 Affidavit of Records that all records were intended to be confidential, there is no reference in any of the descriptors in either Index indicating the communication for a specific record was intended to be confidential, private or subject to privilege. [For examples of Records at Issue marked as confidential where s. 27(1) has not been claimed refer to Doc Counts 77 and 93.]

11. Some descriptions name particular individuals, possibly government employees, but provide no information as to their role or professional title or which department they represent.

12. The affiant indicated in the 2017 Affidavit of Records that the Public Body retained outside counsel for advice with respect to the CFA. There are multiple examples in Case File #F6749 but there is only one entry in the Index for Case File #F6748 for one record that identifies outside counsel by the name of the law firm.

13. Some of the descriptions for s. 27(1) are identical to the language used in the descriptions where only s. 24(1) has been applied. A prime example: For record at Doc Count 93, the claim is s. 24(1) while the record at Doc Count 109, the claim is s. 27(1). The columns for each are populated with *exactly* the same information: date, document type, same people/organizations, except it is only for Doc Count 109 that legal privilege has been claimed.

14. There are Records at Issue where the claim of s. 27(1) appears to be inexplicable and has not been explained. A prime example is the record at Doc Count 151 where the only descriptor is *"Blank Page"* and the only other information is the Section(s) of the Act/FOIPNo Column which reads, s. 27(1) and the Privilege Column which is populated with *"Litigation Privilege Solicitor/Client Privilege."*

15. In January 2017, the Public Body applied s. 27(1) for 22 pages of the Records at Issue in #F6749 for the first time. In its previous Indices, the Public Body had only relied on s. 24(1) (See Tab 2 of the 2014 PBIS in comparison to the Doc Count 88, 167, 168, 169, 196, 197, 204, 257, 258, 259 in Tab B of the 2017 Affidavit of Records). None of the records or REDACTED parts of these records where the Public Body has newly claimed s. 27(1) were included in the package of the Records of Issue given to me in January 2017. For all the Records at Issue where the Public Body had applied s. 27(1) for the first time in January 2017, the FOIP Coordinator's 2014 Affidavit Index for #F6749 only refers to s. 24(1) being claimed for those particular records. I reviewed the original descriptions and compared them with the more recent descriptions of these pages with a view to whether a

determination could be made with respect to the applicability of either exception but particularly the newly added s. 27(1). An analysis of the descriptions of these records reveal that they do not match up. In the case of the following example, Doc Count 88, the descriptions have different dates and different participants to the email.

> FOIP Coordinator at Tab 2 of 2014 Affidavit Index for Page No. 563-565 described as follows:
>
> Page No.: *563-565*
> Description: *January 12, 2010 email from [*name of unidentified person*] to [*name of in-house counsel*], [*name of senior government employee*], [*name of person whose role is not identified*] and [*name of person whose role is not identified*]*
> Section(s) of the Act: *s. 24(1)*
>
> In-house counsel at Exhibit B of 2017 Affidavit of Records Index for pages JSG000563-JSG000565 [Doc Count 88] described as follows:
>
> FOIPNo: *24(1) 27(1)*
> [HC] Doc Date: *1/17/2012*
> Document Type: *Email*
> Title: *Documentation - Jan 12 meeting notes*
> People/Organizations From: *[*name*], Executive Director, Corp. Serv. Health*
> People/Organizations To: *[*name of person whose role is not identified*]*
> Privilege: *Litigation Privilege Solicitor/Client Privilege*

16. After the submission exchange was completed, the Public Body revealed that the Records at Issue in #F6748 were not all duplicated within the Records at Issue in #F6749. The records that are the same can be found at Doc Count 13 and 15 in #F6748 and Doc Count 255 in #F6749. The Public Body, in its latest correspondence, described this document as the Draft Contingency Agreement. The record found at these Doc Counts is not described in this manner. The descriptions differ: one describes it as *"Document"* while in the other *"Agreement."* The parties to the record are stipulated but no other information is provided.

[para 118] The Applicant argued that the Public Body had failed to provide sufficient information in order for the External Adjudicator to make a determination as to whether the Records at Issue are, in fact, privileged. The Applicant notes an example of a Record at Issue [Doc Count 3 in Case File #F6748] described as *"Appendix A - Law Society of New Brunswick - Code of Professional Conduct"* and submits that the descriptions of the record are not sufficiently detailed to allow for an analysis of how or why either of the two types of privilege claimed by the Public Body apply to any given record.

[para 119] In the 2017 Amended Notice dated September 15, 2017, I alerted the Public Body's new counsel of the need for him/her to address the evidentiary requirements, as follows:

> *In that regard, I am heartened at the news that you, [*name of lawyer*], will be reviewing the Records at Issue and propose to provide evidence respecting any legal privilege exception, which the Public Body intends to continue to claim. I can assure you that I have no interest in injuring or compromising valid claims to legal privilege.* ***To date, however, the submissions from the Public Body have been deplete leaving me, as the ShawCor Court of Appeal of Alberta put it "blindfolded": inadequate description of each page or bundle of records [though notably the descriptors in Alberta Health's FOIP Coordinator's affidavit provided some information], unclear link between the particular grounds of legal privilege being claimed for each page or bundle of records, and insufficient information/evidence to assist me (without the Records at Issue over which legal privilege has been claimed being available to me) in assessing the validity of the claimed privilege.*** *I encourage you, [*name of lawyer*], to put your attention to all these aspects during your review of the records and preparation of the relevant affidavit evidence.*
> [Emphasis added]

[para 120] In its 2017 PBSS and its Affidavit of Records and Exhibited Indices, the Public Body provided some evidence that demonstrated that solicitor client privilege and litigation privilege apply to some of the Records at Issue. At the same time, however, the Public Body has failed to provide *sufficiently* clear, convincing, and cogent evidence for many of the Records at Issue with respect to s. 27(1)(a). Some Records at Issue in both Case Files have not been described accurately, adequately or consistently and thus the need for the Interim Decision *infra* that will give the Public Body the opportunity to gather evidence and authority in order to provide a proper and specific description with respect to the application of legal privilege for each Record at Issue where it has failed to meet its burden.

[para 121] Under Findings *infra*, I have listed those Records at Issue where I am able to decide if a record is protected by legal privilege based on the descriptions provided by the Public Body. For the remainder, due to the gaps or shortcomings of the evidence provided with respect to application of s. 27(1)(a), I am unable to decide if the records are protected by either or both legal privileges.

B. Exercise of Discretion under s. 27(1)(a)

[para 122] For those Records at Issue where I have been able to decide that the Public Body has properly relied on s. 27(1)(a), I turn now to the issue of whether the Public Body has properly applied the legal privilege exception. In doing so, I will address the issue of how the Public Body exercised its discretion.

[para 123] The exercise of discretion with respect to s. 27(1)(a) is viewed as distinct from other discretionary exceptions. At para. 14 of its PBRS, the Public Body submits as follows:

> *In conclusion, it is important to keep in mind that the primary issue in this Inquiry is whether the Public Body properly exercised its discretion in deciding not to release the Refused Records [*Records at Issue*] by relying on s. 27(a)* [sic] *of the Act. The fact that the majority of the records have been withheld on the basis of legal privilege should not be lost in the consideration of whether the exercise of discretion was proper.*

[para 124] The Public Body goes on to cite Order F2010-007, which reads, in part, as follows:

> *Section 27(1)(a) states that the head of a public body may refuse to disclose any information that is subject to any legal privilege, including solicitor-client privilege. As a result, section 27(1)(a) is discretionary, given that the head is not required by the FOIP Act to withhold information subject to legal privilege.*
>
> *In Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23, the Supreme Court of Canada commented on the authority of the Ontario Information and Privacy Commissioner to review the way in which the head of a public body exercises discretion to withhold information in response to an access request.*
>
> > *We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in McClure, stressed the categorical nature of the privilege:*
> >
> > > *... solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis in original]*
> > >
> > > *Accordingly, we would uphold the Commissioner's decision on the s. 19 claim.*

> ***In relation to the application of discretion to withhold information subject to solicitor-client privilege, the Court considered that the public policy in keeping this privilege "as close to absolute as possible" is sufficient to demonstrate that discretion has been exercised appropriately. In other words, if information is withheld under section 27(1)(a) because it is subject to solicitor-client privilege, then that is reason enough to establish that discretion was exercised appropriately. With solicitor-client privilege, the purpose for applying discretion to withhold the information is inherent in the privilege itself.***
> [Order F2010-007, at paras. 30-32*]*
> [Emphasis added]

[para 125] The *FOIP Act* grants the Applicant a right of access to information. Section 27(1)(a) provides the Public Body with the right to protect legally privileged information by refusing to disclose that information. Section 27(1)(a) provides the Public Body with the discretion to refuse access to any information to which an applicant may otherwise be entitled where it is able to establish on a balance of probabilities that the content of the records are protected by solicitor client and/or litigation privilege. As the SCC stated in *Descôteaux*:

> *It would, I think, be useful for us to formulate this substantive rule, as the judges formerly did with the rules of evidence; it could, in my view, be stated as follows:*
> *…*
> ***Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.***
> [*Descôteaux*, at p. 875]
> [Emphasis added]

[para 126] Notwithstanding the evidence that the Public Body considered the identity of the Applicant, an irrelevant factor in exercising discretion, discussed *infra,* this does not change the appropriate analysis of the exercise of discretion under s. 27(1)(a). No case-by-case analysis or balancing of interests or rights is necessary or appropriate with respect to s. 27(1)(a) where proper reliance has been demonstrated. For those Records at Issue where, based on the evidence provided, I am able to decide on a balance of probabilities, that the Public Body has properly relied on solicitor client privilege and/or litigation privilege, detailed under Findings *infra*, I find the Public Body has properly applied the s. 27(1)(a) exception by exercising its discretion to refuse access to the Applicant to legally privileged information. This will apply equally under the Interim Decision for those Records at Issue where the Public Body is able to meet its burden of proof to demonstrate that s. 27(1)(a) applies.

C. Section 27(1)(b) and Section 27(1)(c)

[para 127] As stated *supra* in Part III Issues in the Inquiry, what follows is further discussion why these two exceptions are not at issue in this Inquiry. At para. 13 of the 2017 PBSS, the Public Body lists under Issues, the following as the exceptions in the Inquiry: s. 16, s. 24, s. 25. s. 27(1)(b) and s. 27(1)(c). Sections 16 and 25 have never been exceptions at issue in this Inquiry and, therefore, will not be discussed as part of this Order. In its 2014 PBIS, the Public Body provides brief submissions on three discretionary exceptions: s. 24, s. 27(1)(b) and s. 27(1)(c). Section 24 will be discussed *infra*. There are no submissions regarding paragraphs (b) and (c) under s. 27(1) in the 2014 FOIP Coordinator Affidavit, which is found at Tab D of 2014 PBIS. That Affidavit does, on the other hand, refer to another discretionary exception, specifically s. 24.

[para 128] No version of the Indices produced for the Case Files specifies subsections under s. 27(1). In all cases where the Public Body has claimed reliance on s. 27, the only exception cited is . 27(1). Exhibited Indices attached to the 2017 Affidavit of Records, use different designations for the records. In Case File #F6748 the second Column relies on *"Section(s) of the Act"* while in Case File #F6749 relies on *"FOIPNo"* [referred to hereinafter as Section(s) of the Act/FOIPNo Column]. Because the Public Body has populated the Privilege Column with either or both legal privileges for most records

where s. 27(1) appears, the Exhibited Indices establish the Public Body's reliance on the exception in s. 27(1)(a). Neither s. 27(1)(b) nor s. 27(1)(c) appear in either of the Indices. In addition, the text of the 2017 Affidavit of Records has three parts: background, followed by *"Privileged Records"* and finally *"Section 24 Records."* That Affidavit does not provide any submissions or evidence from the affiant about the exceptions in s. 27(1)(b) or s. 27(1)(c). There is no further information in the Exhibited Indices that point to the Public body's reliance on the separate and distinct exceptions under s. 27(1).

[para 129] Section 2 of the *FOIP Act* sets out the purposes of the legislation, and reads, in part as follows:

> *The purposes of this Act are*
>
> *(a) to allow any person a right of access to the records in the custody or under the control of a public body* ***subject to limited and specific exceptions*** *as set out in this Act,*
>
> [Emphasis added]

[para 130] What does the evidence reveal, or not reveal, with respect to s. 27(1)(b) and s. 27(1)(c)?:

- Neither Exhibited Index produced in the Inquiry for either of the two Case Files refers to subsections under s. 27(1)(b) or s. 27(1)(b)

- There are no paragraphs cited for any of the Records at Issue designated in the Section(s) of the Act/FOIPNo Column for s. 27(1) in the Exhibited Indices to the 2017 Affidavit of Records

- In the latter Exhibited Indices, for the Records at Issue claiming s. 27(1), the records are all designated with Litigation Privilege and/or Solicitor/Client Privilege in the Privilege Column

- For those records where s. 27(1) was only added as an exception in one of the Exhibited Indices produced in January 2017 (Doc Counts 167, 169, 196, 197, 204, 257, 258, 259), the Public Body has again failed to specify any subsection under s. 27(1) on which it is relying

- The 2017 PBSS, the 2017 Affidavit of Records, and the 2017 PBRS did not provide any submissions with respect to s. 27(1)(b) or s. 27(1)(c).

[para 131] Apart from what is not in the 2017 Affidavit of Records and the Exhibited Indices, has the Public Body provided any submissions in regard to s. 27(1)(b) and/or s. 27(1)(c)? At paras. 39-48 of its 2014 PBIS, the Public Body provided a submission, at paras. 39-48, regarding s. 27(1)(b) and s. 27(1)(c) but failed to specify to which Records at Issue these submissions related, other than to refer to *"the Agreement and Related Records"* or *"any information in any correspondence relating to any matter involving the provision of advice or other services."* At paras. 42-44 of the 2014 PBIS, the Public Body provided the following submission with respect to s. 27(1)(b):

> ***It is important to note that section 27(1)(b) does not refer to "legal privilege"****. It is irrelevant and immaterial whether the information relating to the provision of legal services would otherwise be subject to any type of legal privilege. This also means that the doctrine of waiver (which relates to the existence or extinguishment of legal privilege) has no role to play in section 27(l)(b).*
>
> *Similarly, it is important to note that section* ***27(1)(b) does not refer to the substance of the legal services provided.*** *To the extent that previous decisions of the Commissioner might have interpreted section 27(1)(b) as being restricted to information about the substance of the legal services provided, those decisions are incorrect in law. Further, if section 27(1)(b) were only to apply to information about the substance of the legal services provided, it would be unnecessary because information about* ***the substance of the legal services provided would come under section 27(1)(a)—legal privilege.*** *The fact that section 27(1)(b) is a separate provision in the Act indicates that the Legislature intended it to have a different meaning from section 27(1)(a).*

Accordingly, Alberta Health submits that section 27(1)(b) is sufficient to justify its refusal to disclose the Agreements and Related Records.
[Emphasis added]

[para 132] At paras. 47-48 of its 2014 PBIS, the Public Body provided the following submission with respect to s. 27(1)(c):

> ***As noted above with respect to section 27(1)(b), the exception in section 27(1)(c) does not require the information in that correspondence to be subject to legal privilege.*** *This also means that the doctrine of waiver (which relates to the existence or extinguishment of legal privilege) has no role to play in section 27(1)(c). Nor does section 27(1)(c) apply only to the substance of the legal advice provided.* ***The only requirements are that the correspondence be between an Alberta Justice lawyer (or agent) and another person, and that it relate to the provision of legal advice or other services by the Alberta Justice lawyer (or agent).***
>
> *Accordingly, Alberta Health submits that section 27(1)(c) is sufficient to justify its decision not to disclose any information in any correspondence relating to any matter involving the provision of advice or other services by Alberta Justice lawyers or their agents.*
> [Emphasis added]

[para 133] In its 2014 PBIS just cited, the Public Body makes the point I want to make. The exceptions provided for in s. 27(1)(b) and s. 27(1)(c) are distinct from the legal privileges protected from disclosure under in s. 27(1)(a). The former exceptions are intended to protect information that relates to the provision of legal advice or other related services but not information subject to legal privilege that would fall under s. 27(1)(a). A public body's claim to protect legally privileged information would properly fall under s. 27(1)(a) while a public body's claim to shield other information about the provision of legal and related services would properly fall under the other two exceptions under s. 27(1). There is no other evidence in the 2017 Affidavit of Records or the Exhibited Indices indicating to which specific Records at Issue the Public Body has applied either s. 27(1)(b) or s. 27(1)(c).

[para 134] As I stated *supra,* by failing to make reference to the specific non privileged exceptions under s. 27(1) in the Section(s) of the Act/FOIPNo Columns in the Exhibited Indices while at the same time claiming both Litigation Privilege and Solicitor/Client privilege for all these Records at Issue in the Privilege Column, this means the Public Body has only established that it has specifically relied on s. 27(1)(a). In doing so, I find that the Public Body has established that it has met the requirement of *"limited and specific exceptions"* as required by the legislation but only with respect to s. 27(1)(a). I find that the Public Body has, however, not provided *sufficiently* clear, convincing, and cogent evidence to meet its burden of proof to show where and for what Records at Issue it claims it relied on s. 27(1)(b) or s. 27(1)(c). Based on this finding, I find it is unnecessary for me to consider the issue of whether the Public Body has properly relied on applied the exceptions under s. 27(1)(b) and s. 27(1)(c). I turn now to the issue of the exercise of discretion under the s. 24(1) discretionary exception.

D. Issue #2: Section 24(1) and the Exercise of Discretion

> ISSUE #2. Whether the Public Body properly relied on and applied s. 24 of the *FOIP Act* [reasonable expectation disclosure could reveal advice from officials] to the information in the records.

[para 135] This section of the Interim Decision/Orders deals solely with those Records at Issue where the Public Body has only claimed the s. 24(1) exception, all of which have been provided to me by the Public Body. The Public Body refused to disclose any of the Records at Issue to the Applicant where it had relied on and exercised its discretion to refuse access under s. 24(1) of the *FOIP Act*.

[para 136] Section 24(1) of the *FOIP Act* reads as follows:

> ***24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal***
>
> ***(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,***
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body,*
> *(ii) a member of the Executive Council, or*
> *(iii) the staff of a member of the Executive Council,*
>
> ***(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations,***
>
> *(d) plans relating to the management of personnel or the administration of a public body that have not yet been implemented,*
>
> *(e) the contents of draft legislation, regulations and orders of members of the Executive Council or the Lieutenant Governor in Council,*
>
> *(f) the contents of agendas or minutes of meetings*
>
> *(i) of the governing body of an agency, board, commission, corporation, office or other body that is designated as a public body in the regulations, or*
>
> *(ii) of a committee of a governing body referred to in subclause (i),*
>
> *(g) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision, or*
>
> *(h) the contents of a formal research or audit report that in the opinion of the head of the public body is incomplete unless no progress has been made on the report for at least 3 years.*
>
> [Emphasis added]

[para 137] As a first step, in the analysis of the 2017 Affidavit of Records and Exhibited Indices, as outlined *infra,* I reviewed the Records at Issue provided to me to determine if the Public Body had met its burden of proof that it had properly relied on s. 24(1) of the *FOIP Act*.

> *As discussed above, the "head" making a decision under ss. 14 and 19 of the Act has a discretion whether to order disclosure or not.* ***This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case.*** *The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.*
>
> *The head must consider individual parts of the record, and* ***disclose as much of the information as possible.*** *Section 10(2) provides that where an exemption is claimed, "the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions".*

(c) The Duty of the Reviewing Commissioner

The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.
[*Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* at paras. 66-68; See also Order F2010-036*,* at para. 99]
[Emphasis added]

[para 138] What has the Public Body submitted with respect to s. 24(1)? At para. 53 of its 2014 PBIS, the Public Body cites the complete text of s. 24(1). At para. 54 it states *"this provision* [s. 24] *applies to many records requested by the applicant. In particular, the affidavit of* [name of FOIP Coordinator] *identifies the records which include information described in paragraphs 24(1)."* The Public Body continues in its submission to cite the language of the statute and simply insert the name of the Public Body, which is the only 'evidence' provided regarding the application of s. 24(1) by the FOIP Coordinator. That is, the FOIP Coordinator, at para. 16 of his/her 2014 Affidavit, refers to the language of the statute with the name of the Public Body inserted, which reads as follows:

From my review I also found that many of the Related Records contained advice, proposals, recommendations, analyses or policy options developed for Alberta Health. They also contained positions, plans, procedures, criteria or instructions developed for the purpose of contractual negotiations by Alberta Health, or considerations that relate to those negotiations. All of these records were withheld from disclosure pursuant to s. 24 of FOIP (see exception sheet at Exhibit "B").

[para 139] At para. 3 of its 2017 PBSS, the Public Body submits it withheld a number of records from the Applicant on the basis of s. 16, s. 17, s. 24, s. 25 and s. 27 of the *FOIP Act.* This submission cites exceptions (s. 16, s. 17, s. 25) that are *not* at Issue in this Inquiry and fails to mention s. 4(1)(q) and s. 29. At para. 28 of its 2017 PBSS the Public Body indicates that it is continuing to rely on its submissions dated August 6, 2014 [2014 PBIS] with respect to the other sections of the *FOIP Act* that have been applied to the withheld information set out in the updated Exhibited Indices. The remainder of the Public Body submissions are silent with respect to s. 24(1).

[para 140] The 2014 Affidavit provides the only information about s. 24(1) by way of the evidence of the FOIP Coordinator. The only provisions in s. 24(1) cited by the affiant are: s. 24(1)(a) and s. 24(1)(c). There are no references in the affidavit or submissions to the remaining subsections of s. 24(1) and therefore, on that basis, it seems reasonable to assume the Public Body is not relying on any other subsections of s. 24(1) and, therefore, only s. 24(1)(a) and s. 24(1)(c) have been considered as the specific exceptions being claimed.

[para 141] At p. 2 of his/her Request for Review included with his/her 2014 AIS, the Applicant submitted the following:

*[*Name of FOIP Coordinator*] does not describe the responsive records and does not provide any information about which of the classes of documents set out in section 24 are said to capture the requested records. This vague and conclusory approach suggests that the Ministry has not discharged its responsibility to consider thoroughly which records, or portions thereof, can properly be withheld and on what basis. The Ministry has a responsibility to disclose those records or portions thereof that do not fall within the classes of documents set out in section 24. In light of the broad nature of the request and the varied classes of documents a blanket reliance on section 24 as a whole is insufficient to discharge the Ministry's responsibilities under the Act.*

[para 142] The Applicant argues that the Public Body bears the onus to establish that the s. 24 exception applies before the issue of exercise of discretion arises. S/he argues that two prerequisites must be met: first that the information sought falls within one of the categories in s. 24(1) and second that

disclosure would affect deliberative processes in the future. If the Public Body fails to meet its burden to show it properly relied on s. 24, the question of how it exercised its discretion is irrelevant and these Records at Issue should be released.

[para 143] The first question is whether the Public Body has provided *sufficiently* clear, consistent, and cogent evidence that the information in the records falls under s. 24(1). The Public Body did not provide any substantive relevant submissions or affidavit evidence regarding its reliance on s. 24(1), however, I had these Records at Issue available. Based on my examination of these Records at Issue, I answer the first question: has the Public Body properly relied on the exception, in the affirmative and go on to the second question: whether the Public Body has provided *sufficiently* clear, consistent and cogent evidence that it has properly applied the exception to the information in the records. That requires an examination of how it exercised its discretion in refusing to disclose the Records at Issue. I do so now.

[para 144] In demonstrating if it has properly applied a discretionary exception, the Public Body must provide evidence that its rationale for exercising its discretion to refuse access is demonstrable and reasonable.

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

[para 145] What are the factors to consider as to whether the discretionary exception has been properly applied?

> *In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:*
>
> > *In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed.*
>
> *…*
> *The Commissioner* ***may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations*** *(see IPC Order PO-2369-F/February 22, 2005, at p. 17).*
> [*Ontario (Public Safety and Security),* at paras. 69, 71]
> [Emphasis added]

[para 146] In this Inquiry, the Public Body has provided little evidence or substantive submissions as to what factors it considered in the exercise of its discretion.

> ***If the reasons for decision are non-existent, opaque or otherwise indiscernible,*** *and if the record before the administrative decision-maker does not shed light on the reasons why the administrative decision-maker decided or could have decided in the way it did, the requirement that administrative decisions be transparent and intelligible is not met: Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62 (CanLII), [2011] 3 S.C.R. 708 at paragraphs 14 and 15 (adequacy of reasons is to be assessed as part of the process of substantive review and is to be conducted with due regard to the record; Public Service Alliance of Canada v. Canada Post Corp., 2011 SCC 57 (CanLII), [2011] 3 S.C.R. 572 and Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654 (within limits, the decision can be upheld on the basis of the reasons that could have been given).*
>
> *…*
>
> *Fourth, under the Act, the decision-maker must assess whether any of the exemptions to disclosure apply to the information sought.* ***But that is not the end of the analysis. Even though an exemption applies, the decision-maker nevertheless can exercise his or her discretion to disclose the material****: Attaran v. Canada (Minister of Foreign Affairs), 2011 FCA 182 (CanLII), [2011] F.C.J. No. 750.*
>
> ***At a minimum, the reasons or the record should show that the decision-maker was aware of this discretion to release exempted information and exercised that discretion one way or the other.***
>
> ***In this case, there is nothing in the reasons or the record on this point.***
> [*Leahy v. Canada (Minister of Citizenship and Immigration),* 2012 FCA 227, at paras. 121, 133-135]
> [Emphasis added]

[para 147] The Public Body has provided little or no evidence about what relevant factors the Public Body took into account in deciding that disclosure could reasonably be expected to reveal information protected under s. 24(1). There is some evidence, however, that the Public Body factored in an irrelevant consideration when making its decision. I turn to that evidence now.

[para 148] In a recent Order, while addressing the issue of the exercise of discretion, an Alberta Adjudicator, referring to the *Ontario (Public Safety and Security)* decision from the SCC, stated the following:

> *Section 24(1) is a discretionary exception. In Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.*
>
> *The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:*
>
> - *the decision was made in bad faith*
> - *the decision was made for an improper purpose*
> - ***the decision took into account irrelevant considerations***
> - *the decision failed to take into account relevant considerations*
>
> *In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded:*

> *In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information* ***not*** *subject to solicitor-client privilege in Ontario (Public Safety and Security). (At para. 104)*
> [Order F2017-28, at paras. 101-103]
> [Emphasis added]

[para 149] Other than with respect to an access request for personal information, it is well established that the identity of an applicant is an irrelevant consideration, one a public body should not consider in making an access to information decision, which is reflected in the following Order from Ontario.

> ***Access to information laws presuppose that the identity of requesters,*** *other than individuals seeking access to their own personal information,* ***is not relevant to a decision concerning access to responsive records.*** *As has been stated in a number of previous orders, access to general records under the Act is tantamount to access to the public generally, irrespective of the identity of a requester or the use to which the records may be put. While I am prepared to accept that institutions may want to categorize requesters broadly - "member of the media", "public interest group", "Member of Provincial Parliament" - in order to ensure that Ministers have a "heads up" regarding the disclosure of records that could generate public discussion,* ***this does not extend to the identity of a specific requester.*** *As IPC Practice 16 states,* ***Ministry employees responsible for receiving access requests under the Act must ensure that the identity of a requester is disclosed to others only on a "need to know" basis during the processing of the request. Except in unusual circumstances, there is no need for requesters to be identified because their identity is irrelevant.***
> [Order PO-1998, at p. 6]
> [Emphasis added]

[para 150] At para. 1 of its 2017 PBSS, the Public Body identified the Applicant by his/her first and last name, by the firm with which s/he is associated and by the fact that his/her firm is one of the defendants in the CRA Litigation, as follows:

> *This inquiry arises out of two requests under the Freedom of Information and Protection of Privacy Act ("FOIP " or the "Act") to access records in the custody of Alberta Health (or the "Public Body") by [*name of Applicant*] that pertain to the tobacco-related health care cost recovery litigation (the "HCCR Litigation") being conducted by the Government of Alberta. [*Name of Applicant*] and [*his/her*] firm, [*name of law firm*], act for one of the defendants in the HCCR Litigation.*

[para 151] This same evidence is in the 2017 Affidavit of Records where, at para. 4, the affiant (in-house counsel), makes the following unconditional reference to the identity of the Applicant:

> *As noted in the Affidavit of [*name of FOIP Coordinator*], two requests were made to Alberta Health relating to any agreements and related records that pertain to the HCCR litigation. The requester [*name of the Applicant*] is a lawyer with [*name of law firm*], a legal firm that that* [sic] *also represents [*name of company*], one of the defendants in the HCCR litigation.*

[para 152] At para. 32 of its 2014 PBIS, the Public Body refers to comments made by the Minister of Justice in the Legislature on December 4, 2012, which were proffered into evidence as statements made to show there was no intention to waive solicitor client privilege over any of the Records at Issue. The portion of the Alberta Hansard cited was as follows:

> *The various statements made by the Minister of Justice or other representatives of the Government do not evince an intention to waive solicitor-client privilege to any of the records at Issue. As the Minister of Justice stated in the Legislative Assembly in response to a request from a Member to disclose the Contingency Fee Agreement: (3)*

> ***Mr. Denis:*** *Well, Mr. Speaker, I am rather surprised to get this information because I know this member is a lawyer of many years, If he doesn't believe me that's fine. But I'm going to quote the former president of the Law Society who sent me an e-mail today. [*His/her*] name is [*name*]. [*S/he*] indicated:*
>
> > *The disclosure of such information can be expected to be of benefit to the opposing litigants, in this case to tobacco companies … Disclosure of the contingency [fee] agreement would almost certainly assist the defendants in fighting the case. Releasing that type of information while the lawsuit is ongoing would be unusual and ill advised.*
>
> [Emphasis in original]

[para 153] With its 2014 PBIS, the Public Body attached the 2014 Affidavit of the FOIP Coordinator at Tab 3. At para. 15 of the 2014 Affidavit, the affiant referred to comments made by the Minister of Justice in the Legislature on December 4, 2012. The Alberta Hansard transcript is attached as Exhibit E and reads as follows:

> ***Mr. Denis:*** *Well, Mr. Speaker, I am rather surprised to get this information because I know this member is a lawyer of many years, If he doesn't believe me that's fine. But I'm going to quote the former president of the Law Society who sent me an e-mail today. [*His/her*] name is [*name*]. [*S/he*] indicated:*
>
> > *The disclosure of such information can be expected to be of benefit to the opposing litigants, in this case to tobacco companies … Disclosure of the contingency [fee] agreement would almost certainly assist the defendants in fighting the case. Releasing that type of information while the lawsuit is ongoing would be unusual and ill advised.*
>
> [Emphasis in original]

[para 154] This evidence points to the fact that those within the Public Body responsible for making a decision regarding the access requests took into account the person seeking the information as a party adverse in interest in another matter; as *"… opposing litigants, in this case tobacco companies."* Neither the FOIP Coordinator nor the Public Body provided any details as to how the statement is evidence that the Public Body had no intention to waive legal privilege, which is not at issue in this Inquiry. Rather, the quotes do appear to suggest that the Applicant's identity was factored into its decision to deny access, including what the Public Body thought was the intended use: "…*would almost certainly assist the defendants in fighting the case."*

[para 155] At paras. 8-9 of his/her 2017 ARS, the Applicant responded to the Public Body's submissions as follows:

> *In its submissions and evidence, the Public Body highlights that the Applicant is a lawyer with a legal firm that represents one of the defendants in Alberta's health care costs recovery litigation. The Applicant's identity is not a relevant consideration in this Inquiry.*
>
> *The Applicant's identity is not relevant to any of the statutory tests for non-disclosure under the FOIP Act.(3) For example, under s. 27, the Requested Records are either privileged, or they are not. The Applicant's identity has nothing to do with the legal test for establishing privilege; a document's status as privileged does not turn on who is asking to see it.*

[para 156] In its 2017 PBRS submitted on January 17, 2018, the Public Body devoted three paragraphs of its rebuttal responding to the Applicant's submission that factoring in *who* was seeking the information was an irrelevant consideration in exercising its discretion to withhold records. At paras. 2-4, the Public Body, attempts to distance itself from the evidence previously submitted that it had considered who the Applicant was when making its decision(s), by stating the following:

> *The Applicant suggests that* ***the Public Body has placed inappropriate emphasis on the identity of the Applicant and that this was somehow a deciding factor with respect to the***

> ***exercise of discretion that was made to withhold the records*** *listed in the updated Index* [sic] *of Records (the "Refused Records").*
>
> *The Public Body wishes to clarify that no decisions with respect to exemptions were ever made with regard to the identity of the Applicant.*
>
> *It is agreed that the identity of an applicant is not a relevant factor. Instead, the relevant analysis is whether any of the requested records fall into any of the exceptions set out in the Act. In this case, given that most of the requested records relate to the ongoing tobacco litigation in Alberta, most of the records have been exempted on the basis of legal privilege-both solicitor client and litigation privilege.*
> [Emphasis added]

[para 157] I do not find the Public Body's rebuttal submission persuasive: its after-the-fact, late in the Inquiry objection to its own initial evidence and submissions. In its 2017 PBRS, the Public Body refers to *"inappropriate emphasis."* Other than in its 2017 PBRS, the Public Body, in all its other submissions and evidence, including both the 2014 Affidavit and the 2017 Affidavit of Records, point to the fact that the identity of the Applicant was a factor the Public Body considered in making its decision to refuse access. This conclusion is based on the fact that details about the identity of the Applicant were referred to by both affiants: the FOIP Coordinator and the in-house counsel, in their respective affidavits, and by the Public Body in its submissions. It was not until its 2017 PBRS after the Applicant had objected to his/her identity being considered, that the Public Body tried to distance itself from its prior evidence and submissions by stating that it acknowledged the identity of the Applicant was not a relevant factor to consider in the exercise of its discretion. The Public Body did not provide any direct evidence by way of rebuttal from either the in-house counsel or the FOIP Coordinator with its 2017 PBRS. In complying with the Interim Decision, it is incumbent on the Public Body to properly exercise its discretion by not considering any irrelevant factors, including who made the access to information request. I find, on a balance of probabilities, as a fact, that the Public Body took the identity of the Applicant into consideration in making its access to information decisions.

[para 158] With respect to its claim to s. 24(1), I have reviewed the Records at Issue provided to me by the Public Body for Case File #F6749 (no records from Case #F6748 produced). My review reveals the following:

1. With the scope of the Applicant's two access to information requests in mind, one of which is broad in scope, the other more narrow, I find that these Records at Issue are responsive.

2. In its correspondence dated February 9, 2018 and February 22, 2018 (reproduced *supra*), the Public Body directed me to refer to, and rely on, the updated Exhibited Indices of Records, which it provided in November 2017 as Exhibit A and Exhibit B to its 2017 Affidavit of Records. Relying on that direction in looking at Exhibit B, for some Records at Issue, the Public Body has claimed s. 24(1) in the Section(s) of the Act/FOIPNo Column while at the same time listing both litigation privilege and solicitor client privilege in the Privilege Column. If the Public Body intended to claim both legal privileges, then it ought to have cited s. 27(1)(a) in the Section(s) of the Act/FOIPNo Column in addition to, or instead of, s. 24(1). If that was its intention, the Public Body has *not* waived privilege by providing these Records at Issue to me. If it intended to rely on s. 24(1) and not s. 27(1)(a), the Public Body ought not to have made an entry in the Privilege Column in Exhibit B to the 2017 Affidavit of Records. Specifying legal privilege is one of the *basic* requirements in the *ShawCor* criteria. The Public Body did not meet this basic requirement for these records. On that basis, I find I am unable to decide the status of the Records at Issue where both s. 24(1) and litigation privilege and solicitor client privilege have been claimed in Exhibit B of the 2017 Affidavit of Records, detailed under Findings *infra.* These Records at Issue will fall under the Interim Decision.

3. I find that s. 24(1)(a) and s. 24(1)(c) apply to some of the Records at Issue, detailed under Findings *infra.*

4. Based on the discussion *supra,* I find in the case of s. 24, however, the fact that the Public Body took an irrelevant factor into consideration in the exercise of its discretion: the identity of the Applicant, is sufficient to quash its decisions where it has improperly exercised its discretion under s. 24(1)(a) and s. 24(1)(b) to refuse access, detailed under Findings *infra*. Because of my finding with respect to s. 32(1)(b) *infra*, it is unnecessary to make an Order of Reconsideration.

5. It may be worth pointing out that during the Inquiry, the Public Body failed to provide any reasons for its access decisions under s. 24(1) and the only known factor it took into account was an irrelevant one.

E. Issue #4: Section 29(1)

ISSUE #4. Whether the Public Body properly relied on and applied s. 29 of the *FOIP Act* [information that is or will be available to the public] to the information in the records.

[para 159] The Public Body has the burden to prove that it has properly relied on and applied the discretionary exception in s. 29(1), which reads as follows:

> *29(1) The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is readily available to the public,*
>
> *(a.1) that is available for purchase by the public, or*
>
> *(b) that is to be published or released to the public within 60 days after the applicant's request is received.*
>
> *(2) The head of a public body* ***must notify an applicant*** *of the publication or release of information that the head has refused to disclose under subsection (1)(b).*
>
> *(3) If the information is not published or released within 60 days after the applicant's request is received, the head of the public body must reconsider the request as if it were a new request received on the last day of that period, and access to the information requested must not be refused under subsection (1)(b).*
> [Emphasis added]

[para 160] Section 29(1) does not appear in Exhibit A for Case File #F6748, the Index for the Applicant's first access to information request. Nor has the Public Body applied s. 29(1) in any previous Index for that Case File.

[para 161] Section 29(1) does appear in Exhibit B (#F6749) for 10 Records at Issue. The Public Body's decision in response to the Applicant's second access to information request read, in part, as follows:

> *Access to all of the information that you requested is denied under … and section 29 (information that is or will be available to the public.) The information on pages 138-171 can be accessed at http://www.qp.alberta.ca/ (Crown's Right of Recovery Act Chapter C-35)*.

[para 162] In its 2014 PBIS, the Public Body submitted that the Applicant had not raised any issue with respect to its application of s. 29(1). But in fact in his/her 2014 AIS, the Applicant submitted that the Public Body's decision was deficient as it failed to provide any information to the Applicant as to how, where or when the information it was refusing under s. 29(1) could be accessed by him/her.

[para 163] Section 29(2) of the *FOIP Act* imposes a duty on the Public Body to *notify an applicant* of the publication or release of information that the head has refused to disclose if it has done so pursuant to

s. 29(1)(b). In this case, when relying on s. 29(1), the Public Body did not specify which sub-paragraph on which it was relying.

[para 164] In the case of one record, that is *"readily available to the public"*, it would fall under s. 29(1)(a). In its access to information decision, the Public Body did, in fact, provide information to the Applicant as to what the record Doc Count 15 in Exhibit B, the Index for #F6749 was: *Crown's Right of Recovery Act*. In the case of one record, Doc Count 68 in Exhibit B, described in the Exhibited Index for Case File #6749 by the Public Body as: Document Type *"email"* entitled *"Health FYI - AB won't invest in tobacco; depression (Glob Cal PM)"* from *"Global Calgary Government of Alberta"* would likely, however, not fall, under s. 29(1)(a) as *"readily available to the public*." On review of this Record it is an email, which is unlikely to be the type of document customarily available to the public. For this Record at Issue, the Public Body was under a duty to inform the Applicant how, where or when the information could be accessed within 60 days after receipt of the access request.

[para 165] Another significant problem arose during my examination of the Index at Exhibit B of the 2017 Affidavit of Records. Relying on the direction from the Public Body regarding reliance on the most recent Exhibited Indices referred to *supra*, in looking at Exhibit B, for the majority (8 of 10) of the Records at Issue where it has claimed s. 29(1), the Public Body has also claimed solicitor client privilege and litigation privilege in the Privilege Column: specifically, Records at Issue at Doc Counts 69, 70, 71, 72, 73, 74, 75, 76. If the Public Body intended to claim both legal privileges, then it ought to have cited s. 27(1)(a) in the Section(s) of the Act/FOIPNo Column and not s. 29(1). If that was its intention, the Public Body has *not* waived privilege by providing these Records at Issue to me. If it intended to rely on s. 29(1) and not s. 27(1)(a), the Public Body ought not to have made an entry in the Privilege Column in Exhibit B to the 2017 Affidavit of Records. Specifying legal privilege is one of the *basic* requirements in the *ShawCor* criteria. The Public Body did not meet this basic requirement for these records. On that basis, I find I am unable to decide the status of the Records at Issue where s. 29(1) and both solicitor client privilege and litigation privilege have been claimed in Exhibit B of the 2017 Affidavit of Records and thus they fall under the Interim Decision.

F. Issue #1: Section 4(1)(q)

ISSUE #1: Whether the Public Body properly relied on and applied s. 4(1)(q) of the *FOIP Act* [records excluded under the *FOIP Act*] to the information in the records.

[para 166] The Public Body has the burden to prove when a record is excluded from the purview of the legislation by demonstrating that it has properly relied on and applied s. 4(1)(q) of the *FOIP Act,* which reads as follows:

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

[para 167] In its 2014 PBIS, the Public Body submitted that the Applicant had no right to access Records at Issue where it had applied s. 4(1)(q), which provision excludes records that do not fall under

the *FOIP Act.* At para. 58 of its 2014 PBIS, the Public Body claimed that the Applicant did not raise an issue about whether this record has been properly excluded. The Public Body's submission is not wholly accurate.

[para 168] In his/her 2014 AIS, the Applicant indicated s/he was relying on his/her submissions in his/her #F6749 Request for Inquiry, which s/he attached as Schedule B. The following is my summary of what the Applicant submitted with respect to the application of the s. 4(1)(q) of the *FOIP Act* in Schedule B:

1. The FOIP Coordinator does not indicate which classes of records described in s. 4(1)(q) are found in the Records at Issue.

2. The FOIP Coordinator also does not provide a description of the Records at Issue said to fall outside the scope as an excluded record, which under the *FOIP Guidelines* it is required to provide.

3. There is no evidence that the Public Body considered following the *FOIP Guidelines,* which provide that a public body should consider accommodating a request for records thought to be excluded from the scope of the *FOIP Act,* outside the *FOIP Act* process.

[para 169] Section 4(1)(q) has only been claimed in the Index for Case File #F6749. As I noted in the 2017 Notice, there are discrepancies between the exception claimed in the 2017 Exhibited Index for a particular Record at Issue and the exception noted on the page itself. This is with respect to Records at Issue included in the package of 150 Records at Issue provided to me in January 2017. An example is the Record at Issue listed as Count Number 20 (JSG000218) where the page cites s. 4(1)(l) but the updated 2017 Exhibited Index continues to refer to s. 4(1)(q) as it appeared in the 2014 Index. The list of Issues contained in the 2014 Notice makes no reference to s. 4(1)(l). The 2017 PBSS is silent on its reliance on s. 4(1)(q): it does not refer to it in its list of issues or provide any submission in that regard. Relying again on the direction from the Public Body regarding reliance on the most recent Exhibited Indices referred to *supra*, in looking at Exhibit B, I find the reference to and reliance on s. 4(1)(q) is accurate.

[para 170] A problem does arise because the Public Body appears to have named the wrong record (JSG000418) to which it applied s. 4(1)(q) in its 2014 PBIS, at para. 57. That is, Exhibit B attached to the 2017 Affidavit of Records, does not indicate that s. 4(1)(q) has been applied to JSG000418, but rather s. 27(1) has been claimed. The updated 2017 Exhibited Index does indicate that s. 4(1)(q) has been applied to JSG000218 [Doc Count 20 in Case File #F6749]. This matches where it has been applied in the #F6749 Index of Records, at Tab 2 of the 2014 PBIS. As s. 4(1) lists records that do *not* fall within the purview of the *FOIP Act,* it is important for the Public Body to be accurate when applying it to records it considers excluded from the purview of the *FOIP Act*. As I have the record (Doc Count 20) where s. 4(1)(q) has been claimed available to me, I find the Public Body has properly claimed s. 4(1)(q) as Record at Issue falls outside the purview of the *FOIP Act.*

G. Issue #6: Public Interest Override

ISSUE #6. Whether public interest under s. 32 of the *FOIP Act* is an issue in the inquiry.

[para 171] Section 32 of the *FOIP Act* imposes a duty on a public body is under a duty to disclose information to the public under specific circumstances. Referred to as the public interest override, the language in s. 32 reads as if it is meant to apply notwithstanding the application of any other exceptions in the legislation. It reads as follows:

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

(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or

(b) ***information the disclosure of which is, for any other reason, clearly in the public interest.***

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

[para 172] One of the key elements of s. 32 is that it is about disclosure of *information* which for any reason is clearly in the public interest. Section 32 is about the disclosure of information not about records, *per se*, and where it is shown to apply, it does so regardless of whether it is in response to an access to information request. The operation of s. 32 (formerly s. 31) was considered in Order F2006-010, where the adjudicator stated:

> *In order 96-011, the previous Commissioner reviewed his jurisdiction to consider requests for review pursuant to section 32 (then section 31). The Commissioner decided that he did have jurisdiction to review the decisions made by the head of a public body under section 32. In determining the standard of review and the burden of proof in relation to public interest decisions, the Commissioner said:*
>
> > *Once the pre-conditions set out in section 31 are met,* ***a statutory obligation arises for the head of a public body to release information, notwithstanding that other sections of the Act*** *protecting individual privacy may have to be over-ridden in releasing that information. The Act cannot be taken to lightly impose this statutory duty on the head of a public body, or to lightly allow an overriding of individual privacy rights. Thus, in any review of a section 31 decision, I must first consider whether one of the pre-conditions set out in section 31 has occurred.* ***The applicant has the burden of proof at this part of the investigation and it is not a burden that will be easily met.*** *These pre-conditions are: risk of significant harm to the environment risk of significant harm to the health or safety of the public release is clearly in the public interest. The latter of these preconditions was considered by Mr. Justice Cairns in Bosch. In the portion of the Bosch decision dealing with section 31(1)(b), Mr. Justice Cairns considered what type of information might be "clearly in the public interest". He made an important distinction between information that "may well be of interest to the public" and information that is "a matter of public interest." I agree with this point. I cannot conclude that the Legislature intended for section 31 to operate simply because a member of the public asserts "interest" in the information.* ***The pre-condition that the information must be "clearly a matter of public interest" must refer to a matter of compelling public interest.***
> > *…*
> > *My function under the general powers contained in the Act is not to second-guess each and every decision made by the head of a public body. It is clear that the Legislature has placed the duty to assess risk and determine public interest on the head of a public body. The head will often, but not always, be a Minister, an elected official. This person will likely have the advantage of information and support staff to assist and advise in carrying out this duty. Accordingly, I will be concerned with whether the head's decision is rationally defensible, as opposed to whether I think he decided correctly.*
>
> *As the previous Commissioner explained, an applicant bears the onus of establishing that section 32 applies to the information he seeks disclosed under section 32.* ***In other words, an applicant must establish through evidence that the benefits of disclosure to the public interest will override any of the public and private interests that the Act has created exceptions to preserve. If an applicant successfully establishes that section 32 applies to the information, then the burden shifts to the head of the Public Body, who must then establish that a decision not to disclose the information is rationally defensible.***
> [Order F2006-010, at paras. 30-31]
> [Emphasis added]

[para 173] Relying on the s. 32(1)(b) test summarized in Order 97-018, the Applicant acknowledged s/he has the burden of proof to meet the pre-condition that disclosure of information is *"clearly a matter of public interest."*

> *Mr. Justice Cairns stated in Order 96-014 that the Applicant bears the burden of proof to show that the criteria in section 31(1)(b) has been met. Therefore, the Applicant must prove that the disclosure of the Third Parties' names and addresses would be "clearly in the public interest". Mr. Justice Cairns also considered what type of information that "may well be of interest to the public" and information that is "a matter of public interest". As I said in Order 96-011,* ***the Legislature did not intend for section 31 to operate simply because a member of the public asserts "interest" in the information. The precondition that the information must be "clearly a matter of public interest" must refer to a matter of compelling public interest.***
> [Order 97-018, at para. 61]
> [Emphasis added]

[para 174] The Applicant acknowledged that in order to meet his/her s/he burden of proof to show that disclosure is a matter of *"compelling public interest"*, s/he must prove that is more than mere interest or curiosity in the information, and that the benefits of disclosure will override any of the public and private interests the *FOIP Act* exceptions are intended to preserve and protect. If the Applicant successfully meets that burden, the onus then shifts to the Public Body to prove that its refusal to disclose the information is rationally defensible.

[para 175] To meet his/her burden with respect to public interest, the Applicant stressed the fact that a number of matters involving non-disclosure of information were the subject of three publicly funded investigations/inquiries. In support of that submission, the Applicant provided an Affidavit with his/her 2017 ARS, to which the following reports were attached:

> *(a) a 2013 inquiry before former Alberta Ethics Commissioner Neil Wilkinson, on the allegations of wrongdoing against former Premier [*name*], which cleared [*him/her*] of wrongdoing*[12]*;*
>
> *(b) a 2015 inquiry before the Honourable Frank Iacobucci on the question of whether Commissioner Wilkinson did <u>not</u> have available to him all information relevant to his investigation*[13]*; and*
>
> *(c) a 2016 re-investigation by Acting Alberta Ethics Commissioner Paul Fraser, Q.C., in which he determined, based on information that was previously not available to Commissioner Wilkinson, that former Premier [*name*] was not in a conflict of interest situation in the procurement process for [*name of law firm*] counsel*[14]*.*
>
> [Emphasis in <u>original</u>]

[para 176] These reports have been examined in detail for the sole purpose of making a determination if the Applicant has met his/her burden pursuant to s. 32 of the *FOIP Act.* The reports from all three investigations/inquiries were attached to an Affidavit submitted by the Applicant, concerned an inquiry or investigation, or issues arising in the course of those reviews, of an ethical question with respect to a potential conflict of interest in the decision-making process of selecting counsel for the CRA Litigation made by a former Minister of Justice. The Applicant submits that the issue of the selection process was not the subject of his/her access requests, is not relevant to this Inquiry and is not what his/her claim under s. 32 entails. Rather, the Applicant argues that non-disclosure by the Government is a recurring theme in all three investigations/inquiries and it is, therefore, reasonable to argue this is the issue of public interest to which the s. 32 override should be applied. The focus of the Applicant's submission to meet the test of *"compelling public interest"* is with respect to how the affidavit evidence submitted establishes that information has been withheld or mis-managed by the Public Body throughout and that, as a result, the information should be disclosed pursuant to the public interest override.

[para 177] After listing the investigations/inquiries in his/her 2017 ARS, the Applicant stressed how the public investigations/inquiries related to access to information issues, a summary of which follows:

- the original inquiry before the Ethics Commissioner was initiated as a result of information made public under access to information processes

- media reports on the "*Tobaccogate"* scandal and in the Acting Ethics Commissioner's report reference *"leaked"* documents

- non-disclosure is a recurring theme through all three inquiries and, using the Iacobucci Review Report as an example, where the former Justice found that the Alberta Government had failed to adequately disclose information to the Ethics Commissioner, the Officer of the Legislature tasked to investigate the alleged ethical question.

[para 178] For the purpose of considering whether the Applicant has met his/her burden pursuant to s. 32, the test is whether the evidence s/he submitted is *sufficiently* clear, convincing, and cogent to demonstrate that these circumstances meet the test of *"compelling public interest."* In deciding whether the s. 32 public interest override applies, it is would be wholly inappropriate and well outside the scope of my delegation, for me to review or even consider any allegation of ethical impropriety in the process of selecting counsel for the CRA Litigation.

[para 179] The Applicant argues that what should be considered is whether the evidence s/he submits demonstrates how the Public Body shared, released or withheld information in circumstances in which there was *"compelling public interest."* Ethics Commissioner Wilkinson reveals in his conclusions that his report was based on *"evidence gathered in this investigation* [that] *is clear, consistent, cogent and uncontradicted."* [Refer to para. 111, Report to the Speaker of the Legislative Assembly of Alberta by Neil Wilkinson, Ethics Commissioner]. It was subsequently revealed in the Iacobucci Review Report that, unbeknownst to him, the Ethics Commissioner did not have all information relevant to his investigation at his disposal [Refer to para. 78, Iacobucci Review Report].

[para 180] Media reports by CBC in 2015 based on leaked documents revealed that the Public Body had *not* provided the Ethics Commissioner with all the relevant documents. Upon learning that Ethics Commissioner Wilkinson did not have all the relevant information available to him for his investigation, the Minister of Justice asked former Supreme Court of Canada Justice, the Honourable Frank Iacobucci, to review the matter. The focus of Iacobucci's investigation was the extent to which the Public Body had provided relevant documents to the Ethics Commissioner, not the conduct of the former Premier. The Minister of Justice instructed that Iacobucci be provided with all relevant documentation for his review including privileged information.

[para 181] Information given to Iacobucci in the course of preparing his report to the Government included materials over which solicitor client privilege had been claimed along with unredacted FOIP information. In his Report on the Independent Review Conducted by The Honourable Frank Iacobucci, C.C., Q.C. of Information Relating to an Investigation by the Former Ethics Commissioner of Alberta into Allegations involving the Honourable (former Minister of Justice) [Iacobucci Review Report], Iacobucci cited from the information that had been provided to him by the Government in the course of his review.

[para 182] The central issue in the Iacobucci Review Report is what information did the Government fail to provide to the Ethics Commissioner, an Officer of the Legislature. Iacobucci found in his review that the Government failed to disclose or provide relevant information to the Ethics Commissioner. This included, but was not restricted to, documents over which it claimed legal privilege. In the case of the privileged documents, the Public Body and the Ethics Commissioner's office devised a process proposed by counsel to the Public Body (original counsel for the Public Body in this Inquiry). The process entailed the documents over which privilege had been asserted being provided to a former judge who the Public Body retained to provide his/her legal opinion. As was subsequently determined by Iacobucci in his Review Report, the former judge who prepared a legal opinion for the Ethics Commissioner was also not provided with all of the relevant documentation by the Government in order to prepare his/her legal

opinion. This former judge, referred to by Iacobucci in his Review Report, was also the author of the Opinion Letter (not a legal opinion) that has been ruled inadmissible in this Inquiry. This evidence is only relevant to the s. 32 issue *vis a vis* the fact that Iacobucci found the former judge had also not been provided with all documents relevant to prepare his/her legal opinion.

[para 183] At para. 74 of his Review Report, Iacobucci stated that it appeared the Ethics Commissioner did not have all of the information relevant to his investigation made available to him. He went on to say that it was abundantly clear some of the key records had not formed part of the Ethics Commissioner investigation and listed them in detail, at para. 75, of his Review Report.

[para 184] At paras. 76 and 78, Iacobucci concluded as follows:

> ***None of this information was released through the Freedom of Information and Protection of Privacy Act requests that preceded the Ethics Commissioner's investigation, and none was included in the statutory declarations of the Government's lawyer, [*****name****] or Minister [*****name****].*** *Nor did the Ethics Commissioner refer to any of this information in his report.* ***I am confident that, given its relevance to the issues under investigation, the Ethics Commissioner would have referred to it if it had been provided to him. Consequently the obvious inference is that none of it was available to the Ethics Commissioner.***
> *…*
> *My conclusion on the first issue that I was asked to consider is, therefore, that* ***the Ethics Commissioner did not have at his disposal all of the information relevant to his investigation.***
> [Emphasis added]

[para 185] The whole of the evidence points to the fact that the Government failed to provide all relevant information or withheld relevant information to some of those tasked with oversight or with providing a legal opinion. In deciding to recommend a remedial option to correct this situation, Iacobucci, at paras. 81 and 85 of his Review Report, stated that:

> ***Leaving these questions unasked and unanswered would, in my judgment, risk undermining public confidence in the administration of government*** *- one of the harms against which the Conflicts of Interest Act was intended to protected.*
> *…*
> *If the questions arising from the information I have obtained are not considered in an appropriate forum, it is likely that they will linger in the public arena. Members of the public will continue to harbour doubts about the propriety of the selection of external counsel to conduct the tobacco litigation and this may lead to an erosion of confidence in the administration of government in the Province more generally.*
> [Emphasis added]

[para 186] At para. 86 of his Review Report, Iacobucci indicated that he was of the view that the public interest was served by the Government taking further action and then proceeded to recommend options. The Government accepted Iacobucci's recommendation to have the Ethics Commissioner consider re-investigating the matter. The newly appointed Ethics Commissioner declared herself in a conflict and referred the matter to BC's Conflict of Interest Commissioner Paul Fraser to seek his opinion regarding re-investigation. Acting Ethics Commissioner Fraser recommended a re-investigation, conducted it and issued a public report.

[para 187] Based on the Applicant's affidavit evidence, how information was provided to the Ethics Commissioners is relevant to the question of public interest. To my knowledge there was no legislative amendment to the *Conflicts of Interest Act* during the period of time between the two ethics investigations making provision to protect privileged information being provided to the respective Ethics Commissioners. The reports indicate that the Government had refused Ethics Commissioner Wilkinson access to privileged information. Despite that fact, after making a determination that a re-investigation was warranted, Acting Ethics Commissioner Fraser stated he *"received and reviewed unredacted and*

privileged documents from the Government that dealt with the process leading to the Decision and the aftermath" despite the fact that Ethics Commissioner Wilkinson had not been provided with that same privileged information. This privileged information was shared with the Acting Ethics Commissioner confidentially, relying for authority on the *Conflict of Interest Act.*

[para 188] The report of Ethics Commissioner Wilkinson is attached as Exhibit A to the 2017 ARS detailing how he was not provided with privileged information and was, in lieu thereof, provided with a former judge's legal opinion who, Iacobucci found, also did not receive all relevant documents. The report of Acting Ethics Commissioner Fraser is attached as Exhibit C to the 2017 ARS. At para. 44 of his report, Acting Ethics Commissioner Fraser refers to s. 26 of the *Conflicts of Interest Act,* which reads as follows:

> *Confidentiality*
>
> *26(1) Except as provided in this section, the Ethics Commissioner, any former Ethics Commissioner and a person who is or was employed or engaged by the Office of the Ethics Commissioner shall maintain the confidentiality of all information and allegations that come to their knowledge in the course of the administration of this Act.*
>
> *(2) Allegations and information to which subsection (1) applies may be*
>
> *(a) disclosed to the individual against whom the allegation was made;*
>
> *(b) disclosed by a person conducting an investigation to the extent necessary to enable that person to obtain information from another person;*
>
> *(c) disclosed in a notice or report made by the Ethics Commissioner under this Act;*
>
> *(d) disclosed to the Minister of Justice and Solicitor General or a law enforcement agency where the Ethics Commissioner believes on reasonable grounds that the disclosure is necessary for the purpose of advising the Minister of Justice and Solicitor General or a law enforcement agency of an alleged offence under this Act or any other enactment of Alberta or an Act of the Parliament of Canada.*
>
> *(3) Despite subsection (1), the Ethics Commissioner may disclose to the public any information contained in a report to the Speaker under section 30.1(9) regarding an administrative penalty.*
>
> *(4) The Freedom of Information and Protection of Privacy Act does not apply to a record that is created by or for or is in the custody or under the control of the Ethics Commissioner and relates to the exercise of the Ethics Commissioner's functions under this Act or any other enactment.*
>
> *RSA 2000 cC-23 s26; 2007 c28 s 17; 2013 c10 s34; 2014 c9 s1(18)*

[para 189] In relying on this provision and after citing the *U of C* decision in the SCC, Acting Ethics Commissioner Fraser stated, at para. 44:

> *It is important to recognize that the Government* ***did not waive privilege and only provided me access to the privileged documents and information on the basis of the assurance of confidentiality, which is set out in section 26 of the Conflicts of Interest Act. Without the documents and information provided to me by the Government, under this statutory assurance of confidentiality, I would not have been able to effectively undertake this investigation. My role as an officer of the Legislature in serving to preserve the integrity of the Legislature and its members would have been undermined.*** *In short, this process of re-investigation should not be seen by anyone as a tool for obtaining access to privileged*

> *information of the Government. If it is, it will impair the ability of the Ethics Commissioner to fulfill her important duty to the Assembly to investigate and make recommendations relating to the discipline of members when there is a breach of the Conflicts of Interest Act.*
> [Emphasis added]

[para 190] Like Iacobucci in his Review Report, the Acting Ethics Commissioner, in his public report, quoted some information verbatim from documents that had been provided to him. I am making the assumption, which I believe to be a reasonable one, that Acting Ethics Commissioner Fraser, as in the case of Iacobucci, did not cite any information that was subject to legal privilege. In finding no breach of the *Conflicts of Interest Act*, Acting Ethics Commissioner Fraser stated:

> *It was necessary to clear the air. In the course of what has been a long and painstaking review, I have given this matter the very best consideration I can, after carefully analyzing the entire body of evidence and information provided to me and considering a variety of concerns that flowed from the information that was not available to Commissioner Wilkinson. I can assure Albertans that I am very sure that the result is correct and that this unfortunate chapter can safely be considered to be at an end.*
>
> ***The existence of this re-investigation has received broad public attention in Alberta. The allegations spurred by the leaked documents, understandably, galvanized citizen attention. Aside from the extensive information that I have received from the Government*** *and through questioning of witness* [sic]*, no individual has come forward with new information. If any individual or organization outside Government possessed any additional information, I would have expected them to provide it. There can surely be no valid reason for any new information to have been withheld by anyone and I assume, therefore, that all of this story has now been told.*
> [2017 ARS, Exhibit C, at paras. 182-183]
> [Emphasis added]

[para 191] After putting the three public investigation/inquiry reports into evidence, the Applicant submitted that s/he is unaware of any case where disclosure has been ordered based on s. 32(1)(b) of the *FOIP Act* and argued that in order for the section to have any meaning, there must be some circumstances where it would apply. The Applicant argued that:

> *If subsection 32(1)(b) is to have any meaning, there must be some circumstances in which it can apply, and that are not already covered by subsection 32(1)(a) (harm to public safety, public health, or the environment). One would be hard pressed to think of more compelling circumstances creating a public interest in disclosure of privileged information that the present: the Requested Records relate to the biggest government corruption scandal in recent memory,* ***and publicly-funded investigations into that scandal have been vexed by inadequate disclosure of relevant information by government.***
> [2017 ARS, at para. 23]
> [Emphasis added]

[para 192] One of the central themes at the heart of why the investigations/inquiries put into evidence by the Applicant took place was the failure on the part of the Public Body to disclose or provide all relevant information to Ethics Commissioner Wilkinson, an Officer of the Legislature. The information withheld from the Officer of the Legislature was essential to enable that Officer to fulfill his/her statutory mandate and is one example of the inadequate disclosure to which the Applicant refers. This was withholding of information in circumstances surrounding the recovery of tobacco related health care costs litigation that the Government had represented was being pursued for the benefit of the public, in which clearly the public had shown significant interest. The Applicant argues *"for s. 32 to have any meaning at all, this set of compelling circumstances must fall within the statutory meaning of "clearly in the public interest"."*

[para 193] The Applicant relied on Order F2017-14 for the proposition that s. 32(1) overrides all exceptions, including s. 27, under the *FOIP Act.* The Applicant is correct that the adjudicator did consider

s. 32 in that Inquiry but found the Applicant had not met the burden under s. 32. At para. 67, citing the *Blood Tribe* decision, the adjudicator stated:

> *The Court found that it is in the public interest to maintain solicitor-client confidentiality. Consequently, any public interest in disclosing solicitor-client communications must outweigh the public interest in maintaining the confidentiality of these communications.*
> [Order F2017-14, at para. 67]

[para 194] In the case of those Records at Issue where I have found the Public Body has met its burden under s. 27(1)(a), I agree. Notwithstanding the statutory language in s. 32(2), I find the public interest override should not apply to records protected by legal privilege and that the public interest is served by preserving legal privilege. In addition to considering *Blood Tribe,* following the reasoning of the SCC in the *U of C* decision, I find that had the Legislature intended the s. 32(2) public interest override to set aside legal privilege, it would have used clear, explicit and unequivocal language to do so.

> *Section 27(1) recognizes and protects a public body's right to solicitor-client privilege, using the term "solicitor-client privilege". This indicates that the legislature had turned its mind to the specific issue of solicitor-client privilege and was alive to its significance.* ***If the legislature had intended s. 56(3) to compel a public body to produce to the Commissioner documents over which solicitor-client privilege is asserted, it could have used clear, explicit and unequivocal language, as it did in s. 27(1) of the same statute where it granted public bodies a right to assert solicitor-client privilege over information. When setting out the Commissioner's production powers, the legislation did not use equally precise language that would set aside the privilege for the Commissioner, or permit her to infringe it.***
> [*U of C,* at para. 52]
> [Emphasis added]

[para 195] The Applicant has met his/her burden to establish that these unique circumstances meet the *"compelling public interest"* test and that s. 32(1)(b) applies. The unique circumstances are the Public Body's pattern of inadequate or inconsistent disclosure in some cases and sharing information, including privileged information, in other cases, without a rational explanation. This has resulted in lingering concerns amounting to a compelling public interest that calls for the full disclosure of all remaining information (other than information protected by legal privilege). While the public reports went some distance to address the conflict of interest issue and how information was provided, or not, to the Ethics Commissioner, there remain residual questions of how, when, why, what and to whom information was shared or distributed by the Government. The compelling public interest is in the disclosure of as much information to the public as is available about the CRA Litigation, being pursued on its behalf.

> *Section 1 sets forth the purpose of the FIPPA. Reflecting the public interest in access to information, it establishes a presumption in favour of granting access. Chief Justice McLachlin and Justice Abella explain in Ontario v. CLA:*
>
> > ***Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society.***
> >
> > *...Open government requires that the citizenry be granted access to government records* ***when it is necessary to meaningful public debate on the conduct of government institutions.*** *[Emphasis added; paras. 1 and 37.]*
>
> *However, s. 1 also recognizes that* ***the presumption must be rebuttable in a limited number of specific circumstances*** *according to the mandatory or optional exemptions provided for in the Act.*
>
> *The scheme of the Act reflects its purpose. The head of the institution that controls or has custody of the requested records, and who has knowledge of their content and the impact of their*

> *release, has the primary responsibility for determining whether one of the exemptions applies to the requested records.* ***In the case of a discretionary exemption, he also has the responsibility of determining whether that exemption should be invoked.*** *However, the Act gives the ultimate power over releasing the information to the IPC, subject to judicial review.*
> [*John Doe V. Ontario (Finance),* 2014 SCC 36, at paras. 41-42]
> [Emphasis in original and added]

[para 196] Because the Applicant met his/her burden under s. 32(1)(b), the burden shifts to the Public Body to demonstrate that s. 32(1)(b) has no application in these circumstances; that its decision not to disclose the (non-privileged) information is rationally defensible.

[para 197] At para. 67 of its 2014 PBIS, the Public Body submitted the following:

> *The inclusion of section 27 in the Act is the embodiment of the public interest. Apart from the very rare case of an emergency of the type referred to in section 32(1)(a), section 32(1)(b) cannot justify breaching legal privilege, and does not provide the basis for weighing or balancing someone's view of the general "public interest" against the public policy of rigorously protecting legal privilege. "Public interest" in section 32 does not mean "where the public is interested", but remains "where it is in their best interests" in some emergent and potentially harmful situation that would justify an override of other exceptions to disclosure in the Act.*

[para 198] The Public Body did not address the issue of the s. 32 public interest override in its 2017 PBSS or in the 2017 Affidavit of Records. At paras. 6 and 8 of its 2017 PBRS, the Public Body provided the following by way of reply to the Applicant's submission regarding the s. 32 issue:

> *The outcome of all three reports confirms that the allegations of impropriety with respect to the selection of the [*name of law firm*] by former Premier [*name*] have been fully investigated. Furthermore, as noted by Ethics Commissioner Paul Fraser, there is no evidence of wronging by [*name*], and no provisions of the conflict of interest legislation were breached when the decision to choose the [*name of law firm*] was made. The most recent* [Acting] *Ethics Commissioner decision (dated March 29, 2017) is conclusive on this point.* ***To the extent that there may be some lingering public interest in the outcome of the Ethics Commissioner probes, it would be insufficient to meet the test under s. 32.***
> ***…***
> ***However, even if these issues were still newsworthy,*** *it is clear that s. 32 can only be triggered when there is a need to provide information where there is potential for severe harm.*
> [citing *Order 2001-028*, at paras. 20-22]
> *…*
> *Furthermore, the Applicants* [sic] *are clearly incorrect in stating that s. 32 would override a claim of solicitor-client privilege.*
> [Emphasis added]

[para 199] As stated *supra,* I agree with the Public Body that s. 32 does not override solicitor client privilege where the Public Body has met its burden to demonstrate s. 27(1)(a) applies. However, I reject the Public Body's submission that s. 32 is only triggered when there is potential for severe harm, as a plain language reading of s. 32(1)(b) specifically, and s. 32 as a whole, does not support that argument.

[para 200] Further, in its submission, the Public Body refers to *"even if these issues were still newsworthy"* and the *"lingering public interest in the outcome of the Ethics Commissioner probes"* and argues that while there may have been significant interest in the issues surrounding the CRA Litigation and the awarding of the contract to [name of law firm], that this is no longer the case. In my opinion, public interest cannot be measured solely at the time of the Inquiry. It would be unconscionable to allow a public body to argue that s. 32 no longer applies since the public interest has faded with the passage of time. This would provide public bodies with an incentive to intentionally delay or extend the entire process of decision-making, review and inquiry well beyond the time of an access to information request. This would allow public bodies to protract proceedings in an attempt to let the public's interest fade and

the compelling nature of the issue to wane, thereafter use this to their advantage in rebutting an applicant's attempt to argue that the public interest override should apply. Refusing to disclose the information in which the Applicant has demonstrated there is a compelling public interest on this basis is not rationally defensible.

[para 201] In fact, the Public Body's own evidence attests to the public interest. The 2014 Affidavit evidence submitted by the Public Body with its 2014 PBIS points to the public interest in this matter: at Tab A, the Government press release regarding the Province's launch of a lawsuit to recover $10 Billion in health care costs associated with smoking-related illnesses and, at Tab E, the Alberta Hansard transcript attesting to the fact that the issue was raised on the floor of the provincial Legislative Assembly. At all material times since these access to information requests, the Public Body appears to have been cognizant that information about the CRA Litigation was a matter of public interest.

[para 202] A similar case that considered the public interest override was an inquiry regarding information about the financing of the West Edmonton Mall, where the adjudicator found:

> *In this case, I am of the view that the extent of the government's involvement in the refinancing of West Edmonton Mall is a public interest issue. The ATB guaranteed a loan to West Edmonton Mall and took a second mortgage at a time when ATB was under the purview of Alberta Treasury. There is an issue as to whether the loan guarantee was economically sound. This is a matter of compelling public interest.*
> [Order 99-023, at para. 94]

[para 203] The adjudicator went on to find that the Government's instruction to the Auditor General to prepare and release a report on this *same issue* would satisfy the need for *information* and that no greater purpose was served by releasing *records* under the access to information request than would be accomplished by the Auditor General's Report. In this case, however, no information in the reports of the three publicly funded investigations/inquiries satisfies the requirement for disclosure of the Records at Issue requested by the Applicant regarding the financial arrangements the Government made with [name of law firm] with respect to the CRA Litigation. This case involves disclosure of information in records about the financial arrangement made by the Public Body on behalf of Albertans in order to recover the financial costs of smoking related health care costs.

[para 204] The Public Body submits that the outcome of the three reports, on which the Applicant relies, is that there was no evidence of wronging or impropriety regarding the selection of the CRA Litigation counsel by the former Minister of Justice. To the extent there may be lingering public interest in the outcome of the probes, it would be insufficient to meet the test under s. 32 as, based on the evidence submitted by the Applicant, the Public Body argued, there is no *"Tobaccogate."* But the public interest made out by the Applicant is not about the scandal regarding the selection process of counsel. It is about the Public Body's pattern of inadequate disclosure; withholding or being selective as to which information it released or provided and to whom. In fact, the Public Body's pattern of non-disclosure is apparent, in this case, in which the Public Body has refused to provide the Applicant with access to any of the Records at Issue, regardless of the exception claimed.

[para 205] I find, therefore, that the Applicant has met his/her burden with *sufficiently* clear, convincing, and cogent evidence to demonstrate that the s. 32(1)(b) public interest override applies and that the Public Body has failed to provide evidence or submissions to successfully prove its decision to withhold the information in the Records at Issue is rationally defensible. Section 32(1)(b) will apply to all those Records at Issue where, pursuant to the Interim Decision, the Public Body is still unable to meet the evidentiary test of *sufficiently* clear, convincing, and cogent evidence to demonstrate s. 27(1)(a) applies. Thereafter, the Public Body will be ordered, in the Interim Decision, to release all the Records at Issue regardless of any other exceptions on which it has claimed.

VI. FINDINGS

[para 206] I make the following findings in this Inquiry for Case Files #F6748 and #F6749:

1. For Case File #F6749, I find the Public Body has provided *sufficiently* clear, convincing, and cogent evidence to discharge its burden of proof with respect to its reliance on s. 27(1)(a) for the Records at Issue described at paras. 12.1.A, 12.1.B and 12.1.C *infra*. For these Records at Issue where the Public Body has properly relied on solicitor client and/or litigation privilege, I find the Public Body has properly exercised its discretion to withhold the legally privileged records from the Applicant because the public interest is served by preserving legal privilege.

2. For Case File #F6748, I find the Public Body has provided *sufficiently* clear, convincing, and cogent evidence to discharge its burden of proof with respect to its reliance on s. 27(1)(a) of the *FOIP Act* for the Records at Issue described at para. 12.2.A *infra*. For these Records at Issue where the Public Body has properly relied on solicitor client and/or litigation privilege, I find the Public Body has properly exercised its discretion to withhold the legally privileged records from the Applicant because the public interest is served by preserving legal privilege.

3. For Case File #F6749, I find the Public Body has failed to provide *sufficiently* clear, convincing, and cogent evidence to discharge its burden of proof with respect to its reliance on the exception under s. 27(1)(a) of the *FOIP Act* for the Records at Issue described at paras. 12.1.D, 12.1.E, 12.1.F and 12.1.I *infra*.

4. For Case File #F6748, I find the Public Body has failed to provide *sufficiently* clear, convincing, and cogent evidence to discharge its burden of proof with respect to its reliance on the exception under s. 27(1)(a) of the *FOIP Act* for the Records at Issue described at para. 12.2.B *infra.*

5. I find that the Public Body has established that it has met the requirement of *"limited and specific exceptions"* as required by the legislation but only with respect to s. 27(1)(a). I find that the Public Body has, however, not provided *sufficiently* clear, convincing, and cogent evidence to meet its burden of proof to show where and for what Records at Issue it claims it relied on s. 27(1)(b) or s. 27(1)(c). Based on this finding, I find it is unnecessary for me to consider the issue of whether the Public Body has properly applied the exceptions under s. 27(1)(b) and s. 27(1)(c).

6. I find the Applicant has met his/her burden with *sufficiently* clear, convincing, and cogent evidence to demonstrate that there is a *compelling public interest* and, therefore, the s. 32(1)(b) public interest override applies. Further, I find the Public Body has failed to provide rebuttal evidence or submissions to successfully demonstrate its decision to deny access to the information is rationally defensible. I find that the s. 32(1)(b) public interest override applies to all the Records at Issue, described at paras. 12.1.G, 12.1.H, 12.1.K and 12.1.L *infra* and, on that basis, I find the Applicant is entitled to disclosure of all of these Records at Issue. For the Records at Issue where the Public Body has met its burden under s. 27(1)(a), however, I find that the public interest is served by preserving legal privilege over these Records at Issue and that the s. 32(1)(b) public interest override does *not* apply to the legally protected Records at Issue described at paras. 12.1.A, 12.1.B, 12.1.C, and 12.2.A *infra.* Similarly, for the Records at Issue subject to the Interim Decision, I find that s. 32(1)(b) will not apply where the Public Body meets its evidentiary burden of proof under s. 27(1)(a) for the Records at Issue described at paras. 12.1.D, 12.1.E, 12.1.F, 12.1.I and 12.2.B *infra*.

7. Notwithstanding my finding with respect to the application of s. 32(1)(b) of the *FOIP Act,* I find that the Public Body took an irrelevant consideration (the identity of the Applicant) into account in the exercise of its discretion in applying all the other applicable discretionary exceptions claimed that are in issue (s. 24(1) and s. 29(1)). Because I have found the Applicant is entitled to disclosure of all of the Records at Issue pursuant to s. 32(1)(b) (other than Records at Issue where the Public Body has met its burden of proof, described at paras. 12.1.A, 12.1.B, 12.1.C, and 12.2.A *infra,* or meets its burden of proof in compliance with the Interim Decision to demonstrate the records that are subject to legal

privilege), it is unnecessary to make an Order to quash the Public Body's decisions and to issue an Order to reconsider with respect to the non-legal discretionary exceptions claimed.

8. With respect to s. 29(1), I find the Public Body has erred by applying this exception to Records at Issue where it has also claimed litigation privilege and solicitor client privilege without citing s. 27(1)(a) for the Records at Issue described at para. 12.1.D.

9. Further, with respect to s. 24(1), I find the Public Body has erred by applying this exception to the Records at Issue where it has also claimed litigation privilege and solicitor client privilege without citing s. 27(1)(a) for the records described at para. 12.1.E.

10. With respect to s. 4(1)(q), I find the Public Body has corrected the error in its 2014 PBIS and has been properly excluded the Record at Issue at Doc Count 20 (JSG000218) because the record *"is a record created by or for a member of the Executive Council*" described at para. 12.1.J *infra*.

11. The Applicant did not take issue with respect to those records listed as NR by the Public Body. However, I find the Public Body has erred in claiming NR for records that, on examination, appear responsive to the access to information request in Case File #F6749 described at paras. 12.1.K and 12.1.L *infra*. I find the Public Body has erred in claiming some records to be NR appearing to define NR based on *some* (but not all) information in a record that is beyond the scope of the access requests. Any Record at Issue that contains any information that is within the scope of the Applicant's access to information is considered responsive. If a *record* is beyond the scope of an access request, it should not form part of the Records at Issue.

12. The Exhibited Indices have been carefully examined with respect to the descriptors for evidence for each Record at Issue for the following factors: who is a party to the communication, is their role specified, is the Record at Issue dated, how is the Record at Issue described, is seeking legal advice or discussing pending or ongoing litigation referred to (without citing it), is a person identified as counsel a party to the exchange, have any columns been REDACTED, is the specific Record at Issue marked as privileged or private, is there any other evidence the Record at Issue was intended to be confidential, is the professional role of named individuals provided, is it clear when in-house counsel or senior government officials are providing legal advice versus policy advice, where identified as being a lawyer is information provided as to whether the person is acting as a solicitor versus as a representative of a client public body, has one or more of the legal privileges been specified for the Record at Issue, have pleadings been referred to or described that are part of pending or ongoing litigation and, further, does the 2017 Affidavit of Records support the evidence for each specific Record at Issue in the Exhibited Indices. These factors have all been taken into account in order to decide, on a balance of probabilities, whether the evidence submitted by the Public Body is *sufficiently* clear, convincing, and cogent to meet its burden of proof. When the 2017 Affidavit of Records and its Exhibited Indices are read and reviewed together and these are measured against the backdrop of the legal requirements discussed *supra*, I make the following findings with respect to each specific Record at Issue for each of the two Case Files:

1. Case File #F6749: 2017 Affidavit of Records and Exhibited Index [Exhibit B]

The following Records at Issue are the subject of the 2017 Affidavit of Records along with its attached Exhibited Index B. *Some of the Records at Issue in Case File #F6749 were provided to me.*

A. Section 27(1) Claimed and Solicitor Client Privilege and/or Litigation Privilege claimed in Privilege Column (Solicitor client privilege and/or litigation privilege properly relied on and properly applied)

[**NOTE:** Records over which solicitor client privilege and litigation privilege have been claimed for which the *ShawCor* evidentiary requirements to demonstrate *sufficiently* clear, convincing, and cogent evidence to meet the *Solosky* test for either legal privilege.]

Referring to the Records at Issue by Doc Count number (Column 1) and where shown as more than one Record at Issue, the numbers are inclusive:

11-12, 14, 16-17, 26, 28-31, 37, 39-41, 43, 46, 55-57, 67, 84-86, 89, 91, 94-96, 98, 103, 105, 108, 110, 113, 115, 120-121, 123, 125-128, 149-150, 153, 156-158, 160-162, 165-166, 171, 174, 184, 191-193, 197-200, 207, 233, 235-236, 242-252, 254, 256-259

B. Section 27(1) Claimed and Solicitor Client and/or Litigation Privilege claimed in Privilege Column (Solicitor client privilege and litigation privilege claimed where only litigation privilege properly relied on and properly applied)

[**NOTE:** Records over which solicitor client privilege and litigation privilege have been claimed where there is *insufficiently* clear, convincing, and cogent evidence to meet the *Solosky* test for solicitor client privilege but the Public Body has provided *sufficiently* clear, convincing, and cogent evidence to meet the *ShawCor* evidentiary requirements to demonstrate litigation privilege. It should be noted that the Public Body could have claimed s. 29(1) for these Records at Issue as publicly available.]

Referring to the Records at Issue by Doc Count number (Column 1):

18, 240

C. Section 27(1) Claimed (Only Litigation Privilege claimed in Privilege Column and Litigation Privilege properly relied on and properly applied)

[**NOTE:** Records over which *only* litigation privilege has been claimed where *sufficiently* clear, convincing, and cogent evidence to meet the *ShawCor* evidentiary requirements for litigation privilege. It should be noted that the Public Body could have claimed s. 29(1) for these Records at Issue as publicly available as it did in the case of Doc Count 19. It is impossible, however, to know if these are drafts that are subject to litigation privilege, though it is unlikely as other Records at Issue have been described the same but with *"Draft"* as part of the description as in the case of Doc Counts 21 and 22.]

Referring to the Records at Issue by Doc Count number (Column 1) and where shown as more than one Record at Issue, the numbers are inclusive:

1-6, 21-22

D. Section 27(1)(a) not Claimed (Section 29(1) claimed in Section(s) of the Act/FOIPNo Column but Litigation Privilege/Solicitor Client Privilege claimed in Privilege Column)

[**NOTE:** The Exhibited Index B shows the Public Body has claimed s. 29(1) in Section(s) of the Act/FOIPNo Column and has claimed solicitor client privilege and litigation privilege in the Privilege Column. These records were *not* provided to me and, therefore, it appears that s. 29(1) may have been improperly cited by the Public Body as these records may be subject to legal privilege. These are Records over which Litigation Privilege and Solicitor/Client Privilege have been claimed in the Privilege Column but the Public Body has not specified s. 27(1)(a) in the Section(s) of the Act/FOIPNo Column. There is no evidence in the Exhibited Index B that s. 29(1) has been properly claimed. For example, there is one record in this category in the Exhibited Index B where the Title of the record has been REDACTED, which is not appropriate if information is or will be available to the public under s. 29(1). If the Public Body did not intend to claim legal privilege, the Interim Decision stipulates these Records at Issue are some of the records where the Public Body is to make a decision. These Records at Issue will fall under the Interim Decision. For the other Records at Issue where s. 29(1) has been claimed, refer to para. 12.1.H *infra*.]

Referring to the Records at Issue by Doc Count number (Column 1) and where shown as more than one Record at Issue, the numbers are inclusive:

69-76

E. Section 27(1)(a) not Claimed (Section 24(1) claimed in Section(s) of the Act/FOIPNo Column but Litigation Privilege/Solicitor Client Privilege claimed in Privilege Column

[**NOTE:** In the Privilege Column of the Exhibited Index B, the Public Body claimed both solicitor client privilege and litigation privilege but in the Section(s) of the Act/FOIPNo Column it has claimed s. 24(1). *These Records were provided to me.* It is *important to stress that if the Public Body's claim to privilege over these records was not an error, provision of the records to me has not waived the privilege*. These Records at Issue will be part of the Interim Decision so the Public Body can decide which exception it is relying on and whether it intended to claim either legal privilege. If the Public Body did not intend to claim legal privilege, the Interim Decision stipulates these Records at Issue are some of the records where the Public Body is to make a decision. For the other Records at Issue where s. 24(1) has been claimed, refer to para. 12.1.G *infra.*]

Referring to the Records at Issue by Doc Count number (Column 1) and where shown as more than one Record at Issue, the numbers are inclusive:

201-203, 205, 230-232

F. Section 27(1)(a) Claimed (Insufficient Evidence of either Solicitor Client Privilege or Litigation Privilege)

[**NOTE:** Records at Issue over which solicitor client privilege and litigation privilege have been claimed where the Public Body has failed to meet its burden of proof with *sufficiently* clear, convincing, and cogent evidence that either legal privilege applies; to meet the *ShawCor* evidentiary test to demonstrate the *Solosky* test for solicitor client privilege and/or part of a continuum of communications that fall within solicitor client and/or litigation privileges. Some of the Records at Issue in this category include those showing REDACTED in one or more Columns. For many of these records because the space for document type or title is REDACTED, it is impossible to make a determination with respect to s. 27(1)(a). These Records at Issue will fall under the Interim Decision.]

i. Referring to the Records at Issue by Doc Count number (Column 1) and where shown as more than one Record at Issue, the numbers are inclusive:

7-10, 13, 24-25, 27, 32, 42, 44-45, 50-54, 78-83, 88, 90, 92, 97, 99-102, 104, 109-112, 116-119, 122, 124, 129, 131-132, 139, 141-143, 147-148, 151-152, 154-155, 159, 164, 167-170, 172-173, 175-181, 187-190, 194-196, 204, 206, 208-221, 223-232, 234, 237-239, 241, 255, 260, 262-263

ii. Of these Records at Issue, the following 11 records have information REDACTED in one or more Columns in the Exhibited Index: [Doc Count 75 where s. 29(1) has been claimed and REDACTED has not been included here, refer to para. 12.1.D *supra*.]

24, 78-80, 102, 116, 141-142, 237-239

G. Section 24(1) Claimed (Section 24(1) only exception applied and some marked NR)

[**NOTE:** *These Records at Issue were available to me.* The Public Body properly relied on s. 24(1)(a) and s. 24(1)(c) but has not properly applied the exceptions because it took an irrelevant consideration into account in exercising its discretion to refuse access to the Applicant. In any event, the s. 32(1)(b) public interest override applies to all of these Records at Issue and are to be released to the Applicant under these Orders. For some of these Records both s. 24(1) and N/R have been claimed in the

Exhibited Index. In all cases there is information on the record that is within scope of this access to information request and is therefore responsive. For the other Records at Issue where s. 24(1) has been claimed, refer to para. 12.1.E *supra.*]

Referring to the Records at Issue by Doc Count number (Column 1) and where shown as more than one Record at Issue, the numbers are inclusive:

23, 33-36, 38, 47-49, 58-66, 77, 93, 106-107, 133-138, 140, 144-146, 163, 182-183, 185, 201-203, 205, 230-232, 253, 261

H. Section 29(1) Claimed (Publicly Available)

[**NOTE:** *These Records were provided to me.* The Public Body has relied on the s. 29(1) discretionary exception. Where the record is marked with an asterisk, s. 29(1) has not been properly claimed. These Records at Issue are to be released to the Applicant. For the other Records at Issue where s. 29(1) has been claimed, refer to para. 12.1.D *supra* and para. 12.1.I *infra.*]

Referring to the Records at Issue by Doc Count number (Column 1):

15, 19, 68*

I. Section 29(1) Claimed (Not Publicly Available)

[**NOTE:** *These Records were not provided to me,* which is incongruous if they were or were going to be publicly available*.* The Public Body has claimed the s. 29(1) discretionary exception and legal privilege by populating the Privilege Column (see para. 12.1.D *supra*) but given the description in the Exhibited Index it is improbable the record would be publicly available. Because the Privilege Column is populated, these Records at Issue will fall under the Interim Decision. For the other Records at Issue where s. 29(1) has been claimed, refer to para. 12.1.D *supra* and para. 12.1.H *infra.*]

Referring to the Records at Issue by Doc Count number (Column 1):

69-76

J. Section 4(1)(q) (Information *excluded* under the *FOIP Act*)

[**NOTE:** Document misidentified by Public Body in its 2014 PBIS as JSG000418 and on the record itself s. 4(1)(l) had been claimed. In the Exhibited Index B the Public Body correctly identified the record as JSG000218, at Doc Count 20. *This Record was provided to me.* The Applicant was concerned that the access to information decisions claimed records were excluded from the purview of the *FOIP Act* because the Public Body did not identify which records fell under s. 4(1). Section 4(1)(q) applies because the record *"is a record created by or for a member of the Executive Council",* notwithstanding the Public Body's failure to properly identify the record.]

Referring to the Record at Issue by Doc Count number (Column 1):

20

K. Records at Issue identified by the Public Body as Non-Responsive [NR]

[**NOTE:** The Public Body claimed these Records are NR. *These Records were provided to me.* It is important to make note that NR is not a proper designation for any record. For a comprehensive review on the use of non-responsive within Canada refer to *Department of Business (Re*), 2016 NSOIPC 10, at paras. 15-74. In all cases, there is some information on the records is within the scope of this access to information request and thus is responsive.]

Referring to the Records at Issue by Doc Count number (Column 1):

38, 114, 130, 140, 186, 222

L. Records at Issue improperly identified by the Public Body as NR

[**NOTE:** The Public Body claimed these Records at Issue are NR but the records are responsive as within the scope of the access to information request. In the case of Doc Count 140 the Public Body has also claimed s. 24(1). *These Records were provided to me.*]

Referring to the Records at Issue by Doc Count number (Column 1):

38, 114, 130, 140, 222

M. Records at Issue where the Public Body refers to a person in the Exhibited Index B but fails to provide the title or professional role

[**NOTE:** For these Records at Issue, the Public Body has claimed s. 27(1)(a) and/or s. 24 (and in some instances the records are marked NR) but because the professional role or title of the person named is not included in the descriptors, the Public Body has not been able to prove the exception(s) claimed. In other instances, its burden of proof has been met despite this lack of identifying information. Because the Public Body has failed to provide the title or professional role, it remains unknown why the individual is privy to the record and this is of particular importance when the Public Body claims the record contains legal or non-legal advice.]

Referring to the Records at Issue by Doc Count number (Column 1) where s. 27(1)(a) claimed in Section(s) of the Act/FOIPNo Column and/or solicitor client privilege and litigation claimed in Privilege Column, along with and without other exceptions and where shown as more than one Record at Issue, the numbers are inclusive:

32, 40, 45, 50-51, 53, 58, 62, 65, 66, 74, 75-76, 81-83, 86, 88, 90, 92, 97-100, 107, 113-114, 116, 119, 122, 124, 126, 129, 142, 144-146, 160, 163-164, 174, 182, 185, 187, 190, 193, 197, 198, 200, 202, 208, 215, 222-223, 232-233, 235, 237, 239, 253, 260, 262

2. Case File #F6748: 2017 Affidavit of Records and Exhibited Index [Exhibit A]

The following Records at Issue are the subject of the 2017 Affidavit of Records along with its attached Exhibited Index A. *No Records at Issue in Case File #F6748 were provided to me.* There are no Records at Issue where information has been shown as REDACTED in the Exhibited Index A.

A. Section 27(1) (Solicitor Client Privilege and Litigation Privilege claimed properly relied on and properly applied)

[**NOTE:** Records over which solicitor client privilege and litigation privilege have been claimed for which the *ShawCor* evidentiary requirements to demonstrate with *sufficiently* clear, convincing, and cogent evidence to meet the *Solosky* test for solicitor client privilege and/or litigation privilege.]

Referring to the Records at Issue by Doc Count number (Column 1) and where shown as more than one Record at Issue, the numbers are inclusive:

1, 4-9, 12, 14

B. Section 27(1)(a) (Insufficient Evidence of either Solicitor Client Privilege or Litigation Privilege)

[**NOTE:** Records at Issue over which solicitor client privilege and/or litigation privilege have been claimed where the Public Body has failed to meet its burden of proof with *sufficiently* clear, convincing, and cogent evidence that either legal privilege applies. These Records at Issue will form part of the Interim Decision. In the Exhibited Index for Case File #F6748, no descriptors for the Records at Issue have been REDACTED.]

Referring to the Records at Issue by Doc Count number (Column 1) and where shown as more than one Record at Issue, the numbers are inclusive:

2-3, 10-11, 13, 15-16

[para 207] Under my delegation from the Commissioner, my duty is to decide all questions of fact and law arising in the course of the Inquiry, pursuant to s. 69(1) of the *FOIP Act*, based on the parties' evidence and submissions. Further, my duty on the completion of the Inquiry is to make a decision and/or an order(s) to dispose of the issues, pursuant to s. 72 of the *FOIP Act*. I have reviewed all of the evidence and submissions to make a decision as to whether the Public Body and the Applicant has met his/her burden of proof. While this has not been an easy task in the absence of the bulk of the Records at Issue, I have executed my delegated authority as the External Adjudicator by taking a reasonable, fair and diligent approach. While it is open to the Public Body to seek judicial review, I am certain any review Court will be cognizant of the challenges faced in adjudicating decisions made by the Public Body about Records at Issue, the majority of which have not been available to the decision-maker. On judicial review, a Court may consider reviewing the Records at Issue (despite these not being available and thus not forming part of the Certified Record of Proceedings) as the Court in *Calgary (Police Service) v. Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114 elected to do. There, the Alberta Court of Appeal determined that on judicial review, where the issue relates to a public body's application of legal privilege under the *FOIP Act*, the Court may rely on its supervisory role to review the records over which the Public Body is asserting legal privilege. Alternatively, as the jurisprudence reflects, it is open to the Court, on judicial review, to show deference to a decision-maker with respect to fact-finding (reasonableness) and legal approach (correctness). In this Inquiry, given s. 73 of the *FOIP Act,* which reads: *An order made by the Commissioner under this Act is final,* a Court, on judicial review, may elect to defer to the statutory decision-maker and confirm the Interim Decision/Orders.

VII. INTERIM DECISION

[para 208] One preliminary point regarding the Interim Decision that follows. I am unwilling to issue an Order in either Case File requiring the disclosure of Records at Issue thereby placing potentially legally privileged information in jeopardy because the Public Body has failed to discharge its burden of proof to provide *sufficiently* clear, convincing, and cogent evidence that the information in any specific Record at Issue is subject to legal privilege. Therefore, I have made a decision to give the Public Body the opportunity to make a decision for specific Records at Issue pursuant to the Interim Decision where it has fallen short in satisfying its burden of proof. In some circumstances, other adjudicators have addressed this type of evidentiary gap through correspondence with the Public Body prior to completing the Inquiry. In this Inquiry, however, the 2017 Notice of Continuation and subsequent correspondence, detailed *supra,* already put the Public Body on notice of what evidence was required and, therefore, this Interim Decision is the next logical step in this Inquiry. [Refer to Order F2014-38/Decision F2014-D-02]

[para 209] I have found that I am unable to decide whether the Public Body has properly relied on s. 27(1)(a) of the *FOIP Act* to claim solicitor client privilege and/or litigation privilege for the Records at Issue described at paras. 12.1.D, 12.1.E, 12.1.F, 12.1.I and 12.2.B *supra*. For some of these Records at Issue, the Public Body has described the record as legally privileged while at the same time claiming s. 24(1) or s. 29(1) and not s. 27(1)(a). The Public Body has not established that the information it withheld is legally privileged and, therefore, that it properly fits under the s. 27(1)(a) exception; though it remains possible

that the information may be subject to legal privilege. Because of the fundamental importance of safeguarding against the erosion of privileged information, rather than order the disclosure of these records to the Applicant, pursuant to s. 72(2)(b) of the *FOIP Act*, I have decided to provide the Public Body with the opportunity to gather evidence and authority, presently absent from the 2017 Affidavit of Records and Exhibited Indices, with respect to its application of s. 27(1)(a) for both solicitor client privilege and litigation privilege for the Records at Issue described at paras. 12.1.D, 12.1.E, 12.1.F, 12.1.I and 12.2.B *supra* and, thereafter, to make a decision in a manner that complies with the evidentiary requirements as set out in *ShawCor*, the Alberta Rules of Court and the *OIPC Privilege Practice Note*. Specifically, but not limited to, the Public Body should consider providing the following kinds of evidence: direct evidence from in-house counsel that is not *general* in nature but that addresses legal privilege for each specific Record at Issue, direct evidence from senior government officials attesting to those specific Records at Issue where they were providing legal advice versus policy advice, direct evidence from senior government officials attesting to those specific Records at Issue where they were acting in the role as a representative of a *client public body* versus when acting in the capacity as a *solicitor* in a 'solicitor client' relationship, where a Record at Issue involves conversations by non-solicitor representatives of a public body that may be part of a continuum discussing legal advice, an unredacted copy of the Exhibited Index B for Case File #F6749 *in camera,* (details of the Records at Issue that have been REDACTED described at para. 12.1.F *supra*) and complete descriptors for the professional title or role for individuals named in the Records at Issue described at para. 12.1.M *supra* where the Public Body elects to continue to rely on s. 27(1)(a).

[para 210] The Public Body will have 60 days from the date it receives this Interim Decision to gather evidence and authority to support its application of s. 27(1)(a). If the Public Body determines that neither solicitor client privilege nor litigation privilege applies to the Records at Issue to which it has applied s. 27(1)(a), then it must disclose the records to the Applicant after the 60 days have expired. On or before that date, the Public Body will provide a decision to the Applicant, copied to me, explaining whether it is withholding the Records at Issue on the basis of solicitor client privilege and/or litigation privilege or whether it has decided to provide the Applicant access to any of the Records at Issue that are the subject of the Interim Decision.

[para 211] I reserve jurisdiction over this Inquiry with respect to the Interim Decision only. Following the 60 days, the Inquiry will resume, if necessary, to dispose of any outstanding issues in relation to the Public Body's compliance with this Interim Decision, specifically, its disposition regarding the Records at Issue described at paras. 12.1.D, 12.1.E, 12.1.F, 12.1.I and 12.2.B *supra.* If the subject records are disclosed to the Applicant because the Public Body decides that s. 27(1)(a) *does not apply*, that will end the matter. For those Records at Issue where the Public Body decides that either or both legal privileges under s. 27(1)(a) apply, the Inquiry will resume to determine if the Public Body has met its burden of proof in its decision made under the Interim Decision.

[para 212] The final disposition of those issues I am able to decide is set out in the Order that follows in Part VIII.

VIII. ORDERS

[para 213] I make these Orders pursuant to s. 72 of the *FOIP Act*, which reads, in part, as follows:

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

(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access;

(c) require the head to refuse access to all or part of the record, if the Commissioner determines that the head is required to refuse access.

…

(4) The Commissioner may specify any terms or conditions in an order made under this section.

[para 214] After the exchange of submissions concluded, the Public Body advised that all of the Records at Issue in Case File #F6748 did not overlap with or were not contained within the Records at Issue in Case File #F6749, as it had represented earlier. When this was revealed by the Public Body in early 2018, I sought clarification. The Public Body provided some information but refused to comply with my request for a Table of Concordance, supplementary Affidavit of Records or an undertaking to sort out the inconsistent representations regarding the complete Records at Issue. Given that the Document Id in each of the Case Files had different prefixes - ABJ in Case File #F6748 and JSG in Case File #F6749 - satisfying myself what particular Records at Issue were common between the two and making a determination that they had been described in the same manner by the Public Body became very difficult. As a result, I advised the parties that there would have to be a separate disposition for each set of Records at Issue for the two Case Files in the Inquiry.

1. ORDER FOR CASE FILE #F6749 RECORDS AT ISSUE

[para 215] I make this Order pursuant to s. 72 of the *FOIP Act.*

[para 216] The Public Body has properly relied on and properly applied solicitor client and/or litigation privileges under s. 27(1)(a) of the *FOIP Act* for the Records at Issue described at paras. 12.1.A , 12.1.B, 12.1.C and 12.2.A *supra* and pursuant to s. 4(1)(q) for the Record at Issue described at para. 12.1.J *supra*. Pursuant to s. 72(2)(b) of the *FOIP Act*, for these Records at Issue, referred to herein, I confirm the Public Body's decision to refuse access to these Records at Issue to the Applicant.

[para 217] I have found that the Applicant has successfully met his/her burden to prove that the s. 32(1)(b) public interest override should be applied to all Records at Issue, excluding any Record at Issue subject to legal privilege. Any Records at Issue to which the Public Body denied access under the discretionary exceptions claimed under s. 24(1) and s. 29(1), where s. 27(1)(a) has not been applied (including where the Privilege Column has not been populated), I order the Public Body to give the Applicant access to the Records at Issue described at paras. 12.1.G, 12.1.H, 12.1.K, and 12.1.L *supra*. To be clear, this Order with respect to the s. 32(1)(b) public interest override does not apply to any Record at Issue where the Public Body has met its burden that s. 27(1)(a) as outlined in para. 216 *supra* or satisfies its burden of proof under the Interim Decision.

[para 218] I further order the Public Body to notify me and the Applicant, in writing, within 50 days of being given a copy of the Order for Case File #F6749, that it has complied with the Order.

2. ORDER FOR CASE FILE #F6748 RECORDS AT ISSUE

[para 219] I make this Order pursuant to s. 72 of the *FOIP Act.*

[para 220] I have found that I am able to decide that the Public Body has properly relied on and properly applied s. 27(1)(a) of the *FOIP Act* for the Records described at para. 12.2.A *supra*. Pursuant to s. 72(2)(b), for the Records at Issue where the Public Body has demonstrated either or both legal privileges apply, I confirm the decision of the Public Body to refuse access to the Applicant to these records.

[para 221] I have found that the Applicant has successfully met his/her burden to prove that the s. 32(1)(b) public interest override should be applied to all Records at Issue, excluding any Record at Issue subject to legal privilege. There are no Records at Issue in Case File #F6748 where the Public Body has denied access under the s. 24(1) discretionary exception alone: in all cases where s. 24(1) has been claimed, the Public Body has also claimed s. 27(1)(a). The disposition regarding the release of any of these Records at Issue described at para. 12.2.B will follow the Public Body's decision under the Interim Decision. To be clear, this Order with respect to the s. 32(1)(b) public interest override does not apply to any Record at Issue where the Public Body has met its burden that s. 27(1)(a) as outlined in para. 220 *supra* or satisfies its burden of proof under the Interim Decision.

[para 222] I further order the Public Body to notify me and the Applicant, in writing, within 50 days of being given a copy of the Order for Case File #F6748, that it has complied with the Order.

_____

S. Dulcie McCallum, LL.B.
External Adjudicator