ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

INTERIM DECISION F2018-D-04
ORDER F2018-70

November 22, 2018

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Numbers F6525/F6761

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Summary: Two Applicants each made one access to information request to Alberta Justice and Solicitor General [Public Body] under the *Freedom of Information and Protection of Privacy Act* [*FOIP Act*]. The First Applicant's access request was for any requests for proposals from, and agreements entered into, by the Public Body regarding external legal services, and without limiting the request, naming three specific law firms, with respect to the recovery of health care costs associated with the use of tobacco under the *Crown's Right of Recovery Act* referred to as the CRRA Litigation. The Second Applicant's access to information request was for all records related to the awarding of the contingency (fee) contract (agreement) [CFA] between the Public Body and the law firm group retained and the CFA itself. In addition, the request was for records related to the process of awarding the tobacco litigation legal work as to how the firm selected was chosen over its competitors. In response to the access requests, the Public Body refused both of the Applicants the majority of the 564 pages of Records at Issue. Both Applicants made a Request for Review to the Office of the Information and Privacy Commissioner but the matter was not resolved. Thereafter, both of the Applicants filed a Request for Inquiry to the OIPC. The Information and Privacy Commissioner, with the consent of all of the parties, merged the two case files into one Inquiry. Due to being in a conflict, after consulting with all of the parties, the Commissioner delegated the Inquiry to an External Adjudicator.

During the initial phase of the Inquiry in 2014, the First Applicant raised a Preliminary Evidentiary Objection [PEO], which resulted in a phase of the Inquiry taking place and the release of Decision 2014-D-03/Order F2014-50 [2014 Decision/Order]. The Public Body applied for judicial review, which application has been adjourned *sine die.*

Unexpectedly on June 10, 2016 the Public Body provided the External Adjudicator with a small portion of the Records at Issue, the majority of which were part of this Inquiry (though some involving another access to information request), including Records at Issue over which solicitor client privilege and/or litigation privilege had been claimed. The Public Body provided and the External Adjudicator accepted the Records at Issue on a non-waiver basis. The Public Body indicated these records were provided as a result of the fact that the Minister of Justice had instructed that the same records be provided to the Office of the Ethics Commissioner with regard to his investigation into an ethics complaint about the selection process of the lawyers retained in the CRRA Litigation. These Records at Issue over which legal

privilege had been claimed were provided before the Supreme Court of Canada [SCC] decisions regarding legal privilege in late 2016 [*Alberta (Information and Privacy Commissioner) v. University of Calgary* and *Lizotte v. Aviva Insurance Company of Canada*]. A phase of the Inquiry took place with respect to these June 10, 2016 Records at Issue ultimately resulting in Order F2017-61 [2017 Order]. The Public Body applied for judicial review, which application has since been adjourned *sine die.* The Public Body and the Applicants were advised that the June 10, 2016 Records at Issue would no longer be part of the Inquiry as it continued.

On September 30, 2016 (and on June 15, 2017) while the hearing with respect to the June 10, 2016 Records at Issue was taking place, the Public Body, unexpectedly, released additional pages of Records at Issue to the Applicants. In addition, the Public Body provided numerous amended indices for the Records at Issue that had expanded from 564 pages to 2,570 pages.

On January 19, 2017 (also during the hearing with respect to the June 10, 2016 Records at Issue) the Public Body unexpectedly provided additional Records at Issue to the External Adjudicator (not to the Applicants), in partial compliance with the 2014 Decision/Order, none of which included records over which legal privilege had been claimed. The pages of records that were provided, however, included the records disposed of in the 2017 Order (June 10, 2016 Records at Issue) and other records that had already been released in full to the Applicants. This provision of an additional portion of the Records at Issue that had not previously been provided 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 advising it had retained a new lawyer, the External Adjudicator issued the 2017 Amended Notice of Continuation 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, which the Applicants did not object to so long as their deadlines were adjusted accordingly.

The Inquiry continued with respect to the remaining Records at Issue, a small portion of which had been provided to the External Adjudicator in January 2017. The Public Body had claimed s. 27(1)(a) for the majority of the Records at Issue and, therefore, they were not available to the External Adjudicator. The Public Body also claimed other discretionary exceptions: s. 21(1)(a), s. 24(1)(b), s. 25(1), s. 27(1)(b) and s. 27(1)(c) and mandatory exceptions: s. 16(1) and s. 17, the majority of which applied to Records at Issue where s. 27(1)(a) had also been claimed so none were available to review.

In addition to relying on its earlier submissions and affidavits from when the Inquiry began in 2014, the Public Body provided the 2017 Affidavit of Records from in-house counsel with an Exhibited Index 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 First Applicant, which is an irrelevant consideration in exercising its discretion to refuse access to information. Near the end of the Inquiry, the Public Body denied it had taken the identity of one of the Applicants into consideration.

In addition to making submissions that the Public Body had not provided sufficient evidence to meet its burden of proof for either legal privilege or any of the other discretionary or mandatory exceptions, the Applicants argued that the Records at Issue should be released pursuant to the s. 32 public interest override. The First Applicant mistakenly argued that the Public Body had the burden of proof under s. 32. Both of the Applicants argued the Records at Issue should be released to promote transparency, accountability and democracy. The Applicants provided submissions regarding s. 32 and some evidence, including an investigation report from the Ethics Commissioner and media reports. While the submissions were substantial, the External Adjudicator found the Applicants had failed to satisfy the burden of proof as they had not provided sufficiently clear, convincing, and cogent evidence to meet the *compelling public interest* test for the s. 32 public interest override to apply to the information in the Records at Issue.

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 by meeting the *ShawCor* evidentiary requirements. In addition, the External Adjudicator found that where it had established the records were protected by either or both legal privileges, the Public Body had properly exercised its discretion under s. 27(1)(a) to refuse access to the Applicants as preserving legal privilege was in the public interest.

The evidence submitted for some of the records 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 gather evidence and authority to support its decision to withhold the records subject to the Interim Decision. 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 Applicants access to these records, which could potentially place legally privileged information in jeopardy because the Public Body has fallen short in meeting its duty to provide sufficiently clear, convincing, and cogent evidence to meets its burden of proof. Details of the significant gaps in the evidence were provided in the Interim Decision/Order.

When the Public Body provided its 2017 submissions they included correspondence from affected third parties, attached as exhibits to the 2017 Affidavit of Records. In 2012, the affected third parties had received notice from the Public Body's FOIP Manager that access to information requests had been received that contained their business information. The Public Body had argued notice to all the affected third parties with respect to its claim for the s. 16 exception was an outstanding matter. The responses provided by the affected third parties in 2012 indicated that the affected third parties had been given copies of the records that contained their business information. In 2012 there were 564 pages of Records at Issue. There was no evidence the affected third parties received notice of the Inquiry or were provided copies of any of the pages of records when the Records at Issue expanded from 564 pages to 2,570 pages in 2016.

As part of their initial submissions, the Applicants raised the issue of waiver of legal privilege. Initially these submissions were with respect to public statements made by government representatives about the terms of the CFA. In the 2014 Decision/Order, the issue of waiver was discussed as a consideration regarding the opinion evidence ruled inadmissible in the order. There was no finding with respect to waiver or limited waiver of legal privilege and amounted to *obiter* in the 2014 Decision/Order. The Public Body elected to continue to rely on the Opinion Letter despite it having been ruled inadmissible. As a result of the Public Body attempting to reserve the right to file further materials, the parties were invited at the close of submissions to make supplementary submissions on the sole issue of waiver. In that regard, the Public Body submitted the 2018 Affidavit of in-house counsel that revealed that there had been a retainer that included a non-disclosure clause, which information regarding the protection of the legally privileged information provided to the author of the Opinion Letter had not been included as part of the Public Body's initial submission in 2014. The External Adjudicator found the public statements made by the Public Body constituted partial waiver over the specific terms of the CFA and ordered release of those portions of the record confirmed by the Public Body to be the CFA that had been the subject of public comment. The External Adjudicator found the Public Body did not waive legal privilege by providing 564 pages of Records at Issue to the author of the Opinion Letter.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 6, 7, 16, 17, 21, 24, 25, 27, 30, 32, 56, 66, 69, 71, 72, 74; *Crown's Right of Recovery Act*, S.A. 2007, c. C-35; *Public Inquiries Act,* R.S.A. 2000, c. P-39; **CAN**: *Privacy Act,* R.S.C., 1985, c. P-21.

Authorities Cited: AB: Adjudication Order #2, Decision F2014-D-03/Order F2014-50, Decision P2011-D-003, Order 96-003, Order 96-011; Order 96-016, Order 96-017, Order 97-009, Order 98-013, Order 99-017, Order 99-023, Order 2001-028, Order F2004-003, Order F2005-009, Order F2005-011, Order F2006-010; Order F2008-021, Order F2008-032, Order F2009-021, Order F2010-007, Order F2011-018,

Order F2012-06, Order F2013-51, Order F2014-38/Decision F2014-D-02, Order F2014-44, Order F2015-31, Order F2016-65, Order F2017-28, Order F2017-54, Order F2017-61; **BC:** Order F07-05, Order F13-15, Order F15-09; **ON:** Order PO-1998, Order PO-3514.

Cases Cited: *University of Calgary v. J.R., 2015 ABCA 118, Alberta (Information and Privacy Commissioner) v. University of Calgary,* 2016 SCC 63; *Lizotte v. Aviva Insurance Company of Canada,* 2016 SCC 52; *Canadian Natural Resources Ltd. v. ShawCor Ltd.,* 2014 ABCA 289; *Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31; *Dagg v. Canada (Minister of Finance),* [1997] 2 SCR 403; *Qualicare Health Service Corp. v. Alberta Office of the Information and Privacy Commissioner,* 2006 ABQB 515; *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR. 817; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31; *Blank v. Canada (Minister of Justice)* [2006] 2 SCR 319; *Imperial Tobacco Co v. Newfoundland and Labrador (Attorney General),* 2007 NLTD 172; *Walker v. Ritchie* 2006 SCC 45; *Hayes v. New Brunswick (Minister of Justice and Consumer Affairs,* 2008 NBQB 112; *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3; *Solosky v The Queen*, [1980] 1 SCR 821; *Morrison v. Rod Pantony Professional Corporation,* 2008 ABCA 145; *Burr (Litigation Guardian of) v. Bhat,* 117 Man R (2d) 279; *Canada (Information Commissioner) v. Canada (Minister of Public Safety and Emergency Preparedness),* 2013 FCA 104; *S. & K. Processor Ltd. v. Campbell Ave. Herring Producers Ltd.,* 45 BCLR 218; *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner),* 2014 ABCA 231; *Descôteaux et al. v. Mierzwinski* [1982] 1 SCR 860; *IMS Health (Canada) v. Alberta (Information and Privacy Commissioner)*, 2008 ABQB 213; *British Columbia (Attorney General) v. Lee,* 2017 BCCA 219; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health,* [2008] 2 SCR 574; *Calgary (Police Service) v. Alberta (Information and Privacy Commissioner)*, 2017 ABQB 656; *Pinder v. Sproule,* 2003 ABQB 33; *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* 2016 ONSC 6913, *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), CanLII 7258 (ONSC); *Hodgkinson v. Sims,* 1988 CarswellBC 437; *Chernetz v. Eagle Copters Ltd.*, 2005 ABQB 712; *FH v. McDougall 2008* SCC 38; *Alberta v. Suncor Inc*., 2017 ABCA 221; *John Doe v. Ontario (Finance),* 2014 SCC 36.

Other Sources Cited: Ethics Commissioner Wilkinson Investigation Report (December 2013); Iacobucci Review Report (March 2016); Alberta Hansard (Legislative Assembly December 4, 2012); Adjudication Practice Note 1; OIPC Privilege Practice Note (2016); Solicitor-Client Privilege Adjudication Protocol (2008); Alberta Rules of Court 5.7, 5.8, 10.7(2).

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I. BACKGROUND

[para 1] On June 6, 2014, I issued the Notice of Inquiry [2014 Notice]. In accordance with the Schedule that I had set out in the Notice, the Applicants provided their Initial Submission on July 7, 2014 and July 9, 2014 respectively, and the Public Body provided its Initial Submission on August 6, 2014. Immediately after the exchange of those submissions, a Preliminary Evidentiary Objection [PEO] was raised by the First Applicant, which the other Applicant agreed should be raised. The main Inquiry was put on hold in order to adjudicate the PEO. What followed was an exchange of submissions between the parties regarding the PEO that resulted in my Decision F2014-D-03/Order F2014-50 [2014 Decision/Order]. The Public Body applied for judicial review of the 2014 Decision/Order.

[para 2] In the 2014 Decision/Order, I laid out the Background to the Inquiry leading up to the PEO being raised, which included the 2014 Notice, as follows:

> *On May 16, 2014, my initial correspondence to the parties was to confirm three matters:*
>
> 1. *The parties had received a copy of my delegation from the Commissioner as an External Adjudicator*
>
> 2. *The parties had already agreed that both of the case files would be consolidated into one Inquiry, and*
>
> 3. *The parties were advised I had taken an oath under s. 51(7) of the Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25 [FOIP Act] prior to commencing the Inquiry on May 13, 2014.*
>
> *By separate correspondence on the same date, I sought the consent of the both Applicants to have their identities disclosed to each other, to share copies of their respective Requests for Inquiry [and their Requests for Review that were attached], and to share their contact information with each other. Both Applicants provided their consent in writing.*

On June 6, 2014 I sent the formal Notice of Inquiry to the Public Body and the Applicants. The Notice of Inquiry reads as follows:

> *This Inquiry arises from two separate requests to access information filed by two separate Applicants with Alberta Justice and Solicitor General [the "Public Body"] pursuant to s. 7 of the Freedom of Information and Protection of Privacy Act [the "FOIP Act"].*
>
> *The first Applicant filed a request to access information [#F6525] with the Public Body on June 12, 2012, which reads as follows:*
>
> *We request all records available from the [Public Body], with respect to the following matters:*
>
> 1. *Any requests for proposals for external legal services from the [Public Body] or any other "public body," as defined in s. 1(p) of the FOIP, relating to the recovery of health care costs pertaining to tobacco use, including, without limitation, the recovery of health care costs under the Crown's Right of Recovery Act, SA 2009, C-35 (the "CRRA"), and including, without limitation, any deliberations, discussions, evaluations, or other information related to any such requests for proposals, and the preparation of any such proposals.*
>
> 2. *Any agreements entered into for external legal services relating to the recovery of health care costs pertaining to tobacco use, including recovery under the CRRA, or pursuant to any requests for proposals for external legal services described in point 1, supra.*
>
> 3. *Any policies, standing orders, terms and conditions, or other documents regarding procurement applicable to requests for proposals for external legal services, described in point 1, supra, or agreements described in point 2, supra.*
>
> 4. *Without limiting the request set out in point 2, supra, any agreements entered into between:*
>
>   (a) *the Government of Alberta, or any "public body," as defined in s. 1(p) of the FOIP; and*
>
>   (b) *any law firms, including without limitation:*
>
>   (i) *[*name of law firm*];*
>
>   (ii) *[*name of law firm*]; and*
>
>   (iii) *[*name of law firm*],*
>
>   *relating to the recovery of health care costs pertaining to tobacco use, including recovery under the CRRA, or pursuant to any requests for proposals for external legal services described in point 1, supra.*
>
> *On August 31, 2012, the Public Body made a decision with respect to that request to access information from the first Applicant, which reads as follows:*
>
> > *564 pages of records were located in response to your request. Some of the records requested contain information that is exempted from disclosure under sections 16, 17, 21, 24, 25 and 27 of the Freedom of Information and Protection of Privacy Act or contain information non-responsive to your request. We have severed the exempted and non-responsive information so that we could disclose to you the remaining information in the records.*

The second Applicant filed a request to access information [#F6761] with the Public Body on July 30, 2012, which reads in its entirety as follows:

> *This request for all records as defined by Section 1(q) of the Act related to the awarding of the contingency contract between Alberta Justice and [*name of law firm group*]. The request would include, but not [be] limited to, the contingency contract itself. [Time period of the records: Sept. 1, 2010 – July 1, 2011]*

The request to access information was amended on September 11, 2012, based on an email from the second Applicant to the Public Body, which stated "please amend my request to include" the following:

> *any records as defined by Section 1(q) to the process of awarding the tobacco litigation legal work, including but not limited to the approval of the firm - [*name of law firm group*] - by the minister. Specifically, I am seeking any records related to how [*name of law firm group*] were chosen over their competitors.*

On September 21, 2012, the Public Body made a decision with respect to that request to access information from the second Applicant, which reads as follows:

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

On October 23, 2012, the first Applicant filed a Request for Review of the Public Body's decision to withhold information from the records it provided in response to [his/her] request to access information.

On January 10, 2013, the second Applicant filed a Request for Review of the Public Body's decision to withhold information from the records it provided in response to [his/her] 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 first Applicant filed a Request for Inquiry with respect to [his/her] request to access information.

On May 27, 2013, the second Applicant filed a Request for Inquiry with respect to [his/her] 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 Applicants were consolidated into one inquiry provided that the records were identical. Legal counsel for the Public Body assured the Commissioner that this was so by letter dated November 21, 2013. The Commissioner confirmed the basis of the agreement to consolidate by letter dated February 27, 2014 to all of the parties.

I. ISSUES IN THE INQUIRY

Based on my reading of all 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. 16 of the FOIP Act [reasonable expectation disclosure harmful to business interests of a third party] to the information in the records.*

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

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

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

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

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

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

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

This list may not be exhaustive. I encourage all 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 all-party 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 detailed lists provided with its decision in #F6525 and its decision in #F6761, which could be used as the foundation for the Index.

The Index is to be provided to both Applicants and to the Commissioner's Office when the Public Body provides its initial submission.
[Emphasis in original]

The remainder of the Notice of Inquiry discussed procedural matters including the schedule for the parties' Submissions.

In accordance with the schedule outlined in the Notice of Inquiry, the Applicants provided their respective Initial Submissions on July 7, 2014 and July 9, 2014, and the Public Body provided its Initial Submissions on August 6, 2014.

On August 14, 2014 the Preliminary Evidentiary Objection was submitted to the External Adjudicator with a copy to all parties. The parties were also notified that they had three business days to respond to the objection, in accordance with the Inquiry Procedures.

On August 15, 2014, I corresponded with all parties requesting that they notify me and each other of their intentions with respect to the Preliminary Evidentiary Objection and gave them additional time to do so due to the Public Body's counsel being unavailable. On August 29, 2014, I received a letter from the other Applicant indicating that s/he was in agreement with the objection, that s/he intended to rely on his or her co-Applicant's legal arguments and that s/he joined him or her in asking that the Opinion Letter be ruled inadmissible. A copy of the co-Applicant's letter was shared with the other parties.

On September 12, 2014, the Public Body filed its Response Submissions opposing the Preliminary Evidentiary Objection raised by the Applicants. On September 26, 2014, the Applicants filed their Reply Submissions.

I agreed with the parties that the schedule for the remaining Rebuttal Submissions from the parties in the Inquiry would be put on hold pending a decision on the Preliminary Evidentiary Objection being communicated to the parties.

[para 3] Subsequent to the release of the 2014 Decision/Order regarding the PEO on December 31, 2014, the Inquiry was stayed pending the outcome of the judicial review application filed by the Public Body, which has yet to be heard.

[para 4] Unexpectedly, on June 10, 2016, the Public Body sent correspondence to the Information and Privacy Commissioner [Commissioner] that included a portion of the Records at Issue [June 10, 2016 Records at Issue] and an Index for the 38 pages provided. The Public Body's counsel advised that the portion of the Records at Issue were being provided as a result of receiving new instructions from the Ministry of Justice and Solicitor General that the same documents being provided to the Ethics Commissioner be given to the OIPC. The instructions followed the release of the Iacobucci Review Report who found that relevant records had not been provided to the Ethics Commissioner for his/her investigation/inquiry into an ethics complaint regarding the selection process of the counsel retained to conduct litigation to recoup smoking-related health care costs under the *Crown's Right of Recovery Act* [CRRA Litigation]. At paras. 4-7 of the 2017 Order, I referred to this new development as follows:

*Unexpectedly, on June 10, 2016, counsel for the Public Body sent correspondence to the Information and Privacy Commissioner [Commissioner] with respect to new instructions [*s/he*] had received from the Ministry regarding the need to provide some of the Records at Issue to the Commissioner's Office. This came as a result of the Public Body having recently provided documents to the Ethics Commissioner with respect to an ongoing investigation at that office following the release of the Iacobucci Review Report that found important information had not been provided to the Ethics Commissioner. The Public Body instructed its counsel to provide the same documents to the Commissioner. The documents included a small portion of the Records at Issue, a sizeable portion of those pages designated Non-Responsive, and some pages from a different access to information request [2012-G-0102]. The portion of the Records at Issue delivered on June 10, 2016 complied, in part, with my [*2014*] Decision/Order.* ***The correspondence from counsel for the Public Body was not shared with the Commissioner. In accordance with office policy, the Public Body's letter was brought to my attention because, as the External Adjudicator, I continued to have conduct of this Inquiry.***

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

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

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

While this phase of the Inquiry only relates to the June 10, 2016 Records at Issue, it is important to explain other reasons for delay in this phase of the Inquiry. ***Adjudicating this part of the Inquiry has been challenging because during it the Public Body released additional Records at Issue to the External Adjudicator and both Applicants on September 30, 2016,*** *committed various errors with respect to records' numbering, produced multiple indices, and referred to records in its Initial Submission [2016] that were not listed in the Amended Index for the June 10, 2016 Records at Issue. These developments meant defining the parameters of this phase of the Inquiry took some time. On a number of occasions, the confusion and mistakes were pointed out to the Public Body who was given several opportunities to explain and clarify these issues. On February 2, 2017 and April 7, 2017, the Public Body provided letters acknowledging its errors and offering an explanation or recitation of former submissions with respect to the renumbering. On January 19, 2017, the Public Body provided another portion of the Records at Issue with another revised Index, which once again I accepted as partial compliance with my [*2014*] Decision/Order.* ***The parties were advised by my letter dated March 23, 2017 that that portion of the records will not be dealt with in this phase of the Inquiry but will form part of the main Inquiry when it continues, after the disposition of the June 10, 2016 Records at Issue is completed.***
[Emphasis added]

[para 5] Notwithstanding that the majority of the 38 pages of the June 10, 2016 Records at Issue had a legal exception applied, the Public Body provided these Records at Issue to me including those Records at Issue where s. 27(1)(a) had been claimed. When the Public Body provided this portion of records, including those over which legal privilege had been asserted, it laid out the conditions on which

they were being provided to me in its June 10, 2016 cover letter. The Public Body sent the letter to the Information and Privacy Commissioner Clayton [Commissioner], but the letter was immediately intercepted and forwarded to me as the External Adjudicator assigned to this Inquiry. The correspondence read as follows:

> *I am writing to follow up on one aspect of Order F2014-50 issued by the External Adjudicator, Dulcie McCallum (the "External Adjudicator"), on 31 December 2014 (the "Order ") .*
>
> ***BACKGROUND***
>
> *In response to certain access applications under the Freedom of Information and Protection of Privacy Act (the "FOIP Act"), Alberta Justice and Solicitor General (the "Ministry") declined to provide certain records to the applicants pursuant to section 27(1) of the FOIP Act. Section 27(1) excepts from disclosure records which are protected by any legal privilege, including solicitor-client privilege.*
>
> *The applicants did not accept the Ministry's decision, and requested the Information and Privacy Commissioner (the "IPC") to conduct an inquiry to determine whether the records were properly withheld.*
>
> *Because of a conflict of interest, you delegated your responsibilities as IPC to the External Adjudicator.*
>
> *The External Adjudicator subsequently issued the Order referred to above. The Order required the Ministry to produce the records with respect to which the Ministry asserts legal privilege, including solicitor-client privilege, so that the External Adjudicator could determine whether privilege and other exceptions to disclosure were properly claimed.*
>
> *The Ministry declined to provide the records in question to the External Adjudicator, and brought an application for judicial review to set aside the Order. One of the issues in the application for judicial review is whether section 56(3) of the FOIP Act properly interpreted authorizes the IPC (or the External Adjudicator acting as the IPC's delegate) to require production of records with respect to which solicitor-client privilege is asserted. The current law is set out in University of Calgary v. J.R., 2015 ABCA 118, which holds that the IPC does not have this authority. As you know, that decision is currently before the Supreme Court of Canada, and the Ministry's application for judicial review has been adjourned pending issuance of the Supreme Court's decision.*
>
> ***SUBSEQUENT EVENTS***
>
> *Because of subsequent events involving an investigation by the Ethics Commissioner, the Ministry has recently provided the Office of the Ethics Commissioner with certain records that were also the subject of past FOIP requests.*
>
> *The Ministry has instructed me to provide the enclosed records to you so that the External Adjudicator can in due course make a determination about whether they are excepted from production to the applicants for the reasons asserted by the Ministry (including but not limited to solicitor-client and other legal privilege pursuant to section 27(1) of the FOIP Act).*
>
> *In accordance with Adjudication Practice Note 1, I am enclosing two copies and an index of the enclosed records.*
>
> *Please note that some of the enclosed records were non-responsive to the applicants' requests in this case. The applicants in this case did not request drafts (99-107; 113-119; 120; 565; 566-569).(1) One record (32) was created after the time frame covered by the application.(2) Nevertheless, because the Ministry has provided these records to the Office of the Ethics*

Commissioner, they are now being provided to your office. Please also note that these records may contain information that would be required or authorized to be withheld had these records been requested under section 7(1) of FOIP.

NON-WAIVER

The Ministry is providing the enclosed records to your office on the following understanding:

> *(a) The provision of the enclosed records to your office* ***is without prejudice*** *to the Ministry's position that the Ministry is not required under the proper interpretation of section 56(3) of the Act to produce any records to your office with respect to which the Ministry asserts legal privilege, including solicitor-client privilege.*
>
> *(b) The Ministry* ***does not waive any legal privilege, including solicitor-client privilege, vis-à-vis your office (or External Adjudicator)*** *with respect to any of the other records which the Ministry has declined to produce to the External Adjudicator.*
>
> *(c) The Ministry* ***does not waive any exception (including but not limited to solicitor-client and any other legal privilege)*** *to the disclosure of any of the enclosed records to the applicants. The Ministry continues to assert that the enclosed records are excepted from disclosure to the applicants.*

Please let me know if you have any questions or concerns.

Footnotes:

1. *For your information, a different FOIP request (2012-G-0102) did request drafts; the Ministry responded to that request; and there was no request for a review in that case.*
2. *The Minister made the decision to select [*name of law firm group*] on 14 December 2010; the Ministry took the position that anything after 31 December 2010 was non-responsive; Record 32 was created in January 2011.*

[Emphasis in original and added]

[para 6] I accepted the June 10, 2016 Records at Issue (38 pages) on the basis outlined by the Public Body. In other words, by providing these records to me, I accepted them on the basis that the Public Body *had not waived legal privilege* over those Records at Issue where it had applied s. 27(1)(a) to the June 10, 2016 Records at Issue.

[para 7] On July 18, 2017, I released Order F2017-61 [2017 Order] that dealt *solely* with the disposition of the June 10, 2016 Records at Issue. Shortly thereafter, the Public Body filed an application for judicial review, which has yet to be heard. The June 10, 2016 Records at Issue are *not* at issue as this Inquiry continues as they are the subject of the 2017 Order. This point was made clear in the 2017 Order where, at para. 7, I stated the following:

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

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

[para 8] Again, unexpectedly, on January 19, 2017, during the course of the phase of the Inquiry regarding the June 10, 2016 Records at Issue, the Public Body provided another portion of the Records at Issue to me (not to the Applicants) and another updated Index of Records at Issue. In this instance, the Public Body did not provide any Records at Issue over which it had claimed a legal privilege exception but did provide an explanation in its cover letter to elucidate this next development, which January 19, 2017 letter read as follows:

Re: Inquiry #F5625 [sic]*/#F6761*

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

I am enclosing an updated "Index of Records (Exchanged Among the Parties)" which 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 continues to deem to be non-responsive to the access requests. These Records are indicated by "Non-responsive" in the enclosed Index. In accordance with the Public Body's decision to expand the time frame of the Records requested and to include drafts, some other Records that the Ministry formerly deemed to be non-responsive on the basis of being outside the requested time frame or drafts have now been included in the Index, with any applicable FOIPP exceptions applied. As indicated in the Index, some of the non-responsive records are protected by solicitor-client or other legal privilege.

*The Ministry is providing a copy of this letter and the updated Index to the [*names of the Applicants*], who are parties to the Inquiry.*

The Ministry is providing to you (but not to the parties 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 ABJ number at the bottom of each page**, and not to the number at the bottom right of each Record.*

*2. With respect to Record 1812, the Ministry had originally claimed exemptions under section 25(l)(c), section 27(1)(a), section 27(1)(b) and section 27(1)(c). **Upon further review, the Ministry has deemed this Record to be non-responsive,** and has included it in the attached Records for your review.*

*3. In the course of its review after the University of Calgary case, the Ministry **noted that names of lawyers (or law firms) that submitted an expression of interest had previously been severed under section 17. If you find that section 17 does not apply in these circumstances, the Ministry submits that section 16 also applies. Disclosing***

the name of the lawyers or law firms that submitted an expression of interest would reveal commercial information that was supplied in confidence.

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

[para 9] On March 8, 2017 I acknowledged receipt of the portion of the Records at Issue and the updated Index in correspondence to all parties in the Inquiry, the relevant portion read as follows:

Re: Inquiry #F6525/#F6761 – 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 Justice and Solicitor General (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 15, 2016, I extended the anticipated completion date for this Inquiry to November 30, 2017 to allow the Inquiry to proceed with respect to the Records at Issue provided by the Public Body to the External Adjudicator on June 10, 2016. The extension would also allow the Inquiry to proceed once the Public Body made its decision with respect to complying with my Decision F2014-D-03/Order F2014-50 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-03/Order F2014-50 was completed or resolved.
…
[O]n 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 an additional portion of the Records at Issue. *The updated Index [January 2017] for both case files, was provided to me and the other parties. The Public Body also provided me, as the External Adjudicator, with two copies of* ***another portion of the Records at Issue for both case files, 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 additional portion of the Records at Issue complies, in part, with my Decision F2014-D-03/Order F2014-50, as did the portion of the Records at Issue provided to me on June 10, 2016.***

For clarification, the Records provided to me by the Public Body on January 19, 2017 do not form part of the Inquiry with respect to the June 10, 2016 Records at Issue that is presently underway. Once I have issued my decision on the latter, I will advise the parties of the next steps for this Inquiry with respect to the portion of the Records at Issue that were provided to me in January 2017.
[Emphasis added]

[para 10] On March 16, 2017 the First Applicant replied to my correspondence, the relevant portion of which read as follows:

…
*[*Name of the First Applicant*] takes the position that the matter of the contingency fee agreement cannot reach an acceptable conclusion until it makes rebuttal submissions to the Public Body's*

*Initial Submission dated August 6, 2014. Therefore, [*name of the First Applicant*] requests that the next steps for the Inquiry include the opportunity to make such rebuttal submissions.*

The Notice of Inquiry dated June 6, 2014, provided the Applicants with the opportunity to make rebuttal submissions to the Public Body's Initial Submission. On October 8, 2014, you suspended the rebuttal submission deadlines and advised that "[t]he schedule for the exchange of rebuttals in the main inquiry will be reset and communicated to the parties after the matter of the Preliminary Evidentiary Objection is concluded." That schedule has not yet been reset and communicated to the parties.

*[*Name of the First Applicant*] has relied on its right of rebuttal, to be exercised following the yet to be released revised schedule, in determining appropriate content to include in its submissions and correspondence in this Inquiry.*

*By way of example, [*name of the First Applicant*]'s submissions in this phase of the Inquiry (regarding the June 10, 2016 Records at Issue) were expressly made on the basis of its understanding that the contingency fee agreement was not at issue at this stage of the Inquiry; therefore, the matter need not be addressed at length in its submissions dated January 15, 2017. The Public Body confirmed this understanding to be correct in paragraph 9 of its Reply Submission with Respect to the June 10, 2016 Records.*

*Accordingly, [*name of the First Applicant*] respectfully submits that the Public Body's failure to produce the contingency fee agreement in response to [*name of the First Applicant*]'s access to information request cannot be determined until the completion of written argument (namely, rebuttal submissions) on the issue as contemplated in the Notice of Inquiry and subsequent correspondence and direction.*

*We look forward to receiving the Public Body's response to your letter dated March 1, 2017, following [*name of counsel*] return to the office. We appreciate the opportunity you intend to provide us to reply to that response and we intend to exercise that opportunity once we receive and review the same.*

[para 11] On March 23, 2017 I responded to acknowledge receipt of the First Applicant's correspondence, copying my correspondence with all of the parties, the relevant portion of which read as follows:

*Re: Inquiry #F6525/#6761 - Response to Questions Raised by Applicant [*name of First Applicant*] in March 16, 2017 Correspondence*
…
I am grateful you took the time to write as it gives me the opportunity to correspond with all the parties in order to clarify our process to minimize any misunderstandings. I am sorry if my letters of March 1 and 8, 2017 were unclear in any way. As you can appreciate, this Inquiry has perhaps not followed the usual course and, therefore, at every stage, it is imperative that the process of next steps be clear.

I begin by putting your recent query into context. Subsequent to my Decision F2014-D-03/Order F2014-50 released December 31, 2014, the Public Body elected to file for Judicial Review. As no Records at Issue had been provided to me by the Public Body and the Preliminary Evidentiary Objection [PEO] was now before the Courts, the Inquiry was put on hold pending the disposition of the Judicial Review. This explains why the schedule for the Rebuttal Submissions in response to the Public Body's Initial Submission dated August 6, 2014 that preceded the PEO being raised was never re-set.

On June 10, 2016, the Public Body unexpectedly provided a small portion of the Records at Issue [and other records related to another access to information request and the investigation by the Ethics Commissioner] to me. This came as a result of the Public Body giving new instructions to

*its counsel, [*name of counsel*], with respect to documentation that had not been provided to the Ethics Commissioner that were to be shared with both the Ethics Commissioner and the Office of the Information and Privacy Commissioner. [See paras. 33, 76, 78 of the Iacobucci Report; refer to [*name of counsel*]'s letter to parties dated June 10, 2016.]*

*At that point, as you know, I corresponded with the parties on July 5, 2016 laying out the schedule for the exchange of submissions in relation to the small portion of the Records at Issue that had been provided to me by the Public Body. The Initial Submissions were exchanged on December 14, 2016 [Public Body], January 5, 2017 [*name of Second Applicant*], and January 15, 2017 [*name of First Applicant] *and, lastly, the Reply on January 30, 2017 [Public Body].*

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

It is my understanding that the Public Body, in and around the same time period [January/February 2017], adjourned its application for Judicial Review sine die.

…

> *6. Once that decision/order regarding the June 10, 2016 Records at Issue is released, I intend to continue with the Inquiry with respect to the entire responsive Records at Issue and the new Index provided on January 19, 2017.* ***I am making the assumption that these are all the Records at Issue the Public Body intends to provide to the External Adjudicator [the CFA pages being the one exception] and that the January 2017 Index of Records is the final index [subject to any changes made once the renumbering is clarified;*** *the CFA pages have already been included by the Public Body and purportedly are properly numbered]. On this basis, the Inquiry that began in 2014 will continue, with the anticipated completion date on or before November 30, 2017.*
>
> *7. In this regard as stated above, the Public Body has already had the opportunity to provide its Initial Submissions [2014]. The Applicants will then be given the opportunity to provide their Rebuttal Submissions [2014] regarding the Records at Issue in their entirety, followed by the Public Body's Reply. Once the decision/order regarding the June 10, 2016 portion of Records at Issue has been released, I will communicate with all parties setting out a schedule for when the Applicants' Rebuttal Submissions [2014] and the Public Body's Reply [2014] are to be provided.*
>
> *8. While the above represents the proposed course of action over the coming months, as mentioned above,* ***adjustments may be required depending on how the Public Body decides to proceed with respect to the s. 16 exception and notice to potential third parties.***

I trust this allays any concerns with respect to your opportunity to provide your Rebuttal Submissions [2014], the provision of which was suspended by me on October 8, 2014, and also provides an adequate response to the questions you raised in your March 16, 2017 correspondence.
[Emphasis added]

[para 12] On September 20, 2017, following the release of the 2017 Order on July 18, 2017, I issued the Notice of Continuation of Inquiry [2017 Notice] to all the parties, which read as follows:

Re: Inquiry #F6525/#F6761: Notice of Continuation of Inquiry

As the parties are aware, I have issued two Orders in this Inquiry: Decision F2014-D-03/Order F2014-50 [2014 Decision/Order] and Order F2017-61 [2017 Order]. Details of what has taken place in each of the phases of this Inquiry are laid out in detail in those decisions.

Overview
A brief overview of the history of the Inquiry to date is as follows:

1. *On August 31, 2012 Alberta Justice and Solicitor General [Public Body] released its decision in response to Applicant [*name of the First Applicant*]'s access to information request. The decision letter indicated the Records at Issue were made up of a total of 564 pages. On September 21, 2012 the Public Body issued the same decision letter to Applicant [*name of Second Applicant*]. A total of 98 pages of records were disclosed to both of the Applicants.*

2. *On June 6, 2014, I issued a Notice of Inquiry in the subject Inquiry. In that regard, on July 7, 2014 Applicant [*name of Second Applicant*] provided his/her 2014 Initial Submission; on July 9, 2014 Applicant [*name of First Applicant*] provided its 2014 Initial Submission; and on August 6, 2014 the Public Body provided its 2014 Initial Submission, which included an Index [2014 Index] for the 564 pages of Records at Issue [Public Body 2014 Initial Submission, at Tab 1].*

3. *Following the exchange of Initial Submissions, on August 14, 2014 Applicant [*name of First Applicant*] filed a formal Preliminary Evidentiary Objection [PEO] with respect to evidence proffered by the Public Body as part of its Initial Submission. On August 29, 2014 Applicant [*name of Second Applicant*] agreed with the PEO being raised and indicated his/her intention to rely on Applicant [*name of First Applicant*]'s submissions in that regard.*

4. *In a letter dated August 15, 2014, I laid out a Schedule for Submissions with respect to the PEO. After I received the PEO submissions, which were exchanged between the parties, I issued the 2014 Decision/Order. The Public Body filed an application for Judicial Review of the 2014 Decision/Order.*

5. *Unexpectedly, the Inquiry was re-activated on June 10, 2016 when the Public Body provided me with 38 pages of records in partial compliance with my 2014 Decision/Order, the majority of which pages had not been identified by the Public Body as part of the Records at Issue listed in the 2014 Index. During the course of this phase of the Inquiry, an issue arose when the Public Body revealed it had designated part of the June 10, 2016 Records at Issue as Non-Responsive based on how it had defined the temporal scope of the access to information requests. After informing Commissioner Clayton by letter dated October 24, 2016, a copy of which letter was shared with the parties, I informed them that the issue of the Non-Responsive designation [Issue #7 in the Notice of Inquiry] had been referred to another forum and would, therefore, not be an issue in the June 10, 2016 phase of the Inquiry. During this phase of the Inquiry, I was advised the Public Body's application for Judicial Review of the 2014 Decision/Order had been adjourned sine die.*

6. *Following the exchange of submissions between the parties on the remaining issues with respect to 35 pages of the June 10, 2016 Records at Issue, I issued Order F2017-61 on July 18, 2017. Since the initial 38 pages were provided to me, the Public Body released 3 of the 38 pages to the Applicants (details outlined below). The Public Body has filed an application for Judicial Review of the 2017 Order.*

7. *On September 30, 2016, during the exchange of submissions with respect to the June 10, 2016 Records at Issue,* ***the Public Body provided an unsolicited updated Index for the Records at Issue [2016 Index] and disclosed 251 pages of the Records at Issue to me and the Applicants, of which 97 pages had been included in the 2012 disclosure to the Applicants (details outlined below). When this 2016 Index was provided, this was the first notice given by the Public Body that the responsive Records at Issue, which the Public Body had tallied at 564 pages in its 2014 access to information decisions, now totalled 2,570 pages.*** *In its covering letter, the Public Body indicated that the accompanying September 30, 2016 Index was for pages 1-2568; but the Index actually lists pages 1-2570. The Index includes the pages of the Records at Issue that have been disclosed to the Applicants shown in the Index as "RELEASED." As the Inquiry reviewing the June 10, 2016 Records at Issue continued,* ***I made it patently clear to the parties that the updated 2016 Index, the new disclosure of records to the Applicants, and the new records added to the total pages of Records at Issue did not form part of the phase of the Inquiry reviewing the June 10, 2016 Records at Issue [35 pages].***

On January 19, 2017, the Public Body again corresponded with me, while the June 10, 2016 phase of the Inquiry was ongoing, *to advise that following the ruling in the Alberta (Information and Privacy Commissioner) v. University of Calgary [U of C] regarding legal privilege in the Supreme Court of Canada, the Ministry had reviewed its 2014 Index for this Inquiry. The result of that review appears to be that the Ministry* ***decided to produce and provide another updated Index of the Records at Issue for case files #F6525/#F6761 [2017 Index],*** *a copy of which correspondence and updated 2017 Index were provided to the Applicants by the Public Body on the same date. With respect to the January 19, 2017 correspondence from the Public Body, I highlight the following:*

1 ***The Public Body provided me with two copies of additional pages of the Records at Issue [40 pages] referred to in its correspondence as excluding those records over which a legal privilege exception had been claimed.***

2. *The 2017 Index indicated that the total for the Records at Issue remained at 2,570 pages (same as in the 2016 Index) and included records over which the Ministry was not asserting any legal privilege (provided to the External Adjudicator but not the Applicants) and records which the Ministry continued to deem as Non-Responsive but which it was including as part of the Records at Issue (for which the Public Body has also claimed a legal privilege exception for some pages. The latter were not provided to the External Adjudicator).*

3. *There was no further disclosure of records to the Applicants.*

4. ***The Public Body indicated that the new 2017 Index was now employing ABJ numbers and not the numbers previously found at the bottom right of each page.***

By letter dated March 8, 2017 I acknowledged receipt of the additional portion of the Records at Issue as further partial compliance with my 2014 Decision/Order. In my letter dated March 23, 2017, I stressed to the parties that the portion of the Records at Issue provided on January 19, 2017 would not be considered during the June 10, 2016 phase of the Inquiry but would form part of the main Inquiry when it continued.

The Inquiry is now positioned to continue with respect to the new complement of the Records at Issue including the 40 pages of the records provided to the External Adjudicator on January 19, 2017 (but excluding the 35 pages making up the June 10, 2016 records, the subject of the 2017 Order). Prior to the PEO and the 2014 Decision/Order that followed, the Public Body and the Applicants had each provided their respective Initial Submission in the Inquiry for the original 564 pages. *The purpose of this letter is to set out*

the parameters for the continuation of the Inquiry regarding the portion of the 2,570 pages of the Records at Issue which have not been the subject of review.

Records at Issue
In addition to providing portions of the Records at Issue to me in compliance with my 2014 Decision/Order, the Public Body has disclosed some of the records to both of the Applicants. The following summarizes what has been provided by the Public Body to the Applicants and the External Adjudicator:

1. Records Disclosed to the Applicants

Decision Letters of August 31, 2012/September 21, 2012:	98 pages of 564 total pages of records
June 10, 2016:	0 pages [2 pages partially redacted in original disclosure to Applicants]
September 30, 2016:	251 pages of 2,570 total pages of records [which included 2 of 3 newly disclosed pages from the June 10, 2016 records and also included 97 of the 98 pages originally disclosed in 2012; 154 pages of the 251 were newly disclosed pages to the Applicants]
January 19, 2017:	0 pages
June 15, 2017:	1 page; one of 3 newly disclosed pages from the June 10, 2016 records [page 120], which it appears the Public Body intended to release in September 2016 but did not in fact disclose to the Applicants until this date

2. Records Provided to the External Adjudicator:

Outset of Inquiry 2014:	0 pages
Post 2014 Decision/Order:	
June 10, 2016:	38 pages [ultimately 35 pages as the Public Body disclosed 2 pages to both Applicants in September 2016 and 1 page in June 2017 prior to my 2017 Order]
September 30, 2016:	251 pages [the same 251 pages given to both of the Applicants on this date]
January 19, 2017:	40 pages of 2,570 total pages of records [included 2 pages of the June 10, 2016 Records at Issue, therefore, a total of 38 new pages were provided on this date]

Summary of totals of the Records at Issue

Summarizing, for the complete Records at Issue made up of 2,570 pages, the Applicants have received a total of 253 pages of records [98 pages August/September 2012, 154 pages September 2016 and 1 page June 2017] and the External Adjudicator has received a total of 73 pages of records [35 pages June 2016 and 38 pages January 2017].

To be clear, the Inquiry will go forward to review all remaining 2,353 pages, of which I have a total of 73 pages, less the 35 pages from the June 10, 2016 Records at Issue, which have been reviewed and for which a decision has been made. It may be helpful to note that with respect to page counts, there are multiple examples of pages partially disclosed to the Applicants but the unredacted pages have not been provided to me, as the Public Body has claimed s. 27 for the severed information.

Other than 33 of the 35 pages of the June 10, 2016 Records at Issue that included pages over which the Public Body had claimed a s. 27 legal exception, the Public Body has not provided me with any other page or part of a page where it has applied the s. 27 legal privilege exception(s).

Indices

Since the outset of this Inquiry, the Public Body has produced a number of indices identified as being an index for all the Records at Issue for #F6525/#F6761, which are listed below:

Tab 1 2014 Initial Submission:	564 pages
Tab 3(c) 2014 Initial Submission:	"FOIP Request 2012-G-0060 - List of exemptions applied to records"
September 30, 2016 Index of Records:	2,570 pages [cover letter states index is for 1 to 2,568 pages]
January 19, 2017 Index of Records: [Records withheld under non s. 27 FOIP exceptions highlighted]	2,570 pages
April 7, 2017 Index of Records: [June 10, 2016 Records at Issue highlighted]	2,570 pages

In regard to the Records at Issue and the Indices, the Public Body is asked to confirm the following as part of its submissions (the schedule for which is outlined below):

1. *After it provided 40 pages of new Records at Issue to me in January this year, the Public Body produced another Index in April 2017. Please confirm that the 2017 Index produced on January 19, 2017 is the Index for the Records at Issue, which Index is the one that the Applicants and I should refer to during the continuation of this Inquiry as the "2017 Index." I believe the Public Body produced the April 2017 Index during the earlier phase of the Inquiry as a convenience to the parties and myself to highlight where the June 10, 2016 Records at Issue appeared in the index for all the records.*

2. *Please confirm that the last count of 2,570 pages, listed in the January 2017 Index, constitutes the complete responsive Records at Issue for #F6525/#F6761. Specifically, that the count of 2,570 pages includes the 564 pages from the 2012 Index, the June 10, 2016 Records at Issue and all of the pages disclosed or partially disclosed, all of which*

the Public Body has accounted for in the 2017 Index. In other words, please confirm there are no outstanding records that are responsive to the Applicants' access to information requests unaccounted for in the 2017 Index.

3. *Please confirm that the total Records at Issue for the purpose of the remainder of the Inquiry is 2,353 pages (calculated as 2,570 total pages in 2017 Index less 182 pages fully disclosed to the Applicants and less 35 pages subject of the 2017 Order), of which 73 pages have been provided to me.*

Issues in the Inquiry
The original Notice of Inquiry listed the following as the relevant issues:

1. *Whether the Public Body properly relied on and applied s. 16 of the FOIP Act [reasonable expectation disclosure harmful to business interests of a third party] to the information in the records.*
2. *Whether the Public Body properly relied on and applied s. 17 of the FOIP Act [disclosure of personal information unreasonable invasion of privacy] to the information in the records.*
3. *Whether the Public Body properly relied on and applied s. 21 of the FOIP Act [reasonable expectation disclosure harmful to intergovernmental relations] to the information in the records.*
4. *Whether the Public Body properly relied on and applied s. 24 of the FOIP Act [reasonable expectation disclosure could reveal advice from officials] to the information in the records.*
5. *Whether the Public Body properly relied on and applied s. 25 of the FOIP Act [reasonable expectation disclosure harmful to economic and other interests of a public body] to the information in the records.*
6. *Whether the Public Body properly relied on and applied s. 27 of the FOIP Act [privileged information] to the information in the records.*
7. *Whether the Public Body properly removed some information in the records on the basis the information was non-responsive to the request to access information.*
8. *Whether public interest under s. 32 of the FOIP Act is an issue in the inquiry.*

On the dates referred to in the above Overview, all the parties provided their 2014 Initial Submission with respect to the Issues. No additional issues were raised by the parties in their respective 2014 Initial Submission (prior to the PEO being raised). There has been a number of significant developments since the parties' respective 2014 Initial Submissions were exchanged, highlights of which include:

1. *Following the release of the Iacobucci Review Report with respect to the Ethics Commissioner's Office, the Public Body produced the June 10, 2016 Index and 38 pages of records to the External Adjudicator. With regard to the June 10, 2016 Records at Issue, the Public Body has since disclosed 3 pages to the Applicants and 35 pages were the subject of my 2017 Order.*

2. *In November 2016, the parties were advised that Issue #7 in the Notice of Inquiry had been referred to another forum and, therefore, would not be considered in the Inquiry when it continued.*

3. *In September 2016, the Public Body produced an Index showing the volume of the Records at Issue had expanded from 564 pages to 2,570 pages.*

4. *In November 2016, the Supreme Court of Canada released two significant decisions regarding legal privilege: U of C and Lizotte v. Aviva Insurance Company of Canada [Lizotte]. The Public Body indicated that the U of C decision prompted it to review its Index of Records and provide additional pages of the Records at Issue to me in January 2017.*

The following is important information for the parties to review with respect to the forthcoming submissions (the schedule for which is outlined below):

1. *The disparity in the total number of pages of records given to me [73 pages] compared to the total pages in the Records at Issue [2,570 pages] is significant. The central reason for this is because the Public Body has elected not to provide any additional records, or parts of any record, over which it has claimed a legal privilege exception. Based on the new decisions from the Supreme Court of Canada, it is open to a public body to make that choice as it is not compelled to provide the records to the Commissioner's Office. However, as a result, that means that the Public Body must provide me, as the decision-maker, with submissions that include adequate descriptions of the records and sufficient evidence to meet its burden that a legal privilege exception applies to any particular record or part of a record.*

2. *With respect to evidence submitted in its 2014 Initial Submission regarding the applicability of legal privilege, the Public Body provided two affidavits: one from the FOIP Coordinator and one from a FOIP Advisor for Alberta Justice and Solicitor General. While this is useful evidence, the Public Body must meet the standard set out by the Alberta Court of Appeal in ShawCor (referred to by the Supreme Court of Canada in U of C as the relevant authority in Alberta) with respect to what is required under the Alberta Rules of Court relating to the content of an affidavit of records where a party claims privilege.*

3. *On December 15, 2016, following the U of C decision in the Supreme Court of Canada, the Commissioner developed, and made public, a Privilege Practice Note [PPN] to replace its former Solicitor-Client Privilege Adjudication Protocol, a copy of which PPN is attached. In this Inquiry, the Public Body continues to object to the production of any further 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, referred to by the Supreme Court of Canada.*

4. *On the basis of the above, I want to emphasize the importance of the need for 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 the individual, identified in the Records at Issue and in the records disclosed to the Applicants as "lead in-house counsel" in regards to the recovery of health care costs associated with tobacco litigation (refer to page #1057/ABJ #1726 disclosed by the Public Body to the Applicants and the External Adjudicator on September 30, 2016 though incorrectly described in the 2016 Index, corrected in the 2017 Index as RELEASED);*

    B. *An affidavit or affidavits of the Records at Issue over which any legal privilege has been claimed from the individuals, who are identified in the Records at Issue and in the records disclosed to the Applicants as senior government employees, who may be lawyers but are not described or referred to as such, but who are privy or party to the information in the Records at Issue. In that regard, it is*

important for the Public Body to heed the evidentiary requirements set out in 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; and

C. *For the most part, the description of the records in the 2017 Index continue to take a minimalist approach. Descriptions should go beyond simply stating the type of record: document, email, briefing note. Each affidavit to be provided (as outlined above), 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, taking care not to reveal any information that is privileged.*** *The details to provide in the descriptions, where applicable, include:*

   * *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 stamped "Confidential" or "Privileged";*
   * *whether any Outlook sensitivity feature has been activated;*
   * *whether the record is marked draft or final;*
   * *where legal advice was given or sought; and*
   * *where the legal advice given was later discussed.*

5. *Should the Public Body attempt to continue to rely on the unsworn letter report [dated July 2, 2014] that was submitted as part of its 2014 Initial Submission (held to be inadmissible evidence in the 2014 Decision/Order) and fail to comply with the evidentiary requirements outlined above, I propose to add the following as Issue #9 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.

Due to the significant developments since the parties provided their 2014 Initial Submissions (outlined above) and given the Public Body's overall reliance on legal privilege exception(s) for the bulk of the 2,570 pages of the Records at Issue (none of which are before me to review), I am setting out a new Schedule of Submissions in the Inquiry. ***This new Schedule requires that the Public Body provide a Supplementary Initial Submission, giving it the opportunity to meet its burden of proof with respect to its reliance on the legal privilege exceptions. Having this opportunity will enable the Public Body to meet the evidentiary requirements in the Alberta Rules of Court, as set out by the Alberta Court of Appeal in the ShawCor decision,***

and laid out in the PPN, thereby assisting me in assessing the validity of the claimed privilege. Without the detailed descriptions and the affidavits of the Records at Issue, 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.
[Emphasis added]

[para 13] On September 21, 2017, the Second Applicant raised a question (by email) as to whether the author of the Opinion Letter (part of the Public Body's Initial Submissions and the subject of the PEO) had been given all 2,570 pages of the Records at Issue. The complete text of the email from the Second Applicant was reproduced in my response to him/her on September 22, 2017 letter, a copy of which letter was shared with all parties, and read as follows;

Re: Inquiry #F6525/#F6761: Response to Question Raised by Second Applicant

*On September 21, 2017 you sent an email to the Registrar [*name*] (copied to all parties) with one question in relation to the Notice of Continuance of Inquiry in #F6525/#F6761 that I issued the day before. [*Name of Registrar*] forwarded your question to me and responded to you advising I was in transit yesterday when you sent your query. I am happy to be able to respond today.*

Your question was as follows:

> *Did the writer (a former judge) of the unsworn letter dated July 2, 2014 review all of the 2,570 pages of the Records at Issue?*

In its 2014 Initial Submission, the Public Body provided the 2014 Index at Tab 1 [total 564 pages of records] and the unsworn letter (retired judge) dated July 2, 2014 at Tab 4. In para. 73 of my Decision F2014-D-03/Order F2014-50 [2014 Decision/Order], I noted that one of the factors I considered in making my decision was the lack of clarity as to exactly what records (or index) the author reviewed in 2014. At paras. 169-170 of the Decision/Order, I exercised my discretion to rule the evidence proffered by the Public Body inadmissible.

Notwithstanding my 2014 Decision/Order that the unsworn letter was inadmissible, at p. 2 of its 2016 Initial Submissions, the Public Body listed the unsworn letter as part of the evidence it had provided. In para. 18 on p. 10 of my 2017 Decision with respect to the June 10, 2016 Records at Issue, I stated the following:

> *[NOTE: The final item in the list of evidence, the Opinion Letter, was the subject of my Decision/Order released December 31, 2014 with respect to the PEO, in which I found the Opinion Letter to be inadmissible in the Inquiry. The Public Body has filed a Judicial Review of that Decision/Order, which has been adjourned sine die. During this phase of the Inquiry, because I have the June 10, 2016 Records at Issue, I find it unnecessary to consider the propriety of the Public Body trying to resubmit the Opinion Letter found to be inadmissible into evidence during this phase of the Inquiry, a step the Applicants strongly oppose. I find it unnecessary to consider particularly given that the Public Body itself does not refer to it in the text of its Initial Submission [2016]. The Opinion Letter has not been re-read or considered during this phase of the Inquiry.]*

As the Notice of Continuance states, should the Public Body attempt to continue to rely on the unsworn letter, I proposed to add an Issue #9 in the Inquiry regarding waiver, as follows:

> *5. Should the Public Body attempt to continue to rely on the unsworn letter report [dated July 2, 2014] that was submitted as part of its 2014 Initial Submission (held to be inadmissible evidence in the 2014 Decision/Order) and fail to comply with the evidentiary requirements outlined above, I propose to add the following as Issue #9 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.

It may be fair to assume that the writer did not have the full complement of 2,570 pages as that total count of pages of records was not revealed by the Public Body until it produced a new Index on September 30, 2016.

Therefore, in response to your email, notwithstanding that the unsworn letter is not evidence before me, it is valuable that you have posed the question as it re-confirms my decision to find the unsworn letter inadmissible because of its limited probative value.

[para 14] Shortly thereafter, on September 25, 2017, I received correspondence from a lawyer advising that s/he was assuming the role as the Minister's new counsel as the former lawyer was stepping aside. The letter received from the new counsel, which was copied to the Applicants and to the Public Body's former counsel, read as follows:

RE: Inquiry #F6525/F6761

*Further to your letter of September 20, 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. 1503-01391.

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 by November 15, 2017.*

3. *The Applicants' 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 15] On September 27, 2017, as a result of receiving notification from the Public Body regarding its change of counsel, I issued an AMENDED Notice of Continuation of Inquiry [2017 Amended

Notice] and, under separate cover to the Minister, of a letter of an Extension of Anticipated Completion Date for the Inquiry. The 2017 Amended Notice read as follows:

> *Re: Inquiry #F6525/#F6761: AMENDED Notice of Continuation of Inquiry and Extension of Completion Date*
>
> *[*Name of new lawyer*], I acknowledge receipt of your correspondence dated September 25, 2017 advising me that you are replacing [*name of former lawyer*] as counsel of record in the subject Inquiry. I certainly appreciate you responding promptly to my September 20, 2017 letter and sharing your notification with the Applicants.*
>
> *[*Name of new lawyer*], your introductory letter was in response to my letter dated September 20, 2017, which had provided the parties with a Notice of Continuation of the Inquiry. The Notice of Continuation, which was shared with the Ministry's former counsel [*name of former lawyer*] and the Applicants, was in response to the Public Body providing me with another portion of the Records at Issue and the Applicants and me with another updated Index for the Records at Issue on January 19, 2017. As I stated in my September 20, 2017 correspondence:*
>
> > *By letter dated March 8, 2017 I acknowledged receipt of the additional portion of the Records at Issue as further partial compliance with my 2014 Decision/Order [Decision 2014-D-03/Order F2014-50]. In my letter dated March 23, 2017, I stressed to the parties that the portion of the Records at Issue provided on January 19, 2017 would not be considered during the June 10, 2016 phase of the Inquiry but would form part of the main Inquiry when it continued.*
>
> *In regard to your September 25, 2017 letter,* ***I am heartened at the news that you will be reviewing the Records at Issue and that you 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. The 2014 Initial Submission from the Public Body, however, was deplete leaving me, as the ShawCor Court of Appeal of Alberta put it "blindfolded": inadequate description of each page or bundle of records, 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 to put your attention to all these aspects during your review of the records and preparation of the relevant affidavit evidence.***
>
> *Should you, [*name of new lawyer*], 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 the Public Body is continuing to rely for those pages. In addition, if you discover any pages of records where the Public Body no longer intends to rely on the claimed exceptions and is now prepared to disclose to the Applicants, I would invite you to do so.*
>
> *I recognize as new counsel that at the outset you will require considerable time to get up to speed on, and to familiarize yourself with, this Inquiry file. The changing scope of the Records at Issue (initially 564 pages; now 2,353 pages in the Records of Issue left to review,* ***remembering that the continuation of the Inquiry will not include the 35 pages in the June 10, 2016 Records at Issue, which were the subject of Order 2017-61) and the numerous Indices produced by the Public Body have made this Inquiry particularly complex. In that regard, in the Notice of Continuation dated September 20, 2017, I attempted to highlight some of the details of these complexities, posing questions for the Public Body (refer to p. 5 of the Notice of Continuation). It is reasonable for me to conclude that given the present state of the January 2017 Index, [name of new lawyer], your plan to include a description of the Records at Issue, as set out in ShawCor, as part of the new affidavit evidence, will take***

some time. Also, importantly, given what I referred to as deplete submissions from the Public Body regarding the legal privilege exceptions on which it has relied (refer to pp. 6-8 of the Notice of Continuation, I laid out specific demands for evidence in line with the ShawCor decision and the Alberta Rules of Court, which I appreciate may require some time to organize and is, therefore, another important factor for me to consider. That being said, I need to be fair to all the parties: reaching a balance between your needs as new counsel for the Public Body with the interests of the Applicants whose access to information requests date back to 2012 and who have never, over the last 5 years, had the opportunity to respond to the kind of evidence you are proposing to submit.

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 Applicants may have. This step will be followed by the Applicants being given ample time to respond to the Public Body's newly tendered evidence in their respective Rebuttal Submission.

You may not be aware but the typical timeline used by the Commissioner's Office for submissions is as follows: 4 weeks for parties to provide an Initial Submission and 2 weeks to provide a Rebuttal Submission, which customary timeline I followed in the earlier Notice of Continuation provided to your predecessor and the Applicants.

Weighing all the relevant considerations and to be fair to all parties, I propose to modify my September 20, 2017 timeline, subject to any objections any party may have, …
[Emphasis in original and added]

[para 16] On the same date, the First Applicant wrote to advise it had no objection to the Amended Schedule for Submissions. The Second Applicant did not respond and therefore, in keeping with the practice at the OIPC, s/he was deemed to be in agreement with the extended timelines.

[para 17] On October 12, 2017 the Registrar distributed the following email to the parties on my behalf:

*Please accept my apologies for the delay in acknowledging receipt of [*name of First Applicant*]'s letter of September 27, 2017 which was received and forwarded to External Adjudicator Dulcie McCallum on the same date. Ms. McCallum has asked me to respond to you as follows:*

> *Thank you [*name of First Applicant*] for your letter. I appreciate you promptly responding to my September 27, 2017 amending the Schedule for Submissions for the Inquiry. I also appreciate your flexibility with respect to extending the timelines for the Public Body's new counsel to provide its Supplementary Initial Submission.*
>
> *As Registrar [*name*] has not received any written response from either [*name of Second Applicant*] or [*name of new counsel*] to my letter of September 27, 2017 and more than three days have elapsed since the letter was sent, I assume they also have no objection to the Amended Schedule.*
>
> *I look forward to receiving the parties' submissions by the deadlines as set out in the Amended Schedule.*

[para 18] On October 16, 2017, in response to a query from new counsel for the Public Body, the Registrar of Inquiries sent the following email to all parties:

Recently you contacted me by telephone regarding whether or not you were required to reply to External Adjudicator Dulcie McCallum's correspondence regarding the Amended Schedule for Submissions. I advised you that your silence would be taken as you having no objections.

During our conversation you indicated that in the next while you would be travelling to Edmonton to view the records. You also posed a question as to why the various inquiries, for which you were now counsel, had not been consolidated into one inquiry. As the Registrar, I was not in a position to answer the question and simply pointed out that the various inquiries involved different public bodies and were as a result of different access to information requests. I believe I referred you to correspondence sent to the parties by Commissioner Clayton when these matters were initially set down for inquiry.

I felt I would be remiss if I did not inform Ms. McCallum about the fact that you raised the possibility of consolidation during that conversation. She has asked me to contact you (with copies to the parties in each of the inquiries) to advise you about the procedure at the Commissioner's Office when this kind of issue is raised. A copy of this email has been forwarded to Ms. McCallum.

When any party has an issue, question or objection during an Inquiry, they may raise the matter with the External Adjudicator. On that basis, if, after reviewing the access to information requests, the Records at Issue and the indices in the various inquiries, you consider it appropriate, you may make a request in writing to the External Adjudicator asking her to consider your request to consolidate two or more of the inquiries. Please follow the instructions for making a variation request provided on pages 3 and 4 of the Inquiry Procedures, a copy of which is attached for your convenience. Thereafter, the External Adjudicator will make a decision in that regard after the Applicants have had an opportunity to comment on your request, should they elect to do so.

You will receive this email from me in each of the inquiries separately because while the identity of the Applicants in each of the inquiries have, by consent early in the inquiries been made known to each other, that is not the case for the identity of the Applicants across the spectrum of the various separate inquiries.

If you have any questions in this regard, please do not hesitate to contact me.

[para 19] On October 23, 2017 counsel for the Public Body sent an email to all parties in this Inquiry, which read as follows:

I am writing to advise that we continue to work on our additional submissions. At this time we are expecting we will be able to meet the November 15 date for our submissions.

[para 20] On the same date, the Registrar of Inquiries circulated a response to all the parties on my behalf, which read as follows:

We acknowledge receipt of your email of today's date. I forwarded your email to External Adjudicator Dulcie McCallum, who has asked me to respond to you as follows:

> *In the subject Inquiry [#F6525/#F6761], you never proposed nor did I expect you to provide me with an update on today's date, as the Schedule for Submissions in the Amended Notice of Continuation of Inquiry already set November 15, 2017 as the due date for the Public Body's Supplementary Initial Submission. Your email today in this Inquiry was unnecessary.*
>
> *Finally, all of today's emails were sent as a reply to the Registrar's email dated October 16, 2017, to which you did not provide any response or question. I assume you now appreciate the process under the Inquiry Procedures. The Applicants have filed no objection to the extended date for the Public Body's Supplementary Initial Submission. By way of reminder, the Inquiries in which you are now counsel remain separate.*

[para 21] On a review of the Index provided with the additional Records at Issue on January 19, 2017, I corresponded with the Public Body, shared with all of the parties, for the purpose of seeking further clarification regarding the upgraded Index, which October 26, 2017 letter read as follows:

> *Re: Inquiry #F6525/#F6761: Discrepancies in the Records*
>
> *On a review of the pages of Records at Issue provided to me on January 19, 2017 by your predecessor, [*name of former lawyer*], a number of questions have once again arisen regarding the records. I consider it fairer to you to add these to the questions contained in my September 20, 2017 Notice of Continuation. As I pointed out at page 4 of the Notice, included in the 40 pages provided to me in January were 2 pages [210, 211] from the June 10, 2016 Records at Issue [already dealt with in my last Order].* ***These pages do not form part of the ongoing Inquiry.***
>
> *On a review of the remaining 38 pages, please be advised as follows:*
>
> 1. *Pages 54 and 213 were released in full to the Applicants in 2012 in response to the access to information request and again on September 19, 2016;* [**NOTE:** On review of this letter, I note that the Public Body actually re-released pages 54 and 213 on September 30, 2016.]
>
> 2. *Pages 1703, 1725, 1732 and 1733 were released in full to the Applicants and provided to the External Adjudicator on September 30, 2016.*
>
> *There are, therefore, 6 less pages of Records at Issue that are before me. This brings the total to 32 pages of Records at Issue available to me. Please confirm this count to be correct.*
>
> *Also I add the following questions to those posed at page 5 of the Notice of Continuation, which are to be answered in your Supplementary Initial Submission:*
>
> 1. *Please provide an update as to the total number of pages of Records at Issue [do not include the June 10, 2016 Records at Issue or any pages disclosed to the Applicants at any time in the count];*
>
> 2. *In relation to the request in bullet 1 immediately above, please confirm that page 2521 has been released to the Applicants [shown in the January 2017 Amended Index as claiming multiple exceptions] and will not be included in the count of the Records at Issue;*
>
> 3. *On page 2 of [*name of former lawyer*] January 19, 2017 letter, the Public Body claims that s. 16 is to be claimed should I find s. 17 does not apply. Is this additional exception being claimed in every instance where s. 17 has been claimed in the January 2017 Amended Index?;*
>
> 4. *Providing some clarity on what is meant by the Public Body when it claims "Non-responsive" in the Index and "subject to litigation and solicitor-client privilege" in a footnote would be helpful [examples pages 2199, 2200] as these pages have not yet been provided to me;*
>
> 5. *Please confirm that s. 16 and s. 17(1) are being claimed in addition to "non-responsive" on page 37. The redacted copy provided to the Applicants only shows non-responsive with no reference to any of the exceptions as they appear on my unredacted copy; and*
>
> 6. *For page 53, the Index shows one of the three exceptions as s. 17(1)(g)). As there is no such exception, please advise which subsection of s. 17 was intended.*

*If you have any questions in this regard, please do not hesitate to contact Registrar [*name*] who will provide them to me.*
[Emphasis added]

[para 22] In this Inquiry, I did not receive a response from the Public Body to the questions I raised in the October 26, 2017 correspondence.

[para 23] On November 15, 2017, the Public Body provided its Supplementary (Initial) Submission [2017 PBSS] in accordance with the 2017 Amended Notice, which will be discussed in detail *infra*. The 2017 PBSS included another updated Index of Records [Exhibited Index] attached to the 2017 Affidavit of Records. The Exhibited Index was to replace other indices previously submitted by the Public Body in January 2017 (when the new Records at Issue were provided to me) and in April 2017.

[para 24] After the OIPC Registrar acknowledged receipt of the 2017 PBSS, the First Applicant requested an electronic searchable version of the Exhibited Index (Schedule) to the 2017 Affidavit of Records [Exhibit A]. On November 21, 2017 the Public Body responded by email sharing the requested electronic version of the Exhibited Index with the External Adjudicator and both of the parties.

[para 25] On November 23, 2017 after receiving the 2017 PBSS, I corresponded with counsel for the Public Body, as follows:

*The following message is being sent to [*name of lawyer*] and copied to the Applicants on behalf of External Adjudicator Dulcie McCallum in regard to Inquiry #F6525/#F6761.*

*Dear [*name of lawyer*]*

*I acknowledge receipt of your Supplementary Initial Submission in the subject Inquiry that was forwarded to me by Registrar [*name*].*

In that regard, given that the Applicants submitted their Initial Submission in 2014 and given they have only one opportunity to provide a response to your Supplementary Initial Submission by way of Rebuttal due December 20, 2017, I raise two issues for the purpose of clarification in advance of them doing so and to avoid any further delay in concluding this Inquiry.

1. *You acknowledge in para. 2 that one of the exceptions relied upon by the Public Body was s. 17. Throughout your submission, however, there is no reference to s. 17, in particular, in paras. 27-30.* ***Please confirm that the Public Body is no longer relying on the s. 17 exception.***

2. *In para. 30 where you note your continued reliance on the Public Body's Initial Submission from 2014, you indicate that "s. 21 has now been applied to more than one record." This new decision to claim the s. 21 exception to more records than just ABJ000281 is reflected in the Index of Records attached to the affidavit of [*name of in-house lawyer*]. If you review the submission from 2014 with respect to s. 21, however, you will find an absence of substantive content. Since you have extended your reliance on this exception to other records, you may wish to provide a submission as to how it applies, to which the Applicants could then respond.*

To be fair to all parties, I ask you provide this information no later than Monday, December 4, 2017 thus giving the Applicants ample time to finalize their respective Rebuttal Submission.
[Emphasis added]

[para 26] On November 30, 2017 I received the following response from the Public Body:

RE: OIPC File Numbers F6525 and F6761

Thank you for your email of November 23, 2017. We respond to your questions as follows:

1. ***Section 17 continues to be relied upon where indicated in the Index of Records attached to [*name of in-house counsel*]'s Affidavit.*** *We continue to rely upon submissions made by [*name of former lawyer*] regarding section 17.*

2. *Section 21 is relied upon where indicated in the Index of Records attached to [*name of in-house counsel*]'s Affidavit. We continue to rely upon submissions made by [*name of former counsel*]. We make no additional submissions in that regard. We point out that wherever section 21 is relied upon we also rely on section 27.*

We trust this is the information you require.
[Emphasis added]

[para 27] On December 13, 2017 the Second Applicant provided his/her Rebuttal Submission [2017 Second ARS] in advance of its due date in the amended schedule set out in the 2017 Amended Notice.

[para 28] On December 20, 2017 the First Applicant provided its Rebuttal Submission [2017 First ARS] in accordance with the amended schedule set out in the 2017 Amended Notice.

[para 29] On January 4, 2018 I corresponded with the Public Body regarding the need for additional clarification about the Exhibited Index to the 2017 Affidavit of Records. After a careful examination of the Exhibited Index, a number of concerns arose, as the recent Exhibited Index appeared to continue to lack the requisite information. There were instances, for example, where pages were not accounted for. The Public Body had not indicated whether it had bundled any of the records. But that had not been specified and, as a result, the Public Body had not accounted for all of the pages of the Records at Issue; there was no document count column and no sequence of pages shown in the Document ID Column. The best example is the line for page ABJ000551, which is what the Public Body had confirmed to be the Retainer and Contingency Fee Agreement. Pages ABJ000552-ABJ000564 were not included anywhere in Exhibited Index. The Exhibited Index appeared not meet one of the basic requirements set out in *ShawCor* and the Alberta Rules of Court: *"each record must be numbered in a convenient order with all pages of the Records at Issue accounted for."* In order to allow the Public Body the opportunity to know of my concerns in advance of the date set for its rebuttal submission [2017 PBRS], the following letter was sent to the Public Body seeking clarification, shared with both of the Applicants, which read as follows:

Re: Inquiry #F6525/#F6761: Request for Clarification of Tab A Index of Records at Issue

*An issue has arisen with respect to the Index attached as Tab A to [*in-house counsel*]'s Affidavit [Tab A Index], which affidavit is found at Tab A of your Supplementary (Initial) Submission in Inquiry #F6525/#F6761. Your updated Index of the Records at Issue, unfortunately, does not appear to meet one of the necessary requirements as set out in the Alberta Rules of Court and the ShawCor decision; each record must be numbered in a convenient order with all pages of the Records at Issue accounted for, even if pages are bundled together as one Record. Bundles are permissible so long as the requirements in Rule 5 are otherwise met.*

> *Rule 5.7 permits records of the "same nature" to be bundled so long as the bundle can be "described in sufficient detail to enable another party to understand what it contains". [ShawCor, at para. 48]*

I would assert that the pages in each bundle are an essential part of the description of a record. On a review of the column titled "Document Id" you will see there are multiple instances where there is a gap in the numbering from one line to the next. Please note that in order to complete

this Inquiry, I will be making my findings for each page of the Records at Issue as they appear in Tab A Index.

There are many instances where records in a potential bundle are not properly described. By way of example, Document Id ABJ000551 is listed and described as Retainer and Contingency Fee Agreement. The next entry for a record in the Tab A Index is ABJ000565. Pages ABJ000552 through to and including ABJ000564 are not accounted for.

*As you will appreciate, this is particularly important where the largess of Records at Issue [all records where legal privilege has been claimed] are not before me and thus the Public Body will be placing considerable reliance on the [*name of in-house counsel*] Affidavit [including the Tab A Index] in order to meet its burden to establish the legal privilege exception has been properly claimed.*

*If affiant [*name of in-house counsel*] intended to omit the pages not referred to from the Records at Issue, please advise accordingly.*

*If affiant [*name of in-house counsel*] did not intend to omit some or all of the pages, for example, those [*s/he*] intended to include as part of a bundle, I require those page sequences to be specified in the Tab A Index [for example, as they appear in the January 19, 2017 Index], or alternatively, each Record and/or bundle of Records needs to be numbered sequentially in the Tab A Index in a separate column, to number all of the Records at Issue - for each page or bundle [Refer to the Practice Privilege Note: Schedule to the Sample Affidavit].* ***This correction to the description of the Records at Issue will need to be provided as an Amended Index/Schedule attached to an affidavit sworn by affiant [*name of in-house counsel*] to replace the present Tab A Index.***

The Public Body Rebuttal Submission is due on January 17, 2018. In order to be fair, I am sending this letter to enable the Public Body to make any corrections to the Tab A Index for the Records at Issue that it considers necessary. This correction is to be included with its Rebuttal on the scheduled date. ***As there has been ample opportunity over the last four years for the Public Body to provide a final and complete Index that met all legal requirements [after multiple amended indices], again, in order to be fair, I will be very reluctant to grant any further time extension in order for the Public Body to provide clarification.***
[Emphasis in original and added]

[para 30] On January 17, 2018 the Public Body provided its Rebuttal Submission [2018 PBRS] in accordance with the 2017 Amended Notice. The 2017 PBRS was accompanied by the Public Body's response to my correspondence of January 4, 2018 that requested clarification regarding the Exhibited Index, which read as follows:

This is in reply to your letter of January 4, 2018.

At the outset we must respectfully dispute your assertions that the revised Index of Records is not compliant with the Alberta Rules of Court and the ShawCor decision. Each document has been separately and sufficiently described or identified. ***Each page is separately numbered on the documents and there has been no bundling*** *as you describe. The affidavit of [*name of in-house counsel*] describes the claims of privilege over the documents.*

That said, and in an effort to remove an issue that we do not think will assist the process, we have revised the Index using a different software program to include a column for page counts and end document numbers. We enclose a PDF and searchable Excel versions of this revised Index, ***which forms part of the Public Body's submissions.***
[Emphasis added]

[para 31] The exchange of submissions was concluded, as set out in the 2017 Amended Notice. As a result of one aspect of a submission in the Public Body's 2018 PBRS that indicated its intention to continue to rely on the Opinion Letter ruled in admissible in my 2014 Decision/Order, I deemed it necessary to send a further communique to all of the parties in the Inquiry. My correspondence dated January 26, 2018 read as follows:

> *Re: Inquiry #F6525/#F6761: Invitation to Provide Further Submissions on the Issue of Waiver*
>
> *This letter acknowledges receipt of the Public Body Reply to the Rebuttal Submissions of the Applicants [Reply] dated January 17, 2018. In the usual course of an Inquiry, after all the final submissions have been exchanged, all parties would be receiving a communique advising that the exchange of submissions was concluded and that a decision would be forthcoming.*
>
> *The deviations throughout this Inquiry have caused considerable delay in concluding the matter. It is disappointing to have to correspond with the parties at this juncture regarding one further issue. After five years since the filing of the requests for access to information, for me to propose a further step is unfortunate but I believe necessary to ensure the Inquiry has the benefit of comprehensive arguments from the parties.*
>
> *In its Reply, the Public Body stated at para. 18:*
>
> > ***However, as the Applicants have raised the issue of waiver in their submissions, the Public Body provides the following response, reserving its right to file further materials with respect to the issue of wavier*** **[sic].**
>
> *Immediately after making that statement, the Public Body went on in its Reply to provide argument and case law regarding the issue of waiver.*
>
> > ***The only question at this time is how to respond to the Public Body's claim to having a right to file further materials. It is not necessary to comment on whether the Public Body has the right it claims, but rather will rely on my discretion regarding procedural matters related to the conduct of an Inquiry in deciding how to proceed.***
>
> *In the Notice of Continuation of the Inquiry dated September 20, 2017, I stated the following:*
>
> > *Should the Public Body attempt to continue to rely on the unsworn letter report [dated July 2, 2014] that was submitted as part of its 2014 Initial Submission (held to be inadmissible evidence in the 2014 Decision/Order) and fail to comply with the evidentiary requirements outlined above, I propose to add the following as Issue #9 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.*
>
> *In correspondence to all of the parties dated September 22, 2017, I once again notified the parties that if the Public Body failed to provide the substantive evidence laid out in detail in the Notice of Continuance <u>and</u> continued to rely on the Opinion Letter, that the following would be added as an issue in the Inquiry. That letter stated the following:*
>
> > *As the Notice of Continuance states, should the Public Body attempt to continue to rely on the unsworn letter, I proposed to add an Issue #9 in the Inquiry regarding waiver, as follows:*

> *Should the Public Body attempt to continue to rely on the unsworn letter report [dated July 2, 2014] that was submitted as part of its 2014 Initial Submission (held to be inadmissible evidence in the 2014 Decision/Order) and fail to comply with the evidentiary requirements outlined above, I propose to add the following as Issue #9 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.*

Both Notices to the parties made it clear that there were two requirements (conjunctive) that the Public Body had to meet or the issue of waiver, as outlined, would be added as an issue. In its Supplementary (Initial) Submission, the Public Body met one of the two requirements by providing substantive evidence attesting to legal privilege in affidavit form.

With respect to the second requirement, however, the Public Body has elected to continue to rely on the Opinion Letter as part of its evidence in its Supplementary (Initial) Submission, which was its decision to make. In that regard, at para. 26, the Public Body Supplementary (Initial) Submission dated November 15, 2017 stated:

> *In addition to the affidavits of … submitted as evidence in this inquiry, the Public Body continues to rely on the report prepared by retired Justice [*name*], and its submissions regarding that report dated September 12, 2014, recognizing that the decision of the External Adjudicator regarding the admissibility of that report has been judicially reviewed and is currently stayed. [Emphasis added]*

*The First Applicant in this Inquiry has addressed the issue of waiver in its Rebuttal Submission in response to the Public Body's Supplementary (Initial) Submission. In [*his/her*] Rebuttal Submission, the Second Applicant has chosen to rely on the submissions of the First Applicant with respect to all issues.*

To be clear, admissibility of the Opinion Letter is the subject of Decision F2014-D-03/Order F2014-50 [2014 Decision/Order] and is not presently an issue in this Inquiry. In the 2014 Decision/Order, I made no finding or decision as to whether there had been a waiver of privilege and, therefore, the issue of waiver is live and not res judicata. ***The issue with respect to waiver is clearly stated in both notices supra and does not relate to the Opinion Letter itself. The issue is whether the Public Body has waived legal privilege over any of the Records at Issue.***

With a view to procedural fairness, I am responding to the Public Body's reservation to file further materials by inviting it to make one further submission on the sole issue of waiver. Similarly, with fairness in mind, after the Public Body provides its Supplementary Reply Submission in regard to the issue of waiver, both of the Applicants, if they elect to do so, *will have the opportunity to provide a Supplementary Rebuttal Submission, again, on the sole issue of waiver. I urge the parties to contain their respective submissions to the sole issue of waiver as outlined in the Notices they received.*

I would appreciate all of the parties providing their respective submission in accordance with the Schedule below …
[Emphasis in original and added]

[para 32] On February 9, 2018 the Public Body provided its Supplementary Submission [2018 PBSS Waiver], which included an Affidavit of in-house counsel [2018 Waiver Affidavit], on the issue of waiver, in accordance with the schedule of submissions, that will be detailed *infra.*

[para 33] On February 22, 2018 the First Applicant provided its Supplementary Rebuttal Submission [2018 First ASRS Waiver] on the issue of waiver, in accordance with the schedule of submissions, that will be detailed *infra.*

[para 34] On February 23, 2018 the Second Applicant provided his/her Supplementary Rebuttal Submission [2018 Second ASRS Waiver], in accordance with the schedule of submissions, that read as follows:

> *Please be advised that I will be relying on the supplementary rebuttal submission of [*name of First Applicant*].*

[para 35] By correspondence dated February 23, 2018 the Registrar advised the parties that the scheduled submission process was now complete, that the inquiry would now continue and that no further submissions would be accepted unless specifically requested or approved by the External Adjudicator.

II. RECORDS AT ISSUE

[para 36] As discussed in some of the correspondence reproduced *supra,* clarifying the exact parameters of the Records at Issue has been a challenge. 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 approximately 2,570 pages, only 40 pages of which have been available to the decision-maker.

[para 37] The parameters of the Records at Issue have shifted multiple times from the time of the access to information requests in 2012 to the final submission received from the Public Body in 2018. The size of the record began in 2012 as 564 pages, remained at 564 pages at the time of the 2014 PBIS, and ultimately reached 2,570 pages in 2017. The Public Body released 38 pages to the External Adjudicator on June 10, 2016, which have been ruled on in the 2017 Order and are not at issue in this phase (3 pages of which have been released to the Applicants). During the June 10, 2016 phase of the Inquiry, the Public Body released two additional sets of Records at Issue on two separate occasions (September 30, 2016 and January 19, 2017), which were not part of that phase [2017 Order], but are part of this phase.

[para 38] On January 19, 2017 the Public Body provided 40 additional pages to the External Adjudicator. However, 2 of the 40 pages were part of the June 10, 2016 Records at Issue so these were no longer at issue. Of the remaining 38 pages, 2 pages had already been released in full to the Applicants in 2012 and 4 pages had been released in full to the Applicants on September 30, 2016. And lastly, in a footnote (#17) in its 2017 PBSS, dated November 15, 2017, the Public Body advised that it was releasing 17 additional records to the Applicants (which had been previously released in redacted form), which records it included at Tab B of its 2017 PBSS. Details are set out in the Table under Findings *infra.*

[para 39] The following is my best attempt to summarize the pages of Records at Issue based on information provided by the Public Body in various indices and in correspondence, having to do so without having the majority of the Records at Issue available to me:

> Total number of pages referred to in Access to Information Decisions (2012): 564 pages [179 Records at Issue]
> Total number of pages in 2017 Exhibited Index: 2,570 pages [805 Records at Issue]

Total number of pages disclosed to the Applicants: 273 pages made up of:

* 98 pages disclosed in August/September 2012 access to information decisions;
* 154 pages in September 2016 with updated index;
* 1 page June 2017; and
* 20 pages [17 records] in November 2017 with Exhibited Index.

Total number of pages of Records at Issue under review in the Inquiry: 2,297 pages

III. ISSUES IN THE INQUIRY

[para 40] The issues were laid out in the Notice of Continuation of Inquiry [2017 Notice]. The 2017 Notice made note that Issue #7 from the 2014 Notice: whether the Public Body properly removed some information in the records on the basis the information was non-responsive [NR] to the access to information requests, was no longer an issue in the Inquiry: the issue of how the Public Body had defined the Records at Issue (temporal scope and NR) was referred to another forum as this issue was beyond the scope of my delegation as the External Adjudicator. The Public Body has continued to include the designation of NR for some of the Records at Issue in the Exhibited Index. These will be discussed under Findings *infra.*

[para 41] In addition, as outlined in the 2017 Notice and repeated again in my letter dated September 21, 2017 *supra,* I advised the parties in advance that should the Public Body continue to rely on the Opinion Letter (subject of the 2014 Decision/Order), the issue of waiver would be added as an issue in the Inquiry. The Public Body continued to rely on the Opinion Letter in its 2017 PBSS [Refer to para. 26 of the 2017 PBSS]. This resulted in my requesting supplementary submissions from the parties on the sole issue of waiver, as discussed *supra.* Thus, for the purpose of the continuation of this Inquiry, the following are the remaining Issues:

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

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

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

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

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

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

7. **No longer an Issue in the Inquiry:** Whether the Public Body properly removed some information in the records on the basis the information was non-responsive to the request to access information.

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

9. 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.

IV. SUBMISSIONS OF THE PARTIES

[Throughout the review of all of the parties' submissions, where I consider it may assist to provide clarity, information will be placed in parentheses and marked by **NOTE**. In addition, the litigation under the *Crown's Right of Recovery Act* to recover health care costs associated with the use of tobacco is referred to as the *"CRRA Litigation"* or the *"HCCR Litigation"* or the *"CRRA Action"* by the parties. For simplicity and consistency these will be referred to as the *"CRRA Litigation"* throughout the Interim Decision/Order, other than where quoting or referencing a party's submission. Additionally, throughout the submissions, the parties refer to the *"Related Records"* or *"Refused Records."* For simplicity and consistency these will be referred to as the *"Records at Issue"* throughout the Interim Decision/Order, other than where quoting or referencing a party's submission. The following submissions are reviewed in the order in which they were received.]

A. Second Applicant Initial Submission [2014 Second AIS]

[para 42] On July 7, 2014, the Second Applicant's Initial Submission [2014 Second AIS] was received, in advance of the due date set out in the 2014 Notice. What follows is a detailed overview of the Second Applicant's 2014 Second AIS:

Introduction

1. The Second Applicant indicates his/her submission will not address all of the issues in the Inquiry. This s/he bases on *"the fact it is impossible to know how the public body applied the sections in support of redaction. In some instances I will speculate about the intended application of the sections, while recognizing my premise may be wrong and therefore of no practical use."*

2. The Second Applicant states his/her position is that in all instances where it has applied a section to redact information, regardless of whether s/he addresses the exceptions (s. 21 and s. 24), the Public Body has to prove all of the elements of the section to show it applies, meet the legal threshold for the harms test and demonstrate that public interest has been considered.

Public Body's refusal to allow review of Records at Issue

3. The Second Applicant states that the key issue is the fact that the Public Body has refused to give the vast majority of the Records at Issue to the External Adjudicator or the OIPC for their review.

4. The Second Applicant submits that the issue of whether solicitor client privilege applies ought to be decided by the External Adjudicator on behalf of the Commissioner and not the Public Body, as if it is the latter who decides (based on an affidavit of the FOIP Advisor), it would arbitrarily usurp the legislated authority of the Commissioner. [**NOTE:** The Second Applicant attaches correspondence from an OIPC investigator (referred to him/her as an adjudicator) as Appendix A reporting on the outcome of the Second Applicant's Request for Review.]

5. The Commissioner has established a protocol to deal with Records at Issue over which a public body has claimed solicitor client privilege, which the Second Applicant submits the Public Body has ignored thereby denying access of the Records at Issue to the Commissioner and him/herself as an Applicant and has needlessly delayed the process.

6. The Second Applicant submits that the Public Body appears not to trust the Commissioner, acting like it is above an Officer of the Legislature. This calls into question, the Second Applicant argues, who can hold the Public Body to account on behalf of the public. The Second Applicant submits that the Public Body's arbitrary refusal to allow the Records at Issue to be reviewed undermines the independent Legislative Officer. This arbitrary refusal by the Public Body should not be allowed and ought to be publicly censured.

7. The Second Applicant refers to the Commissioner having all the powers, privileges, and immunities as a Commissioner under the *Public Inquiries Act* (s. 56(1)) and cites two further provisions in the *FOIP Act* with respect to powers while conducting the Inquiry, arguing that on the basis of these powers, the External Adjudicator should order the Public Body to produce all the Records at Issue, previously withheld from the Portfolio Officer, which provisions are as follows:

> *Section 56(2) states:*
>
> > *The commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.*
>
> *Section 56(3) states:*
>
> > *Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).*

8. The Second Applicant requests that if the Public Body does not produce the withheld records, that court action should be initiated to force the Public Body to abide by its own legislation. [**NOTE:** To be clear, and to be fair to the Second Applicant, it is important to note that the 2014 Second AIS was submitted well in advance of the *Alberta (Information and Privacy Commissioner) v. University of Calgary,* 2016 SCC 63 [*U of* C] decision in the SCC released on November 25, 2016 regarding the Commissioner's statutory power, or lack thereof, to compel production of records over which a public body has claimed legal privilege.]

Public Body ignored purpose and intent of FOIP: Section 32

9. The Second Applicant submits that the *"purpose of FOIP in a democracy is to hold governments accountable and facilitate democracy. Several levels of court have recognized this purpose"* and goes on to cite the following:

- Citing the *Dagg v. Canada (Minister of Finance),* [1997] 2 SCR 403 [*Dagg*] decision with respect to the object of access legislation:

> *The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 Can. J. of Econ. and Pol. Sci. 479, at p. 480:*
>
> > *Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.*
>
> [*Dagg,* at para. 61]

- Citing the *Qualicare Health Service Corp. v. Alberta Office of the Information and Privacy Commissioner,* 2006 ABQB 515 [*Qualicare*] decision*,* in which the Alberta Court of Queen's Bench stated, referring to access to information legislation as a:

> *a vital component in ensuring public confidence in the integrity of the public administration is transparency.*
> [*Qualicare,* at para. 42]

- Referring to *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 [*Baker*], at paras. 53, 56 and 65, the Second Applicant submits that the SCC held that a person exercising statutory discretion must do so consistent with the purpose of the legislation, which, in this case, is set out in s. 1 of the *FOIP Act*: the right to access records subject to limited exceptions in specific instances.

- The purpose, the Second Applicant submits, includes allowing access in the public interest, relying on the *(Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* [2010] 1 SCR 815 [*Criminal Lawyers' Association*], which s/he cites as follows:

> *The public interest override in s. 23 would add little to this process. Section 23 simply provides that exemptions from disclosure do not apply "where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption". But a proper interpretation of s. 14(1) requires that the head consider whether a compelling public interest in disclosure outweighs the purpose of the exemption, to prevent interference with law enforcement. If the head, acting judicially, were to find that such an interest exists, the head would exercise the discretion conferred by the word "may" and order disclosure of the document.*
> [*Criminal Lawyers' Association,* at para. 49]

10. The Second Applicant reviews in detail the facts surrounding the selection of counsel in the CRRA Litigation as reported in news releases and in the Ethics Commissioner investigation report, which s/he supports with exhibited evidence (attaches Appendices B, C, D and E). The First Applicant argues at p. 5 of his/her 2014 Second AIS, that the exhibited evidence, consisting of two CBC News articles, the Ethics Commissioner Wilkinson Investigation Report (December 2013), and a statement from the Minister of Justice dated January 7, 2013, demonstrates that this matter is clearly in the public interest, which s/he states as follows:

> *The politicians involved in this case have not been forthcoming with the public and have not shown they can be trusted to provide the public with accurate information, even though this legal action potentially represents tens of billions of dollars to Alberta taxpayers. There are still numerous troubling questions about how the contract was awarded.*
>
> *The monetary benefits to the public are potentially significant. The public clearly would be interested to know if the tobacco-litigation decision was in their best interest. This matter is clearly in the public interest under Section 32.*

Public Body can't rely on Section 16

11. With respect to the Public Body's reliance on s. 16, the Second Applicant stated the issue is *"whether the release of the information could be reasonably expected to be harmful to the business interests of a third party. As stated previously, both applicants are primarily interested in the contingency fee agreement."*

12. The Second Applicant continues on with details of statements made to the media by government representatives (attaches Appendix E in support), which s/he argues placed information about the CFA and the law firm group selected for the CRRA Litigation into the public realm and, therefore, any harm to the business interests has already been done. The information from the news releases

recited by the Second Applicant of statements made by the Minister responsible included: the law firm group offered the lowest bid, if the lawsuit was unsuccessful there would be no cost to taxpayers, the law firm group had the lowest contingency fee, and the law firm is carrying the cost of the litigation. By so doing, the Second Applicant argues, the Public Body has waived its right to redact information from the CFA, concluding that there has been no complaint from a third party and that there is *"no evidence whatsoever of any business or economic harm either to the government or the third parties."* [**NOTE:** To be clear, and to be fair to the Second Applicant, it is important to note that it was not until late 2017 that the Public Body informed the Applicants and the External Adjudicator that in 2012 the Public Body gave notice to and received responses from the affected third parties, discussed *infra*.]

13. As stated at the outset of his/her 2014 AIS, the Second Applicant argued it was incumbent on the Public Body to provide evidence to meet the harms test. In that regard, s/he submitted as follows:

> *The Supreme Court of Canada addressed the issue of proven evidence of harm, and the balancing of confidentiality and the public interest in transparency and accountability, in Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31:*
>
> > *"[54] This Court in Merck Frosst adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in Merck Frosst emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": Merck Frosst, at para. 94, citing F.H. v. McDougall, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.*
> > *[...]*
> > *[66] In sum, the Commissioner's decision reasonably applied the appropriate evidentiary standard. The Commissioner took into account the fact that the Registry's efficiency is based on its confidentiality. However, she had to balance this concern with the public's interest in having transparent and open governmental institutions. In striking a balance between those two competing interests, the Commissioner decided that the risks suggested by the Ministry were too remote and not supported by the evidence to ground a reasonable expectation of probable harm. This finding was reasonable."*

Sections 25 and 27 don't apply

14. The Second Applicant elected to paraphrase the First Applicant's submissions with respect to s. 25 and s. 27, which are summarized as follows:

- Both Applicants' access requests are primarily about obtaining the CFA, although the First Applicant is also keenly interested in access to information about how the outside counsel retained to undertake the CRRA Litigation was chosen.

- The First Applicant submitted that s. 25 and s. 27 are limited discretionary exceptions and the Public Body bears the onus as to why Applicants have no right to the information.

- The purpose of the legislation *"is to promote access and discretion should be exercised to promote the applicant's right to disclosure."* The Second Applicant cites from a decision of the Alberta OIPC, as follows:

A discretionary decision must be exercised for a reason rationally connected to the purpose for which it's granted. The court in Rubin stated that "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act …"

The court rejected the notion that if a record falls squarely within an exception to access, the applicant's right to disclosure becomes solely subject to the public body's discretion to disclose it. The court stated that such a conclusion fails to have regard to the objects and purposes of the legislation: (i) that government information should be available to the public, and (ii) that exceptions to the right of access should be limited and specific.

In the court's view, the discretion given by the legislation to a public body is not unfettered, but must be exercised in a manner that conforms with the principles mentioned above. The court concluded that a public body exercises its discretion properly when its decision promotes the policy and objects of the legislation.
[Order 96-017, at paras. 49-51]

- Regarding the application of s. 25, a discretionary exception, the Second Applicant argues that s. 25 does not apply in this case. For the discretionary exception to apply the Public Body must establish objective grounds for believing disclosure of the records will likely harm economic interests, citing a number of precedents attached as exhibits relied upon by the First Applicant, as follows:

    - Appendix F: Order 96-003 for the harms test;
    - Appendix G: Order F2008-032 for Public Body must establish a direct link between disclosure of information and reasonable expectation of harm to the Public Body;
    - Appendix H: Order 96-016 and Order F2009-021 as precedents that there is no protection of information of a contractual relationship without evidence of specific harm;
    - Appendix I: Order F2009-021 as precedent that disclosure of the contract value and financial information in an agreement, after the request for proposal process, did not meet the harms test; and
    - The Second Applicant concludes that s. 25 does not apply in this case because disclosing the commercial agreement between the Public Body and the outside counsel in the CRRA Litigation would not cause harm to any of the parties, particularly given information already released publicly by the Minister.

- The Second Applicant joins the First Applicant and states: *"we have to speculate that Alberta Justice is applying Section 27 - legal privilege - in relation to solicitor-client privilege and limitation privilege"*, which s/he argues does not apply. In that regard, the Second Applicant cites *Blank v. Canada (Minister of Justice)* [2006] 2 SCR 319 [*Blank*], where the SCC said the following:

    I hasten to add that the Access Act is a statutory scheme aimed at promoting the disclosure of information in the government's possession. Nothing in the Act suggests that Parliament intended by its adoption to extend the lifespan of the litigation privilege when a member of the public seeks access to government documents.

    The language of s. 23 is, moreover, permissive. It provides that the Minister may invoke the privilege. This permissive language promotes disclosure by encouraging the Minister to refrain from invoking the privilege unless it is thought necessary to do so in the public interest. And it thus supports an interpretation that favours more government disclosure, not less.
    [*Blank*, at paras. 51-52]

- Regarding the application of s. 27, the Second Applicant submits that the Public Body often makes contracts for services public as not containing legal advice, like the CFA.

- Citing a case relied on by the First Applicant, the Second Applicant argues that the *Imperial Tobacco Co v. Newfoundland and Labrador (Attorney General),* 2007 NLTD 172 [*Imperial Tobacco*] involves a legal challenge from another province that is a *"foursquare comparative."* The citation provided reads as follows:

> *In principle, a contingency fee agreement which provides for the scope of the retainer, the fees payable and the manner of their payment in discharge of the retainer would not be expected to provide a means of ascertaining the nature of the legal advice passing between lawyer and client, nor would it contain the type of information going to the merits of the matter at issue that would be necessary for the lawyer to have in order to be able to give legal advice.*

- The Second Applicant refers to Order F2011-018 that held in order to be protected by litigation privilege, a document must be a confidential third-party communication, which s/he argues the CFA is not.

- Turning to Order F2008-021, the Second Applicant states the case found that s. 27(1)(b) does not apply to information that simply refers to, or describes, legal services.

Conclusion

15. The Second Applicant concludes with two final points:

> *The first is that this is a unique situation. The tobacco litigation is the first in Alberta's history and won't be comparable to future situations. Put another way, it is almost impossible that there will be a similar situation for which this information could be used to undermine the government's negotiating position or a third-party's business interests.*
>
> *The second point is that the public body has provided no evidence of any harm and the third parties are not interveners. If the third parties don't have an issue with the information being released, the government can't argue harm on their behalf.*

B. First Applicant Initial Submission [2014 First AIS]

[para 43] On July 9, 2014, the First Applicant's Initial Submission [2014 First AIS] was received, in compliance with the Schedule set out in the 2014 Notice. What follows is a detailed overview of the First Applicant's 2014 First AIS:

Part I: Introduction

A. Summary of issue

1. In its Part I introduction, the First Applicant provides an overview of the issue in the Inquiry, a summary of which is as follows:

- The issue is whether the Public Body is required under the *FOIP Act* to disclose to requesting members of the public a CFA under which the government has retained external counsel to pursue multi-billion dollar litigation on its behalf.
- The Public Body has refused the CFA based the listed exceptions: s. 25(1)(c)(i) (harm to economic interests of the public body), s. 27(1)(a) (legal privilege), and s. 27(1)(b) (information prepared in relation to the provision of legal services).
- The exceptions do not apply in these circumstances and even if they did, the Public Body should disclose the CFA as it is clearly in the public interest to do so, because, the First Applicant, argues:

1. Over the last two years, it has failed to produce any evidence to demonstrate the Public Body would suffer economic harm as a result of the disclosure of the CFA.
2. It claims privilege over a commercial agreement - negotiated with a party adverse in interest - but has failed to produce any evidence that the CFA contains solicitor client advice. Further it admitted to retaining outside counsel to negotiate the lowest price but fails to provide an explanation how solicitor client privilege attaches to the negotiations of, or to the CFA itself.
3. It has failed to produce any evidence how the CFA reveals the substance of the provision of legal services and not a mere description of those services.

Part II: Facts

A. Background to the Request for Review

2. In its Part II, the First Applicant lays out the facts beginning with the background to the Request for Review. Most of the facts have been provided in the Background *supra.* The following summarize those highlighted by the First Applicant and/or not detailed *supra*.

- In general terms, the First Applicant seeks disclosure of the CFA and any related documents to the CRRA Litigation: the Records at Issue.
- Correspondence dated August 31, 2012 received by the Applicant from the FOIP Director indicated the Records at Issue to be 564 pages and what exceptions allegedly applied (s. 25(1)(c)(i), s. 27(1)(a) and s. 27(1)(b)), 433 of which were exempted in entirety and 40 additional pages redacted. Two pages (50 and 283) had no exception applied but were not included in the partial disclosure to the First Applicant.
- On September 25, 2012 the First Applicant contacted the Public Body by phone to confirm which were the page numbers for the Records at Issue sought by the First Applicant - the CFA, which the Public Body advised were pages 551-564.
- On October 22 and 23, 2012 the First Applicant submitted a Request for Review of the Public Body's decision to withhold the pages for the CFA, which review did not result in a settlement.
- On June 25, 2013 the First Applicant submitted a Request for Inquiry.
- After the External Adjudicator was appointed by the Commissioner on February 27, 2014 a Notice of Inquiry was issued and she requested that the Public Body provide an Index to identify the responsive records and all of the exceptions it had claimed.

[**NOTE:** The First Applicant attached correspondence exchanged with the FOIP office and the OIPC regarding its request for access to information and its Requests for Review and Inquiry at Tabs 1-6 of its 2014 First AIS.]

B. Background to the CRRA Litigation and retainer of outside law firm [name of law firm group]

3. Relying primarily on the Ethics Commissioner Wilkinson Investigation Report (2013) and some records that were publicly available, the First Applicant reviews the background to the CRRA Litigation and the retainer of the law firm group ultimately selected:

- In 2009, the law firm group that was ultimately selected, lobbied the Crown with respect to the anticipated new *Crown's Right of Recovery* legislation including lobbying as to the merits of retaining it to conduct the litigation on a contingency fee basis.
- On October 25, 2010 the Public Body announced its intention to commence the CRRA Litigation.
- A senior government official of the Public Body initiated a selection process by email invitations to ten law firms who had previously expressed an interest or who were thought to have an interest, which email had an attachment laying out the process and parameters of the selection process and set a deadline for expressions of interest for November 15, 2010.
- One law firm and three law firm groups submitted expressions of interest. The latter three law firm groups were invited to make presentations to the selection Review Committee, one of which was the law firm group ultimately selected that now included another new law firm as part

of the group (identified by Ethics Commissioner Wilkinson as having a connection with the head of the Public Body).

- After the Review Committee provided an analysis of the proposals to the Minister responsible, on December 14, 2010, the Minister responsible sent a memorandum to a senior government official with his/her choice.
- On December 22, 2010 a senior government official advised a partner of the new law firm in the law firm group that it had been selected to represent the government in the CRRA Litigation.
- In January 2011 the Public Body retained outside counsel to negotiate the CFA with the selected law firm group, which was signed by the then Minister of the Public Body on June 21, 2011.

[**NOTE:** The First Applicant attached the Ethics Commissioner Wilkinson Investigation Report (December 2013), briefing notes and emails from senior government officials and a memorandum from the Minister of the Public Body, at Tabs 7-11 of its 2014 First AIS as documentation in support of its submissions.]

C. Public discourse concerning the retainer of external counsel in the CRRA Action

4. Relying primarily on media reports (CBC, Calgary Herald, Edmonton Journal, Global News), Alberta Hansard (Legislative Assembly December 4, 2012), the Ethics Commissioner Wilkinson Investigation Report (December 2013), Communications New Brunswick (online) and the *Imperial Tobacco* decision, the First Applicant reviews the public discourse regarding the retainer of external counsel in the CRRA Litigation, highlights of which include:

    - One of the partners is the new law firm in the selected law firm group had been personally and professionally involved with the head of the Public Body who made the selection.
    - There were other individuals associated with the selected outside law firm who had a connection to the head of the Public Body who made the selection.
    - On December 3, 2012, the managing partner of the new law firm in the selected outside law firm group advised the media that s/he had no objection to the public release of its contract with government (CFA).
    - On December 4, 2012, the head of the Public Body was questioned about the terms of the CFA in question period in the Legislative Assembly, who stated s/he had been advised by the managing partner and the former President of the Law Society of Alberta that disclosure of the CFA would assist the defendants in the CRRA Litigation.
    - During the same Oral Question period, the Deputy Premier stated that *"this agreement was not directly negotiated between the department of Justice and the law firm, but there was a third party sort of grinding them down to the lowest. I can also assure Albertans that we as Albertans are paying the lowest contingency fee of any province that is involved in this lawsuit."*
    - On January 7, 2013, the head of the Public Body issued a statement that the retainer of the selected law firm group was based on merit and said it, *"offered the lowest cost of all bids received and was in the best interests of taxpayers. If this lawsuit is not successful, the Alberta taxpayers pay nothing."*
    - In New Brunswick and Newfoundland Labrador the contingency fees agreed upon with external counsel in similar actions to the CRRA Litigation have been disclosed to the public, details of which for NB are available online [www.gnb.ca/cnb/news/jus/2007e1138ju.htm] and for Newfoundland Labrador is *"30% of whatever amounts are recovered against the tobacco companies*" [*Imperial Tobacco,* at paras. 12, 15].

[**NOTE:** The First Applicant attached news reports from various media outlets and a transcript of Alberta Hansard (Legislative Assembly December 4, 2012) at Tabs 12-18 as documentation of public statements made, in support of its submissions.]

Part III: Law and Submissions

A. Public Interest and the purpose of the Act: The public interest is paramount

5. The First Applicant submits that the purpose of the legislation is to foster open and transparent government. Further, citing the SCC in *Dagg* and Adjudication Order #2, access to information is to facilitate democracy to ensure *"citizens have the information required to participate meaningfully in*

the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry." Thus when a public body refuses disclosure it must first consider the public interest within the narrow statutory limitations.

6. Citing s. 32(1) and s. 32(2), the First Applicant submits that s. 32 is an override provision that has been defined narrowly: information must be of *"compelling public interest"* in order to be *"clearly in the public interest"* and must be a *"matter of public interest"* not simply information that *"may well be of interest to the public."*

Public Interest and the purpose of the Act: Burden of proof

7. The First Applicant argues that the burden of proof is on the party who raised the issue or is in the best position to meet the burden.

8. Arguing that because it alone possesses the Records at Issue and knows their contents, the Public Body is in the best position to meet the burden of proof by explaining why it is not clearly in the public interest to disclose its fee arrangement with the selected law firm group. [**NOTE:** A discussion of that party who has the burden of proof with respect to s. 32 public interest is discussed *infra.*]

Public Interest and the purpose of the Act: The public interest compels disclosure of the Records at Issue

9. Regardless of who bears the burden of proof, the First Applicant submits that *"the nature of the Records at Issue makes it of compelling public interest they be disclosed."* Citing Order 99-017, the First Applicant draws a parallel with a case where the Commissioner found that information about the extent of the government's involvement in Alberta Treasury Branches' refinancing of the West Edmonton Mall was a matter of compelling public interest. The Commissioner ultimately found that because the public body had instructed the Auditor General to release his/her report on the refinancing to the public, complied with the requirement for disclosure under the public interest override.

10. Disclosure of the Records at Issue, the First Applicant submits, could reveal significant compensation to the selected law firm group based on a compensation formula for which it lobbied. The First Applicant cites the *Walker v. Ritchie* 2006 SCC 45 decision in the SCC that provides a description of a typical CFA, that provides, in part: *"A contingency fee arrangement is typically used by plaintiff's counsel where there is the prospect of receiving a damages award … Thus, where counsel expends time and incurs disbursements on behalf of a client, that lawyer assumes the risk of non payment for those services and disbursements should the litigation prove unsuccessful. To compensate for this risk, a contingency fee will typically be higher than that which would have been payable had counsel billed the client irrespective of the outcome.* [Emphasis in original]

11. The First Applicant states that at least two Alberta cabinet ministers have publicly referenced the relatively low contingency fee contained in the Records at Issue. Disclosure is required so the public can scrutinize whether the selected law firm group was an economically sound means to pursue the CRRA Litigation in keeping with the language in *Dagg* regarding meaningful participation and accountability: *"through public scrutiny of the potential future allocation of public funds."* Relying on Order 98-013, the First Applicant argues the Commissioner has held that one of the primary purposes of the legislation is *"to ensure that the public has the right to scrutinize how its tax dollars are being managed."*

12. The First Applicant submits that *"the Records at Issue are a compelling matter of public interest that must be disclosed without delay under Section 32(1)(b) of the Act, regardless of whether any statutory exceptions apply in the circumstances (which they do not)."*

13. The First Applicant distinguishes two access to information decisions from other provinces (BC and NB) that on their face are similar (Order F13-15 and *Hayes v. New Brunswick (Minister of Justice and Consumer Affairs),* 2008 NBQB 112*,* [*Hayes*]: public interest was not considered in either case.

Public Interest and the purpose of the Act: Alberta Justice must disclose to the public the Records at Issue

14. Relying on Order 97-009, the First Applicant submits that the Public Body must disclose *"information"* that has been interpreted as *"the actual record, a summary of the record, or a warning of the risk based on the contents of the record"* and, therefore, the appropriate form of disclosure in this Inquiry should be to make the Records at Issue publicly accessible, rather than only disclosing them to the Applicants.

B. Interpretation of the discretionary exceptions in the Act: General right of access for any person

15. Section 2 of the legislation provides a broad right of access to any person subject only to limited and specific exceptions, which if not applicable, means the information must be disclosed.

Interpretation of the discretionary exceptions in the Act: Discretionary exceptions promote disclosure

16. After referring to the two categories of exceptions: mandatory and discretionary, the First Applicant cites the SCC in *Blank* as authority for an interpretation that the use of discretionary language for the legal privilege exception promotes greater disclosure of information, not less, a portion of which case reads: *"This permissive language promotes disclosure by encouraging the Minister to refrain from invoking the privilege unless it is thought necessary to do so in the public interest. And it thus supports an interpretation that favours <u>more</u> government disclosure, not less."* [Emphasis in <u>original</u>] The Public Body has relied on three discretionary exceptions.

Interpretation of the discretionary exceptions in the Act: Review of a discretionary decision

17. Relying on the *Criminal Lawyers' Association* in the SCC, the First Applicant submits that a review of a public body's application of a discretionary exception 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."* If properly claimed, the Commissioner can order the Public Body to provide access to all or part of a record. In contrast, where properly claimed but where a public body unreasonably exercised its discretion, the Commissioner may quash the non-disclosure decision and require the public body to re-consider its decision, pursuant to s. 72 of the *FOIP Act*.

18. The First Applicant submits that the Public Body bears the burden, pursuant to s. 71 of the *FOIP Act*, to prove why the records should not be disclosed by providing evidence to establish that one or more discretionary exceptions apply in the circumstances.

C. Section 25(1)(c)(i): Financial loss to the Government of Alberta or a public body

19. After reproducing s. 25(1)(c)(i) of the *FOIP Act*, the First Applicant submits that in the *Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3* [*Merck Frosst*] decision, the SCC interpreted *"harm"* in the context of privacy legislation to mean *"reasonable expectation of probable harm."* The First Applicant then reproduces, in part, the tripartite *"harms test"* as set out in the *Qualicare* decision, as follows:

    a. *there must be a clear cause and effect relationship between the disclosure and the harm alleged;*
    b. *disclosure must actually cause harm or detriment, beyond mere interference or inconvenience; and*
    c. *the likelihood of harm must be genuine and conceivable.*

    [*Qualicare,* at para. 6; *Merck Frosst,* at paras. 195-206]

20. The First Applicant submits that the Commissioner confirmed that a public body must meet the *"harms test"* to rely on s. 25(1) and further submits that in this case, the Public Body has *"not met the Harm* [sic] *Test, as it has failed to provide any evidence whatsoever that disclosure of the Records at Issue would actually cause harm or financial loss."* Both the Commissioner and the ABQB have held that without adducing evidence directly linking disclosure of a record with the harm

alleged, there can be no reasonable expectation of harm within the meaning of the statute, citing Q*ualicare,* Order 96-003 and Order F2005-009.

21. The First Applicant, relying on Order 96-016, submits it is the specific information (in a record) that must be capable of causing the harm if disclosed and that the statute and, specifically s. 25(1), were *"not intended to include a general protection for contractual relationships."* Further, the First Applicant submits, relying on Order F2009-021 discussing s. 25(1)(c)(ii) and s. 25(1)(c)(iii), disclosure of the contract value and financial information in an agreement does not meet the test of harm.

22. The First Applicant submits that the CFA contained in the Records at Issue is a standard commercial contract and based *"on the facts known to the [*First*] Applicant there is no evidence of a reasonable expectation of specific harm resulting from disclosure."*

D. Section 27(1)(a): Legal privilege

23. The First Applicant reproduces the s. 27(1)(a) discretionary exception on which the Public Body has relied, noting that although the Public Body has not specified which form of privilege it is claiming, but for the purpose of its 2014 First AIS, the First Applicant states it is assuming it is the solicitor client privilege that is being asserted. [**NOTE:** It is important to point out that the 2014 First AIS was provided over two years before the *U of C* and *Lizotte* decisions were decided by the SCC, which are discussed *infra*.]

Section 27(1)(a): Legal Privilege: Test for solicitor client privilege

24. Citing the SCC's decision *Solosky v The Queen*, [1980] 1 SCR 821, at p. 837 [*Solosky*] that held the three part test for where solicitor client privilege attaches is: *"(a) a communication between solicitor and client, (b) which entails the seeking or giving of legal advice, and (c) which is intended to be confidential by the parties*, the First Applicant points to how the Commissioner has defined legal advice: *"a legal opinion about a legal issue, and a recommended course of action, based on considerations, regarding a matter with legal implications",* citing Order 96-017, at para. 23.

Section 27(1)(a): Legal Privilege: Negotiating parties are adverse in interest

25. Citing the *Morrison v. Rod Pantony Professional Corporation,* 2008 ABCA 145 [*Morrison*] decision in the Court of Appeal, the First Applicant submits that in negotiating the CFA, the solicitor and client are adverse in nature, referred to in the *Morrison* decision at para. 25, in part, as follows: *"Retainer agreements are obviously in a special category. The client is negotiating an agreement with a person (the solicitor) that the client would usually look to for advice on such matters. In negotiating the agreement the parties are adverse in interest, contrary to the normal state of affairs where the solicitor is bound to represent the client's interest."* [Emphasis in original]

26. The First Applicant recites specific historical facts: the selected law firm group's efforts to be retained, the head of the Public Body's decision to select it as the *"best choice for Alberta",* and the Public Body's hiring of a third party as legal counsel to negotiate the CFA on its behalf to successfully meet its mandate: *"paying the lowest contingency fee of any province."* The First Applicant argues that the function of the third party law firm was to act, not as a lawyer, but as a consultant to negotiate the most favourable terms in the CFA for the Public Body.

Section 27(1)(a): Legal Privilege: The Records at Issue do not meet the test for solicitor client privilege

27. The First Applicant acknowledges that the Records at Issue were potentially communications made in connection with the *eventual* provision of legal advice, but, relying on the *Imperial Tobacco* decision argues that a CFA would only be privileged if disclosure *"would involve disclosure of information on which legal advice could be based, or the legal advice itself, or could reasonably lead to the discovery of legal advice passing between lawyer and client."*

28. Preferring the approach in the *Imperial Tobacco* decision over those of adjudicators in BC and NB who both held that the CFAs in those cases were protected by solicitor client privilege (referred to

supra), the First Applicant submits that CFAs *"generally do not contain, reveal or relate to legal advice, and hence are not captured by solicitor client privilege."* The Chief Justice in *Imperial Tobacco* stated it as follows:

> *In principle, a contingency fee agreement which provides for the scope of the retainer, the fees payable and the manner of their payment in discharge of the retainer would not be expected to provide a means of ascertaining the nature of legal advice passing between lawyer and client, nor would it contain the type of information going to the merits of the matter at issue that would be necessary for the lawyer to have in order to be able to give legal advice.*
> [*Imperial Tobacco,* at para. 96]

29. The First Applicant submits that the form and content of CFAs are heavily regulated, citing Rule 10.7(2) of the Alberta Rules of Court in full, and any defects in a CFA are strictly construed against the lawyer, with Courts having limited discretion to alleviate only minor technical oversights without import. Given the requirements set out in the Alberta Rules of Court and the limited judicial oversight role for CFAs, and based on the assumption the CFA in this case is in compliance with Rule 10.7(2), the First Applicant argues that there are *"several of the terms contained in the Records at Issue are unrelated to legal advice."*

30. In addition, the First Applicant, citing para. 26 of the *Blank* decision in the SCC, submits that disclosure of the financial arrangements between a solicitor and a client in the CFA would not offend a principle underlying the rationale for solicitor client privilege, which decision said, in part: *"The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on the full, free and frank communication between those who need legal advice and those who are best able to provide it."*

31. At the time of negotiating the CFA, the selected law firm group and the Public Body were adverse in interest during which the solicitor was not bound to represent the client's interests and, therefore, there is no need to protect the end product, the CFA, to further the *"full and frank disclosure."*

32. The First Applicant refers to *Burr (Litigation Guardian of) v. Bhat,* 117 Man R (2d) 279 [*Bhat*], a Manitoba decision where the Master held that a CFA was not protected by solicitor client privilege.

33. The First Applicant submits that almost certainly the Records at Issue do not include legal advice or information on which legal advice could be based and, therefore, they cannot be considered under s. 27(1)(a).

Section 27(1)(a): Legal privilege: The Records at Issue must be severed and disclosed

34. In the alternative, citing s. 6(2) of the *FOIP Act* and relying on the *Merck Frosst* decision*,* the First Applicant proposes that if there is genuinely legally privileged information in the Records at Issue, in order to facilitate access to the most information reasonably possible, those portions must be severed and the remaining portion disclosed.

35. The First Applicant cites Order F2011-018 for authority that this approach has been adopted by adjudicators in Alberta and by the Federal Court of Appeal in *Canada (Information Commissioner) v. Canada (Minister of Public Safety and Emergency Preparedness),* 2013 FCA 104, at paras. 20-21 where records over which solicitor client privilege had been claimed were ordered severed and disclosed, rejecting the Ministers' all-or-nothing argument in the latter case *"that where solicitor-client privilege applied to part of a record, the entire record was exempt from disclosure*."

36. On that basis, the First Applicant argues that because the Records at Issue are essentially a commercial agreement for services, which although they may have parts referencing legal strategy, the content involving scope of the retainer, fees payable and manner of payment constitute information that is not legally privileged, and would not reveal privileged information. Thus, the First Applicant argues it has a right to access the non-privileged parts of the Records at Issue.

Section 27(1)(a): Legal privilege: Alberta Justice waived privilege over the CFA

37. If the Public Body properly claimed solicitor client privilege over the entire Records at Issue, the First Applicant argues by publicly disclosing information, the government waived the privilege.

38. The First Applicant cites the *S. & K. Processor Ltd. v. Campbell Ave. Herring Producers Ltd.,* 45 BCLR 218 [*S. & K.*] decision in the BCSC, which summarized the tests for waiver of privilege as follows:

> *Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advise is lost …*
> [*S. & K.,* at para. 6]

39. Before citing the *Imperial Tobacco* decision, the First Applicant provides examples of public statements made by the Newfoundland Labrador government that, in that case, disclosed the following: *"(1) contingency fee method of payment; (2) the percentage of the contingency fee; and (3) that external counsel would cover all costs and disbursements in relation to the claim until it was resolved."* The First Applicant submits that the Chief Justice emphasized *"the importance of government accountability to the waiver issue in the access to information context"* when he said:

> *Here, the partial disclosure was not inadvertent. It was done deliberately to achieve a political result - to demonstrate to the public that the government was acting in a fiscally responsible manner in the way in which it was conducting the litigation. It was ostensibly promoting itself as complying with principles of transparency …The problem, however, with releasing only selected parts of a fee agreement in these circumstances is that the public whom the government is trying to reassure about its fiscal responsibility, has no way of judging whether the government's assertions are correct unless they see the whole document. Other provisions of the document might contain terms that detract from what has been disclosed or make the overall arrangement not as advantageous or fiscally responsible as represented.*
>
> *Having decided to go down the road of wrapping itself in the twin flags of fiscal responsibility and transparency with a view to convincing the public of the appropriateness of its actions, it is not unreasonable to assume that the government was essentially saying that its financial arrangements with its lawyers were an "open book" and should be used as a basis for public judgment on its decisions. As such, it cannot pick and choose as to how much it will disclose in its "defence". Otherwise, it would be tantamount to saying "you can't see all the evidence; just trust us". That would be contrary to the purpose stated in the Assistant Deputy Minister's affidavit of being "more open, transparent and accountable".*
> [*Imperial Tobacco,* at paras. 112-113]
> [**NOTE:** The quote is as cited here, not paras. 9-15 as referenced by the First Applicant.]

40. Drawing a comparison with that decision, the First Applicant submits that the government has claimed: *"(1) Alberta is paying "the lowest contingency fee of any province"; (2) [t]he* [selected law firm group] *offered the lowest cost of all bids received"; (3) "[i]f this lawsuit is not successful, the Alberta taxpayers pay nothing"; and (4) that it was "in the best interests of taxpayers" to retain the* [selected law firm group]*"* but has refused to disclose the terms of the CFA in the Records at Issue, disallowing the public from judging whether the assertions are correct.

41. Through the disclosure by the Public Body discussed *supra*, the First Applicant argues that the Alberta Government *"has voluntarily evinced an intention to waive any privilege it believes exists over the financial terms contained in the Records at Issue. As a result, the Government of Alberta*

has waived any solicitor-client privilege over the financial terms in the Records at Issue and those terms must therefore be disclosed."

E. Section 27(1)(b): Legal services

42. After reproducing s. 27(1)(b), the First Applicant relies on Order 96-017 for the Commissioner's definition of *"legal services"* to include *"any law-related service performed by a person licensed to practice law"* and Order F2013-51 for the proposition that the exception *"does not apply to information that merely refers to or describes legal services without revealing their substance."*

43. Because the Records at Issue describe the nature of the services to be performed but would not reveal the substance of the legal services, the First Applicant submits they cannot be considered under s. 27(1)(b). Or if portions do reveal the substance of legal services, these can be severed with the remaining record disclosed, in accordance with s. 6(2) of the *FOIP Act*.

F. Alberta Justice unreasonably exercised its discretion

44. Even if the discretionary exceptions apply, the First Applicant submits that it was unreasonable to apply them in these circumstances. Relying on the *Criminal Lawyers' Association* decision in the SCC and Order F2004-003, the First Applicant argues that discretionary exceptions cannot be automatically relied on and the Public Body must exercise its discretion giving consideration to the purpose of the exception, the purposes of the statute and all other relevant interests and considerations.

45. The First Applicant highlights that the Public Body has yet to provide any justification for applying the discretionary exceptions other than referring to the sections it has applied. If it fails to adduce any evidence of the factors it took into account including the objects and purposes of the *FOIP Act*, the First Applicant submits that the decision must be returned back to the Public Body for reconsideration, citing Order 96-017.

Part IV: Conclusion

46. In concluding, the First Applicant submits the Public Body has failed to provide any evidence or basis for the refusal to disclose other than *"mere references to sections of the Act."*

47. The First Applicant argues that because there is an *"overwhelming public interest in disclosure of the Records at Issue, which relate to the possible future allocation of billions of dollars of public funds"*, the public requires access to hold government to account and, therefore, the Records at Issue should be disclosed.

C. Public Body Initial Submission [2014 PBIS]

[para 44] On August 6, 2014, the Public Body's Initial Submission [2014 PBIS] was received, in compliance with the Schedule set out in the 2014 Notice. What follows is a detailed overview of the Public Body's initial submission:

1. The Public Body begins by stating the Inquiry arises out of two access to information requests and identifies the two Applicants.

A. Index of Records

2. Tab 1 contains the Index for the 564 Records at Issue which relate to the two access requests, which Index specifies which records have been released, in whole or in part, and the section of the statute it has relied on to refuse to release.

B. Issue

3. The Public Body states the issue in the Inquiry is as follows:

… is the decision by Alberta Justice to withhold agreements (and related documents) relating to the Government of Alberta and its external lawyers with respect to the provision of external legal services in connection with the ongoing tobacco-related health care costs recovery legislation.

C. Evidence

4. The Public Body submits that *"[*i]*n addition to the material contained in the Notice of Inquiry issued on 6 June 2014, and the Index referred to above,"* it lists other evidence, attached to its submission, that it is providing: the Affidavit of the FOIP Advisor sworn April 16, 2013 [2014 FOIP Advisor Affidavit], the Affidavit of the Public Body's Director of FOIP and Records Management sworn July 31, 2014 [2014 FOIP Director Affidavit], and a Letter report [Opinion Letter] from a retired judge [attached at Tab 4 of the 2014 PBIS] [Opinion Letter]. [**NOTE:** The Opinion Letter was the subject of the PEO raised by the First Applicant, which evidence was ruled inadmissible in the 2014 Decision/Order.]

D. 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) 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 second 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, therefore, 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.

E. 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.

F. Section 27(1)(b): Information in relation to the provision of legal services

8. The Public Body submits that from the evidence presented *"it is patently evident that section 27(1)(b) squarely and literally describes the information in the Contingency Fee Agreement and the related Records which the applicants seek to access."*

9. 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).

10. 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.

11. The Public Body submits that s. 27(1)(b) is sufficient to justify its refusal to disclose the CFA and related records sought by the Applicants.

G. Section 27(1)(c): Information in correspondence between Alberta Justice lawyers and any other person in relation to the provision of legal services

12. The Public Body submits that s. 27(1)(c) excepts disclosure of any information in *correspondence* between Alberta Justice lawyers and any other person in relation to a matter involving the provision of legal services.

13. As noted with respect to s. 27(1)(b), the exception in s. 27(1)(c) 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). This also means the doctrine of waiver has no role to play in s. 27(1)(c).

14. The Public Body submits that s. 27(1)(c) is sufficient to justify its decision to refuse to disclose any information relating to such correspondence.

Section 27(1)(a): Legal Privilege

15. Alternatively, the Public Body states: *"if it were necessary to consider whether section 27(1)(a) also applies, Alberta Justice submits that the information in the Contingency Fee Agreement (and related records) is subject to legal privilege."*

16. The Public Body submits *"legal privilege"* includes solicitor client privilege but also includes litigation privilege, common interest privilege, settlement privilege and various other forms of privilege that exist at common law.

17. What constitutes *"solicitor-client privilege"* or any other 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*] arguing that the Commissioner cannot ascribe these terms a different meaning under the *FOIP Act*.

18. In very similar proceedings involving related litigation, the Public Body cites two decisions; the *Hayes* decision from the NBQB and Order F13-15 from the BC Information and Privacy Commissioner, that held the respective contingency fee agreements were subject to solicitor client privilege. Both of these decisions, the Public Body points out, were decided after the *Imperial Tobacco* decision.

19. After speculating about what the *Hayes* 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, which citation said, in part:

> *The applicant submits that the first two criteria [from Solosky] are not satisfied because the contingency agreement is, in essence, a contract between the province and the consortium which reflects how public monies will be spent if the action is successful and that since it pre-dates the formation of the solicitor-client relationship is not a solicitor-client communication.*
>
> *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 [Solosky] criteria. I find that it is clearly a communication between solicitors acting in their professional capacity and their client, the Province of New Brunswick.*
> *…*
> *The point is moot in any event, in my view, because the privilege does not come into effect only after negotiations leading to the relationship are finalized. If it did then the client would be deprived of the privilege at the very time it is most needed, when he or she is explaining the legal problem to a prospective lawyer… In my view the privilege comes into effect "as soon as the potential client takes the first steps, and consequently even before the formal retainer is established."*

…
In my view the contingency agreement represents the culmination of the retainer process, the essence of which, from the client's perspective, is the seeking of legal advice. It follows, and I find, that the second criteria set out in Solosky, supra, has been met.
[*Hayes,* at paras. 9-13]

20. Turning next to the BC case that declined to follow *Imperial Tobacco*, 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 the *Descôteaux et al. v. Mierzwinski* [1982] 1 SCR 860 [*Descôteaux*] decision from the SCC, which said, in part:

> *The following statement by Wigmore …. is a good summary, in my view, of the substantive conditions precedent to the existence of the right of the lawyer's client [Alberta Justice] to confidentiality:*
>
> > *Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.*
>
> [*Descôteaux,* at pp. 872-873]
> [Emphasis in original]

21. In responding to the First Applicant's submission, the Public Body replies:

- It is irrelevant that a retainer may not be privileged if it becomes necessary to resolve differences as this is a limited incursion on privilege in a specific context that does not obliterate the privilege generally.
- It is not appropriate to propose severing or dissecting parts of the information as all of the information in a retainer is privileged because privilege protects the *"communication"* between the lawyer and the client regardless if some of the information in other contexts would not be privileged. The Public Body states, therefore, that: *"[s]everance is inapplicable in such circumstances because no part of the communication is unprivileged."*
- There is no merit to the idea that the CFA is not privileged as it is a standard commercial contract because first, that is not the test for privilege. Second, the Applicants make it clear in their submissions that the CFA is not simple but rather a contract resulting from lengthy negotiations undertaken by external counsel acting for the Province. And third it is less than sincere to suggest that knowledge of the CFA would not reveal information about the Public Body's litigation strategy, the very information legal privilege is designed to protect.
- Privilege is not abridged because the Alberta Rules of Court contain provisions about form and items required to be in a CFA or otherwise no CFA would be privileged. Citing *Hayes* as follows:

> *…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.*
> [*Hayes,* at para. 10]

22. The Public Body states that as in *Hayes,* the CFA and related information *"is clearly a communication between solicitors acting in their professional capacity and their client, the Province of Alberta."* [**NOTE:** The Public Body then refers to the Opinion Letter that has been held to be inadmissible in the 2014 Decision/Order and does not form part of evidence in the continuation of this Inquiry.]

Legal Privilege has not been waived

23. The Public Body submits that various statements made by the Minister of Justice and other government representatives do not evince an intention to waive solicitor client privilege to any of the Records at Issue. At para. 29, the Public Body cites a passage from Hansard where the Minister of Justice responded to a request from a Member of the Legislative Assembly to disclose the CFA:

> *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.*

24. The Public Body states that other BC decisions have held that similar (public) statements made 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 that justifies coming to a different conclusion. [**NOTE:** It will be assumed the Public Body meant waiver of privilege not waiver of the contingency fee agreements.]

25. The Public Body then addresses the issue with respect to whether some public comments made by 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 of the 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, discussed *supra*, the Public Body states that public statements of aspects of a CFA *"is not misleading or unfair, and did not justify extinguishing privilege."*

Summary on legal privilege under section 27(1)(a)

26. 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.

I. Section 32: Information to be released in the public interest

27. The Public Body acknowledges that s. 32 has been raised by both Applicants asserting that it overrides the exceptions in s. 27.

28. After reproducing the complete text of s. 32 under Division 4 Public Health and Safety, the Public Body submits that *"[r]ead in its context, including the title* (Information must be disclosed if in the public interest), *it is plain that section 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."*

29. Relying on *IMS Health (Canada) v. Alberta (Information and Privacy Commissioner)*, 2008 ABQB 213 [*IMS Health*], the Public Body submits that the language *"which is, for any other reason, clearly in the public interest"* in s. 32(1)(b) must not be read as a disembodied, stand-alone provision but rather must be read in the context and purpose of s. 32 as a whole - dealing with emergencies involving risk of significant harm.

30. The Public Body re-makes its earlier submission 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 rigorously protecting legal privilege.

31. 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 ABCA, 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'."*

32. The Public Body submits *"if the applicant's* [sic] *expansive interpretation of s.32(1)(b) were correct"* then it would enable a public body and the Commissioner to override both mandatory and discretionary exceptions, contrary to the *Imperial Oil* decision.

33. The Public Body submits that its submissions *supra* relate to the principal arguments by the Applicants and that each of its responses is sufficient to dismiss the Applicants' request [sic] for disclosure of any of the records.

34. The Public Body submits that because in addition to basing its decision on s. 27, it referred to other exceptions for many of the requested records, it will discuss these briefly, noting, however, that if s. 27 applies to any record, it is unnecessary to consider the other exceptions.

J. Section 24: Disclosure of advice from officials

35. After reproducing s. 24(1) in full, the Public Body provides particulars. The Public Body's particulars include a near identical recitation of the statutory language in paragraphs (a), (b) and (c) of s. 24(1) with the name of the Public Body *"(including the Minister)"* inserted. The only addition is in paragraph (c) on p. 18 of the 2014 PBIS, where the Public Body adds: *"(which directly applies to the selection of external counsel and the negotiation of the Contingency Fee Agreement)."*

K. Section 25(1)(c): Disclosure of information which could reasonably be expected to result in financial loss to the Government of Alberta

36. After reproducing s. 25(1)(c)(i), the Public Body submits that it relies on this exception in addition to s. 27, to refuse disclosure because disclosure of the Agreements and related records *"can also reasonably be expected to result in financial loss to the Province of Alberta, which is the Plaintiff in a multi-billion dollar lawsuit."*

37. The Public Body, referring back to the Hansard quote *supra*, submits that the Minister of the Public Body attests to *"the adverse effect on the litigation which could be expected from the disclosure of the Contingency Fee Agreement. This view is supported by the past President of the Law Society [*name*]."*

38. In addition to this evidence, the Public Body submits that *"it should be obvious that there is a paramount need not to do anything which might even remotely jeopardize the tobacco recovery litigation, and this justifies the public body's decision to exercise its discretion under section 25(1)(c)(i) not to disclose the Agreements and Related Records."*

39. The Public Body submits the Court of Appeal approach of *"reasonable expectation"* should be adopted, citing the *Imperial Oil* decision. The Public Body argues that in this ABCA decision, the Court held that it could decide disclosure of information in a remediation agreement could reasonably be expected to significantly harm the negotiating position of a third party, without requiring any evidence to that effect.

L. Section 16: Information which could reasonably be expected to result in financial loss to a third party

40. After reproducing s. 16(1)(a)(ii), s. 16(1)(b) and s. 16(1)(c)(i), the Public Body submits these are mandatory provisions that require it to refuse disclosure of some of the Records at Issue.

41. The Public Body submits that the disclosure of the Agreements would directly affect the financial interests and competitive positions of: the party or parties to the Agreements, the lawyers retained in the CRRA Litigation, other provinces/territories who are party to an agreement with the Province, and prospective law firms who provided information.

42. The Public Body respectfully submits that if there is any doubt that s. 16 applies *"all of the outside lawyers involved in this matter should be given notice of this Inquiry"* giving them the opportunity to make submissions regarding their information. [**NOTE:** The issue of notice to the affected third parties will be discussed *infra*.]

M. Section 17: Disclosure of information which would be an unreasonable invasion of a third party's personal privacy

43. The Public Body reproduces s. 17(1) and s. 17(4)(d), (g) and (h), which it submits it relied on in excepting some of the Records at Issue from disclosure because some of the records contained information about third parties, the disclosure of which would constitute an unreasonable invasion of their personal privacy.

44. In its final submission on s. 17, the Public Body submits as follows:

> *Alberta Justice respectfully submits that, if there is any doubt about whether section 17 applies, all of the persons whose personal information is involved should be given notice of this Inquiry and be given the opportunity to make submissions about whether section 17 applies to information relating to them.*
> [**NOTE:** Records released to the Applicants by the Public Body with its 2017 PBSS were the majority of the Records at Issue for which the Public Body had previously claimed s. 17.]

Section 21: Disclosure of information which would be harmful to Intergovernmental Relations

45. In its submission, the Public Body reproduces the entire s. 21, which it indicates it relied on in addition to s. 27 to refuse to disclose one record (281). [**NOTE:** In the updated Exhibited Index of Records provided in 2017, record ABJ000281 is located at Doc Count 155, which is a three-page record ABJ000280-ABJ000282. The Section(s) of the Act Column of the Exhibited Index indicates the record was partially released but the only exception claimed under s. 21 is *"Section 21(1)(a)(i)."*]

O. Summary

46. The Public Body submits that the information in the Records at Issue are excepted from disclosure by one or more parts of s. 27(1).

i. Tab 2 of 2014 PBIS: 2014 FOIP Advisor Affidavit

[para 45] At Tab 2 of its 2014 PBIS, the Public Body attached the 2014 FOIP Advisor Affidavit sworn April 16, 2013. The Public Body advises that it continues to rely on this evidence in its 2017 PBSS. It is important, therefore, to review in detail. I do so now:

1. The affiant identifies him/herself as an employee of the Alberta Justice and Solicitor General holding the position of FOIP Advisor. As part of the duties in that position, the affiant states s/he has reviewed the Records at Issue over which the Public Body has claimed legal privilege.

2. The affiant describes the Records at Issue as including email, memoranda and other communication between various legal counsel for Alberta and their clients within the Public Body and Alberta Health.

3. The affiant submits that based on his/her review of the records and *"consultations with some of the individuals named in the records, I do verily believe that the Privileged Records"*;

- involve the giving or seeking of legal advice [at para. 4]
- were intended to be confidential and that the distribution of which was limited to only those who needed to have the information [at para. 5]

4. The affiant affirms that s/he has been advised by in-house legal counsel for the Public Body, and does verily believe, the Records at Issue are subject to solicitor client privilege and/or litigation privilege.

5. The affiant swears the affidavit is made in support of the Public Body's response to the Applicants' Request for Review under s. 66 of the *FOIP Act*.

> [**NOTE:** The style of cause in the 2014 FOIP Advisor Affidavit lists names of individuals who are not a party to this Inquiry. The style of cause also lists Case File numbers for other inquiries involving this Public Body, which are not part of this Inquiry.]

ii. Tab 3 OF 2014 PBIS: 2014 FOIP Director Affidavit

[para 46] At Tab 4 of its 2014 PBIS, the Public Body attached the 2014 FOIP Director Affidavit sworn July 31, 2014. The Public Body advises it continues to rely on this evidence in its 2017 PBSS. It is important, therefore, to review in detail. I do so now:

1. The affiant identifies him/herself as an employee of Alberta Justice and Solicitor General who is the Director of FOIP and Records Management. As part of the duties of that position, the affiant states s/he received two access to information requests: First Applicant (Case File #F6525) and Second Applicant (Case File #F6761).

2. The affiant submits that because the respective access to information requests from the First Applicant and the Second Applicant were *"very similar, the responsive records were identical."*

3. The affiant indicates that the information sought in the access to information requests relate to the Alberta government lawsuit against tobacco companies in which it is seeking recovery of health care costs attributable to smoking pursuant to Part 2 of the *Crown's Right of Recovery Act*.

4. The affiant attaches the May 30, 2012 news release announcing the $10 Billion lawsuit as Exhibit A and the Statement of Claim commencing the proceedings as Exhibit B.

5. As part of his/her duties, the affiant swears s/he *"collected and reviewed records which were responsive to the two requests (the "Responsive Records"). All together there were 564 responsive records. I was aware that with the ongoing litigation against the tobacco manufacturers that I would have to be cognizant of possible legal and other privilege along with other exemptions."* [**NOTE:** To be clear, when the affiant FOIP Director refers to 564 *"Responsive Records",* on a review of the Index at Tab 1 of the 2014 PBIS, there are 564 *pages* of Records at Issue, for a total of 142 Records at Issue.]

6. The affiant states his/her understanding is that legal privilege described in s. 27(1)(a) includes solicitor client and other forms of legal privilege under the common law such as litigation privilege and settlement privilege. The affiant distinguishes the exemptions under s. 27(1)(b) and s. 27(1)(c), which s/he states may be different than legal privilege under the common law.

7. The affiant states it is his/her understanding that solicitor client privilege applies where:

   a. The record is a communication between a solicitor and client;
   b. The communication must have been in the context of the seeking or giving of legal advice; and
   c. The communication must have been intended to be confidential.

8. The affiant states it is his/her understanding that *"litigation privilege applies where documents were created for the dominant purpose of furthering litigation, whether existing or contemplated."*

9. The affiant indicates that the Records at Issue were reviewed based on this understanding. On his/her review, the affiant found the large majority were privileged, based the following indicators:

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

10. The affiant refers to the exception sheet for the "564 records", which s/he attaches as Exhibit C. The affiant states the documents are subject to legal privilege or are exempted by s. 27(1)(b) or s. 27(1)(c), which s/he collectively refers to as the *"Privileged Records",* noting that the Index has an error: *"[t]he reference to pg. 281 as being non-responsive in Exhibit "C" was in error. It was document No. 282 that was non-responsive."*

11. The affiant states that the Privileged Records all relate to the CRRA Litigation, and s/he believes they were meant to be confidential and are privileged as a communication between a solicitor and a client relating to the seeking of legal advice. Specifically referring to an agreement, the affiant states that this agreement would be privileged as *"a communication between a client and its lawyer about legal advice, and could form the basis for future legal advice or general strategy as the claim progresses - thus this agreement would be privileged."*

12. The affiant attaches a transcript of Hansard as Exhibit D with comments by the Minister of the Public Body, as evidence that legal privilege has not been waived.

13. The affiant states that it is his/her understanding that the same privilege concerns apply to records related to the fee agreement: *"Records that were prepared in anticipation of the litigation are privileged, just as records containing confidential communication between legal counsel and Alberta Health would be."* [**NOTE:** The affiant refers to Alberta Health, which is not the Public Body in this Inquiry.]

14. As disclosure of the fee agreement and other related records could reasonably be expected to harm the economic interests of the Public Body and possibly interfere with contractual or other negotiations, the affiant states *"records of this type"* were also withheld under s. 25 of the *FOIP Act*.

15. On his/her review of related records, the affiant states s. 24 has been applied because they contain advice, proposals, recommendations, analyses or policy options developed for Alberta Health and also positions, plans, procedures, criteria or instructions developed for contractual negotiations by Alberta Health and were withheld from disclosure referring to the exception sheet at Exhibit B. [**NOTE**: The affiant refers to the exception sheet at Exhibit B. Exhibit B is the Statement of Claim. The only exception sheet is at Exhibit C. Also, the affiant again refers to Alberta Health, which is not the Public Body in this Inquiry.]

16. The affiant concludes by stating the affidavit is made in support of the *"Public Body's decision that the records in dispute are not to be disclosed pursuant to sections 16, 17, 21, 24, 25, and 27 of the Freedom of Information and Protection of Privacy Act."*

D. Public Body Supplementary (Initial) Submission [2017 PBSS]

[para 47] Two additional portions of the Records at Issue were provided to the External Adjudicator by the Public Body on two separate occasions: September 30, 2016 and January 19, 2017. As the segment of the Inquiry dealing with the June 10, 2016 Records at Issue was, at the time, ongoing, the parties were advised by me that these new Records at Issue would not be dealt with until that phase was concluded and the Inquiry was set to continue. The details of this history are reviewed in detail *supra.*

[para 48] On September 20, 2017 I issued the 2017 Notice, signalling the continuation of the Inquiry. In the 2017 Notice, I outlined specific and detailed evidentiary requirements for the Public Body, emphasizing the importance of the need to provide evidence in order to meet its burden of proof. I pointed out that the standard as set out in the Alberta Rules of Court and the *ShawCor* decision is what is required to demonstrate the applicability of the legal privilege exception(s). I considered this of particular importance as the records over which the Public Body had claimed legal privilege had not been provided to me. Subsequent to the 2017 Notice, the Public Body advised that new counsel had been retained. As a result the 2017 Amended Notice was issued to accommodate new counsel and to set out a new schedule for submissions for all the parties.

[para 49] The Public Body provided its Supplementary (Initial) Submission on November 15, 2017. The Public Body provided its 2014 PBIS dated August 6, 2014 shortly after the commencement of the Inquiry, prior to the First Applicant raising the PEO that resulted in the 2014 Decision/Order, discussed *supra.* 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 Submissions*."

Introduction

1. The Public Body begins with an introduction laying out that the Inquiry arises out of two access to information requests, identifying the two Applicants by name. In para. 2, the Public Body lists the multiple exceptions (sections 16, 17, 21, 24, 25, 27) on which it relied to withhold information from both Applicants.

2. At para. 3 of its 2017 PBSS, the Public Body indicates that the Applicants disagreed with the access to information decision [sic], resulting in the Inquiry. The Public Body states: *"[i]nitial Submissions on this issue were made by Alberta Justice in this inquiry on August 6, 2014, and the External Adjudicator released her decision on December 31, 2014, which decision is under judicial review."* [**NOTE:** How the Public Body has framed the 2014 Decision/Order could be misunderstood. In fact, the 2014 Decision/Order was solely on the issue of the PEO raised by the First Applicant about the admissibility of the Opinion Letter evidence proffered by the Public Body in its 2014 Initial Submission. The 2014 Decision/Order was not an order about the Public Body's access decisions to withhold the CFA and other related documents and did not rule on the applicability of any of the claimed exceptions including legal privilege.]

3. The Public Body footnotes its continued reliance on its 2014 PBIS and submits that its 2017 PBSS is to address recent guidance on the law of legal privilege from the Supreme Court of Canada [SCC] regarding the law of legal privilege and to provide an updated Index of Records. [**NOTE:** The Public Body states in footnote 1 that its supplemental submissions are to address recent guidance from the SCC. Its submissions do, in fact, address the recent SCC rulings. The 2017 Notice and the 2017 Amended Notice were issued to notify the parties the Inquiry was continuing, which re-activation was triggered by the Public Body providing additional portions of the Records at Issue to the External Adjudicator.]

4. The Public Body goes on to refer to the fact that it provided the June 10, 2016 Records at Issue to the External Adjudicator, over which it did not waive privilege. A hearing was conducted *vis vis* those records, about which the Public Body provided submissions on December 14, 2016 and January 30, 2017, resulting in the 2017 Order. [**NOTE:** The June 10, 2016 Records at Issue are the subject of the 2017 Order for which the Public Body has also applied for judicial review. Those records will not be part of this Interim Decision/Order.]

5. The Public Body cites s. 74(4) of the *FOIP Act* submitting that the inquiry process is stayed until the application is dealt with by the Court, indicating that the matter has been adjourned *sine die*. Notwithstanding the stay, the Public Body indicates it has undertaken to provide further evidence to support its decision to refuse disclosure of the records based on privilege as well as to provide *"an expanded index or schedule of records in keeping with the current state of Alberta law."*

Solicitor Client Privilege and Litigation Privilege

6. 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, relying on the *Solosky, Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31 [*Pritchard*] and *Lizotte* decisions.

7. The Public Body submits that the cardinal importance of both types of privileges (both of which are class privileges and, therefore, need not 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*].

8. The Public Body goes on to cite decisions:

- The *British Columbia (Attorney General) v. Lee,* 2017 BCCA 219 [*Lee*] decision from the BCCA found that once the solicitor client relationship is established then privilege applies to *"all communications made within the framework of the solicitor-client relationship."*
- 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 counsel does not remove the privilege or change its nature.

9. 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 affidavit of [name of in-house counsel], which includes an updated Exhibited Index, the large majority of the records have been withheld on the basis of legal privilege, both solicitor client privilege 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, when it is referring to the *Crown's Right of Recovery Act* and can be used interchangeably for the HCCR Litigation. In this Order, as noted *supra,* CRRA Litigation is used throughout unless quoting from a party's submission.]

10. The Public Body cites two decisions from the SCC: *U of C* and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health,* 2008 SCC 44 [*Blood Tribe*], where the Court decided that the *FOIP Act* (and the federal *Privacy Act,* R.S.C., 1985, c. P-21) do not confer upon the Commissioner the traditional power to compel, review and rule upon assertions of solicitor client privilege. On that basis, therefore, records over which a public body asserts legal privilege pursuant to s. 27(1)(a) are not compellable or reviewable by the Commissioner.

Issues

11. On the basis of its submissions *supra,* 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 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 of Records?*

[**NOTE:** It is always helpful for the parties, both the Applicants and the Public Body, to name the issues as they see them from their perspective. One of the roles of the External Adjudicator is to decide the issues in the Inquiry as it progresses, which I did in the 2017 Notice, the 2017 Amended Notice and have done in this Interim Decision/Order *supra.* The Public Body makes no reference to the s. 17 exclusion in its statement of the issues *supra*.]

The Affidavit of In-House Counsel [2017 Affidavit of Records]

12. The Public Body refers to indices it already provided in 2014 and January 2017 that listed the basis upon which the Records at Issue had been withheld.

13. In an effort to settle any confusion about numbering and consistency between the indices, the Public Body tenders the 2017 Affidavit of Records that attaches a further updated Exhibited Index of Records. [**NOTE:** As a point of clarification, the Public Body refers to the *confusion* about the indices inferring that it was the lack of understanding that caused the confusion. The errors in, and multiple changes to, the indices provided by the Public Body throughout the Inquiry have caused confusion. The Public Body suggests that two previous indices have been provided. I refer to Appendix A of the 2017 Order, which laid out, in a table, the nine Indices that have been produced by the Public Body, five for the June 10, 2016 Records at Issue and four of which are referred to as an Index for the Records at Issue in the main Inquiry. Since the Public Body provided the Exhibited Index to the 2017 Affidavit of Records, that index has been upgraded again to provide a document count and page count number for the Records at Issue. Details of errors, omissions and lack of information in the Exhibited Index are discussed *infra*.]

14. The Public Body submits the Exhibited Index has been prepared to reflect the current practice in Alberta with respect to an Affidavit of Records and cites the *ShawCor* decision, referred to by the SCC in the recent *U of C* decision. [**NOTE:** In order to be fair, after receiving the 2017 PBSS and the Applicants' Rebuttal Submissions, I wrote to the Public Body on January 4, 2018, well in advance of the date on which its Rebuttal Submission was due, pointing out that the Tab A Exhibited Index appeared to be lacking as it did not meet one of the requirements of current practice, to which the Public Body had referred at para. 14 of its 2017 PBSS. This step was taken as a courtesy to give the Public Body the opportunity to account for *all the pages* for the Records at Issue.]

15. The Public Body references the OIPC Privilege Practice Note (2016) [*OIPC Privilege Practice Note*], released in 2016 after the SCC decisions, that similarly adopts the guidance from Court of Appeal in the *ShawCor* decision, and submits that the Exhibited Index conforms with the *OIPC Privilege Practice Note.*

16. The Public Body states that certain information in the updated Exhibited Index has been redacted because it would allow a party to ascertain the content of privileged information. [**NOTE:** The issue of the use of REDACTION in an index forming part of an affidavit of records will be discussed infra.]

17. The Public Body submits that *"[a]t no point has [it] provided copies of any of the records that have been withheld on the basis of privilege to the External Adjudicator or Commissioner for review as part of this Inquiry, other than the June 2016 records, nor has the Public Body waived privilege to any information in the records listed in the updated Index of Records or the June 2016 records."*

Section 27(1)(a) - Legal Privilege

18. The Public Body refers to the 2017 Affidavit of Records which sets out that nearly all of the documents have been withheld on the basis of s. 27(1)(a): specifically, to the records relating to the retaining of counsel to pursue the CRRA Litigation, to the CFA negotiated with the outside law firm group retained for the CRRA Litigation and to the drafting of the May 31, 2012 News Release, submitting that *"[a]ll of these records are subject to both solicitor-client and litigation privilege."*

19. Relying on the *Calgary (Police Service) v. Alberta (Information and Privacy Commissioner)*, 2017 ABQB 656 decision, the Public Body quotes Justice Hall, at para. 14, who noted that *"nothing in the Act protects solicitor-client privilege for those documents if they are produced to the Commissioner for review."* The Public Body submission states that under the *FOIP Act "there are no statutory protections afforded to privileged information that is disclosed as part of an inquiry process. Therefore, solicitor client privilege would be lost if records were provided to the External Adjudicator as a party to this inquiry."* [**NOTE:** The Public Body refers to the External Adjudicator, *"as a party to this Inquiry".* As an External Adjudicator, I have been appointed and delegated authority as an independent External Adjudicator under the *FOIP Act* and in fulfilling my duties in that regard remain impartial and neither adverse nor advantageous in interest to either the Applicants or the Public Body, who are the parties to the Inquiry.]

20. The Public Body states that in view of the judicial comments it was entirely appropriate for the Public Body to withhold the Records at Issue from the External Adjudicator. The Public Body submits that it continues to maintain privilege over the records listed in the Exhibited Index, *"as there has never been nor is there now, an intention to waive privilege to any of the information in those records."*

21. The Public Body submits that the 2017 Affidavit of Records is evidence that the records over which solicitor client privilege has been claimed *"all involve communications between solicitor and client, where legal advice was either sought or given, in circumstances where the communication was intended to remain confidential."*

22. The Public Body further 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:*
    - *Description of the type of document:*
    - *The section of the Act applied to withhold the information; and*
    - *The type of privilege claimed.*

    [**NOTE:** These are not the titles of the Columns in the Exhibited Index to the 2017 Affidavit of Records in this Inquiry, though *some* of the same types of information are provided.]

23. 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."*

24. 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 of Records meets: the burden is a balance of probabilities, not absolute certainty under s. 71 of the *FOIP Act.*

25. The Public Body states that, in addition to the 2014 Affidavits of the FOIP Director and FOIP Advisor and the 2017 Affidavit of Records, it continues to rely on the report from the retired judge [Opinion Letter] along with its submissions from September 12, 2014 [2014 PBIS] acknowledging that the

2014 Decision/Order regarding the Opinion Letter is stayed. [**NOTE:** The 2014 Decision/Order held the Opinion Letter to be inadmissible.]

Other Sections of FOIPP

26. The Public Body begins this section of its submission with the mandatory exception in s. 16 (Disclosure harmful to business interests) of the *FOIP Act.* The Public Body submits it is required to refuse access to the records over which it has claimed s. 16 because disclosure would reveal the financial interests of the lawyers retained by the province in the litigation with respect to health care costs recovery associated with tobacco [CRRA Litigation] as well as prospective law firms and that disclosure could reasonably be expected to affect the financial interests and competitive position of other prospective law firms.

27. Further the Public Body submits that *"all of the affected third parties identified in the records have been given notice of this inquiry, and all have refused to consent to disclosure of all or part of their information in the records."* [**NOTE:** The issue of notice to the affected third parties will be discussed *infra*.]

28. In footnote 17 of its 2017 PBSS, the Public Body indicates that the names of third party law firms have been disclosed in the exhibits to the 2017 Affidavit of Records and submits, therefore: *"[*g*]iven that the names of these third party law firms have now been disclosed, the Public Body is now releasing 17 additional records to which section 17 is no longer applicable. These records were previously "partially released", and had redacted information which is now public. These records are located at Tab B of these Submissions."* [**NOTE:** The Public Body did not refer to s. 17 in its Issues *supra.* In fact, prior to the release referred to in footnote 17, the Public Body had claimed s. 17 for these Records at Issue, which it had redacted on that basis. However, s. 17 is not the exception related to harm to business interests of a third party as that exception is found in s. 16. Section 16 was not applied to any of the Records at Issue at Tab B. The updated Exhibited Index of Records properly reflects that these new Records at Issue have now been fully disclosed to the Applicants. The Exhibited Index indicates that for some Records at Issue where s. 17 has been claimed, the Public Body continues to rely on this exception, which Records at Issue have not been released to the Applicants. Some of these Records at Issue have been provided to the External Adjudicator. Details are discussed under Findings *infra.*]

29. The Public Body summarizes its submission by stating: *"it has demonstrated the basis for its withholding the records on the grounds described in the Index of Records attached to the affidavit of [in-house counsel]. The affidavit and the Index of Records are in accordance with the law and practice in Alberta. It is respectfully submitted 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 50] The 2017 Affidavit of Records, sworn November 15, 2017 by in-house counsel, had the Exhibited Index and Exhibited letters from affected third parties attached, which combined formed the 2017 PBSS. The 2017 Affidavit of Records and exhibits 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 claim by government against the tobacco industry seeking recovery of health care costs expended as a result of tobacco-related disease 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 Affidavits of the FOIP Director and the FOIP Advisor submitted as part of the 2014 PBIS and that those affidavits set out the basis upon which the Public Body has refused certain Records at Issue in response to the access requests by the Applicants for information related to the HCCR Litigation.

3. The Public Body goes on to refer specifically to the 2014 FOIP Director Affidavit in which the affiant referred to two requests being made to the Public Body regarding records related to the retention of counsel in the HCCR litigation and identifies one of the Applicants as a law firm and that the law firm represents one of the defendants in the HCCR Litigation. [**NOTE:** The Public Body's evidence referencing the identity of one of the Applicants will be discussed *infra*.]

4. The Public Body explains that counsel retained for the HCCR Litigation was by way of expression of interest in which law firms submitted detailed and lengthy proposals setting out their legal strategy against the tobacco companies. Three senior government officials from the Public Body and Alberta Health (details of the names and professional titles of the three senior government officials listed) reviewed the proposals, who the Public Body submits, along with other Public Body lawyers, were acting as legal counsel to the Public Body. The Public Body submits that all of the proposals were made in the context of privileged and confidential communications and all contained proposed litigation strategy and legal advice.

5. After the submission of written proposals, the Public Body indicates that three firms were asked to present their strategy in person before a panel of the same three senior government officials who were then responsible for evaluating the presentations. The affiant submits that the records detailing the presentations and the evaluations and internal consultations were privileged and confidential containing proposed litigation strategy and legal advice.

6. The affiant indicates that a decision was made by the Minister of Justice on December 14, 2010 choosing [name of law firm and associate firm] as counsel to represent the province in the CRRA Litigation. The affiant makes reference to a released record that confirms this decision.

7. The affiant confirms that after the Minister of Justice's decision to retain the CRRA Litigation law firm, another outside law firm (name of law firm provided) was retained to assist in negotiating and drafting the Contingency Fee Agreement [CFA]. This was done, s/he attests, as a result of the fact the Public Body rarely utilizes CFAs and required legal advice on the agreement it was negotiating with the CRRA Litigation law firm (name of law firm provided). [**NOTE:** Providing the name of the law firm retained to assist with the CFA was helpful in reviewing the evidence in the Exhibited Index. The affiant did not, however, provide the names of individual lawyers in that law firm in the 2017 Affidavit of Records or in the Exhibited Index.]

8. The communications between lawyers from the outside firm and employees of the Public Body were all privileged and confidential communications and all contained legal advice. [**NOTE:** The affiant does not identify the employees of the Public Body by name to whom s/he is referring.]

Privileged Records

9. The affiant indicates s/he has reviewed all of the records in the Exhibited Index attached as Exhibit A to his/her affidavit. S/he submits that the Public Body objects to produce the records listed as solicitor client privilege, litigation privilege, or both.

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

> *Records, email or other correspondence to and from Alberta Health's lawyers and lawyers at Alberta Justice and Solicitor General;*
>
> *Records that are attached to correspondence to or from a lawyer;*
>
> *Records of communications between employees of the Public Body, referencing legal advice given by a lawyer; and*
>
> *Records documenting legal advice provided by a lawyer.*

11. 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 or ongoing HCCR litigation*."

12. Records numbered 1 to 669 in the Exhibited Index all concern retention of counsel to pursue the HCCR claim and the actual CFA. The affiant states that the records in this set provide the following information:

> *Legal advice from the responding firms regarding proposed strategies for pursuing the HCCR litigation.*
>
> *Discussions among the Alberta Health lawyers and Alberta Justice and Solicitor General lawyers regarding the strategies proposed for pursuing the HCCR litigation.*
>
> *Legal advice from Alberta Health lawyers and lawyers at* Alberta Justice and Solicitor General *regarding the strategies proposed for pursuing the HCCR litigation.*
>
> *The Contingency Fee Agreement (CFA), which contains the mechanism by which the Public Body could pursue the HCCR litigation.*

13. 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 were all for the purpose of giving or receiving legal advice. They were also created for the dominant purpose of facilitating, furthering and/or dealing with the contemplated HCCR litigation."*

14. Records numbered 670 to 2569 in the Exhibited Index *"generally"* concern the negotiation of the CFA with the law firm group and the drafting of the May 31, 2012 News Release. The affiant swears the records marked privileged in this set are *"generally"*:

> *Records describing legal advice between lawyers from [*name of outside law firm*] and the Public Body regarding the terms of CFA,*
>
> *Records describing legal advice from the 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.*
>
> *Records describing communications between the Public Body and [*name of law firm group*] regarding the CFA or the HCCR litigation.*

15. 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 and 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."*

16. The affiant states it should be noted that *"one of the applicants herein also represents [*name of tobacco company*]. Any privileged record released could be used to glean confidential information about the Public Body's legal strategy, budget and actions in relation to the HCCR litigation."* [**NOTE:** The Public Body's evidence referencing the identity of one of the Applicants will be discussed *infra.*]

Section 16 Records

17. From his/her review of the Records at Issue in the Exhibited Index, the affiant attests that those *"identified by s. 16 are records that contain commercial, financial, or technical information of third*

parties. The records were supplied in confidence and the disclosure of them could reasonably be expected to harm the competitive position of the third parties."

18. The affiant swears that *"[a]ll of the Third Parties identified in the records have been given notice of this inquiry, all of which have refused to consent to the disclosure of all or part of their information found within the records."* The affiant attaches five letters from a list of affected third parties (names of the five law firms in list provided) as Exhibits B, C, D, E and F to his/her 2017 Affidavit of Records. [**NOTE:** The issue of notice to the affected third parties will be discussed *infra*.]

Section 24 Records

19. The affiant states s/he also found from his/her review of the records in the Exhibited Index identified by s. 24, are records that contain *"advice, proposals, recommendations, analyses or policy options developed for the Public Body"* and *"contain positions, plans, procedures, criteria or instructions developed for the purpose of contractual negotiations by the Public Body, or considerations that relate to those negotiations",* all of which have been withheld from disclosure under s. 24 of the *FOIP Act*.

20. 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."*

21. The affiant concludes by stating that s/he has sworn the Affidavit 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 delegate in the Inquiry and has not at any point been shared with the Commissioner.]

E. Second Applicant Rebuttal Submission [2017 Second ARS]

[para 51] The following is a detailed overview of the Second Applicant's Rebuttal Submission [2017 Second ARS] dated and received on December 13, 2017. The Second Applicant provided his/her Initial Submission dated July 7, 2014 shortly after the commencement of the Inquiry prior to the First Applicant raising the PEO to which s/he conjoined, resulting in the 2014 Decision/Order.

1. The Second Applicant begins his/her Submission by stating s/he has reviewed the 2017 PBSS.

2. The Second Applicant summarizes what s/he understands the nub of the 2017 PBSS contention to be: that the Public Body has provided sufficient document-identifying information to allow the External Adjudicator to determine whether privilege has been properly applied, which the Public Body buttressed by citing two rulings from BC and Alberta Adjudicators.

3. The Second Applicant submits that the cases relied on by the Public Body are not applicable as they both involve *"narrow-issue, personnel matters"* where the nature of the legal advice in the records would be evident to the adjudicators in the respective cases. The Second Applicant argues the rulings are not applicable in this Inquiry.

4. The Second Applicant argues that in this Inquiry there are many more issues, which are much more complex. These s/he outlines as follows: *"[t]he behaviour of the officials charged with selecting the [*law firm group*] is at issue. The selection process is at issue. (If, as Alberta Justice has claimed, the process was completely independent, why did the selection committee think it was appropriate to provide [*name*], [*name of that person's political executive assistant*], with a copy of its so-called draft briefing note and allow [*him/her*] to provide input? Any right-thinking person would conclude the process was anything but independent.)"*

5. The Second Applicant further submits that the Public Body *"has never provided its legal justification for publicly releasing, and thus waiving privilege for, [*name*]'s Dec. 14, 2010 memo. Justice released the memo but continues to vigorously maintain privilege on documents that we know - because they were leaked - contained information that was of equal or lesser legal significance."*

6. Continuing, the Second Applicant argues that the Public Body cannot, on the one hand, claim, even publicly, that waiving privilege on one document would effectively end privilege on everything while, on the other hand, continue to claim privilege: *"[t]he ministry can't have it both ways.* The Second Applicant requests that counsel for the Public Body provide an explanation for the release of the memo over which it claims privilege that supported a particular narrative but which was wholly misleading based on other leaked documents, external reviews and media reports.

7. The Second Applicant asks the External Adjudicator to consider the fact that the Public Body did not provide the leaked documents to Ethics Commissioner Wilkinson even though those documents were clearly relevant, as was determined by Justice Iacobucci in his Review Report, and to take that fact into account in deciding whether the Public Body's claim that privilege has been properly applied. The Second Applicant states the Public Body has *"clearly shown what can only be charitably described as very poor judgment in the past."* This, compounded by its disrespectful attitude toward the Inquiry and the External Adjudicator, the Second Applicant submits: *"I don't believe it has earned any trust."*

8. The Second Applicant states that it appears to him/her that the disrespectful attitude continues because the Public Body has failed to respond to the External Adjudicator's request for additional information to enable her to conduct the Inquiry, further stonewalling the process. The Second Applicant submits, this means more information should be provided in a way so as not to breach privilege *"if the public body has not already breached it."*

9. The Second Applicant concludes by stating his/her intention to rely on his/her co-Applicant's case law that it will be submitting relating to the issue of lack of information from the Public Body and the other issues and will also continue to rely on the First Applicant's submissions.

F. First Applicant Rebuttal Submission [2017 First ARS]

[para 52] The following is a detailed overview of the First Applicant's Rebuttal Submission [2017 First ARS] dated and received on December 20, 2017. The First Applicant had already provided its Initial Submission dated July 9, 2014 shortly after the commencement of the Inquiry prior to it raising the PEO resulting in the 2014 Decision/Order, discussed *supra*.

Overview

1. The First Applicant begins its submissions by stating that the Public Body has not met its burden to establish the asserted exceptions apply despite having produced a *"morass of indices"* (referencing the 2017 Order, at para. 8) over the past five years and three affidavits as evidence purporting to justify the exceptions. This evidence, the First Applicant argues, is not sufficient to permit a meaningful review of the Records at Issue and, as a result, disclosure should be ordered. [**NOTE:** To be clear, it is 5 years since the access to information requests were filed and 4 years since the 2014 Notice of Inquiry was issued.]

2. The First Applicant submits further that the Public Body's refusal to produce the CFA is improperly motivated because the First Applicant acts for one of the defendants in the CRRA Action. [**NOTE:** In its 2017 First ARS, the First Applicant uses "CRRA Action" when referencing the HCCR or CRRA Litigation. As noted *supra,* this has been replaced throughout the Order for consistency to CRRA Litigation other than where quoting or referencing a party's submission, as noted *supra*.]

3. The First Applicant lists the issues that will be addressed in its 2017 First ARS, highlighted with headings referred to *infra*.

Alberta Justice has not met its evidentiary burden: The applicable evidentiary threshold

4. Shortly after the parties' exchange of initial submissions in 2014, the First Applicant argues that the *ShawCor* decision clarified that a party must provide a sufficient description where it claims privilege for meaningful assessment, that is, sufficient information to show why privilege applies, without disclosing the privilege.

5. Subsequently, the First Applicant continues, the SCC suggested in *U of C* that the rules in civil litigation regarding claims of solicitor client privilege apply to claims of privilege in the context of access requests.

6. Adopting both rulings, the OIPC issued the *OIPC Privilege Practice Note* [Tab 1 of the 2017 First ARS] that requires the Public Body to provide an affidavit of the records over which privilege is claimed, *"along with a description for each record (or bundle) that 'shows why the claimed privilege applies to them'.*"

Alberta Justice has not met its evidentiary burden: Alberta Justice's 2014 Evidence

7. The First Applicant lists the evidence provided by the Public Body with its 2014 Initial Submission (footnoting where the evidence is found in the 2014 PBIS), which it submits *"falls well short of the evidentiary threshold to establish privilege",* as follows:

    * *unsworn Index of Records describing CFA as a "Document";*[(6)]
    * *an affidavit based on hearsay;*[(7)]
    * *an affidavit that improperly relies on blanket assertions of privilege;*[(8)] *and*
    * *an opinion letter from a retired judge that the External Adjudicator ruled inadmissible.*[(9)]

Alberta Justice has not met its evidentiary burden: Alberta Justice's 2017 evidence

8. The First Applicant states that the Public Body provided the Exhibited Index, which expands the Records at Issue from 564 to 2,570 pages, and to further clarify the basis for its refusals, it adduced the 2017 Affidavit of Records from in-house counsel. The First Applicant highlights the facts to which the affiant of the 2017 Affidavit of Records has sworn, which are summarized as follows:

    - The affiant is a lawyer responsible for supervising and instructing counsel re the HCCR Litigation;
    - The Public Body hired an outside [name of law firm] to negotiate the CFA with the [name of law firm group];
    - The affiant has reviewed all of the Records at Issue;
    - The CFA meets the test for solicitor client privilege and litigation privilege and *"contains the mechanism by which [*the Public Body*] could pursue the [CRRA Action]";* and
    - If the CFA is released, the Applicant (who acts for a defendant in the HCCR) may glean confidential information about the Public Body's *"'legal strategy, budget and actions in relation to the CRRA Action."*

9. The First Applicant reproduces the line of the Exhibited Index for Document ID ABJ000551, described as an agreement titled the *"Retainer and Contingency Fee Agreement."* [**NOTE:** This Record is Doc Count 179 in the final upgraded Exhibited Index provided by the Public Body.]

10. The First Applicant submits that the information and description of the CFA in the Exhibited Index and the 2017 Affidavit of Records fails to meet the evidentiary threshold required as set out in the *ShawCor* decision. The First Applicant argues that the Public Body could have provided a brief description of the type of particulars to meet the threshold, without revealing privilege, which are summarized as follows:

    - issues on which legal advice was provided;
    - how the Public Body's budget would reveal that content of legal advice or strategy;

- how anticipated standard steps in civil proceedings would reveal the content of legal advice or strategy; and
- the dispute resolution or termination clauses in the CFA.

11. These kinds of particulars, the First Applicant argues, would allow the External Adjudicator to meaningfully review the blanket claim of privilege and determine whether severance of some or parts of clauses in the CFA could be in line with the purpose of the *FOIP Act.*

12. Relying on the *Imperial Tobacco* decision, the First Applicant submits that the Public Body's position remains *"you can't see all the evidence; just trust us"* is contrary to the *FOIP Act* and the evidentiary threshold to establish privilege.

13. Because the Public Body has left the Applicants and the External Adjudicator blindfolded from being able to determine if privilege, in fact, applies to the Records at Issue, the First Applicant contends that they must be disclosed.

Privilege does not shield the CFA from disclosure: Alberta Justice waived privilege by providing Records at Issue to retired Justice [name of author of Opinion Letter]

14. In the 2014 Decision/Order, the External Adjudicator noted, without making a decision, that the Public Body may have waived privilege when it disclosed the Records at Issue to the author of the Opinion Letter (former Justice). If waiver is established, it is unnecessary to assess the substance of the Public Body's privilege claim.

15. Relying on the language from the *Pinder v. Sproule,* 2003 ABQB 33 [*Pinder*], at para. 64, the Court stated *"once a document is disclosed, it is exposed for all purposes, and nothing can be done to make it secret again",* the First Applicant submits that the Public Body has, in fact, waived privilege, regardless of intention.

16. Turning to Decision Order PO-3514, the First Applicant submits that the recent Ontario Divisional Court decision in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* 2016 ONSC 6913, upheld the Ontario Commissioner's decision, in similar circumstances, finding a waiver of privilege based on the fact that the record over which privilege had been claimed was provided to a third party without any evidence of correspondence setting out expectations or limitations of use or that the document was shared in confidence.

17. Referring to the 2014 Decision/Order at paras. 90 and 93, the First Applicant highlights the evidentiary indicators of similar circumstances as those in the Ontario decision, with respect to the Records at Issue being provided to the author of the Opinion Letter. Specifically, there is no evidence that the Public Body took precautions as to disclosure: did not put in place safeguards in the author's retainer or provide for a confidentiality requirement, and did not impose a restriction as to use. There is evidence from the author of the Opinion Letter that s/he was not retained to give legal advice.

18. The First Applicant states that the Public Body refers to the Opinion Letter as *"expert opinion evidence",* that in Alberta the use of expert opinion evidence generally results in waiver of privilege over the documents given to the expert relied on in drafting their report and that this waiver includes the Records at Issue given to the author of the report [Opinion Letter] in this Inquiry. As a result of waiver, the First Applicant submits that all claims of legal privilege over the Records at Issue given to the former Justice must be dismissed. [**NOTE:** The Public Body has continued to list the June 10, 2016 Records at Issue in the Exhibited Index without earmarking them as such. These records are the subject of the 2017 Order. Any submissions by the First Applicant that waiver should apply to all Records at Issue given to the author of the Opinion Letter, if successful, will not extend to those records included in the June 10, 2016 Records at Issue already the subject of the 2017 Decision.]

Privilege does not shield the CFA from disclosure: The CFA is not solicitor client privileged

19. Confirming its reliance on its 2014 Initial Submission, the First Applicant restates its position that the CFA does not meet the test for solicitor client privilege based in part on the decision in *Imperial Tobacco.*

20. The issue, the First Applicant submits in this Inquiry, is whether *"this carefully negotiated, custom-tailored CFA is subject to solicitor-client privilege"* and not, as the Public Body has argued, whether the terms of contingency fee agreements or retainers generally are subject to solicitor client privilege.

21. The First Applicant argues that the case law (including Order F2011-018, at para. 92) already establishes that the CFA can be appropriately severed to withhold any actual legal advice or information revealing litigation strategy while at the same time to disclose non-privileged information to an applicant and that the Public Body is incorrect, therefore, in claiming that it is inappropriate to sever non-privileged information where solicitor client privilege may apply to parts of a record. [**NOTE:** On a review of the Exhibited Index there are instances where the Public Body has, in fact, released a partially redacted record over which legal privilege has been claimed in conjunction with other exceptions (s. 17 or s. 24) [examples refer to Doc Counts 14-16].]

22. Responding to the Public Body's claim *"it is disingenuous to suggest that the CFA does not contain information about the Province's litigation strategy"*, the First Applicant submits the burden is on the Public Body to establish the CFA contains such information, which burden it argues, the Public Body has not met.

Privilege does not shield the CFA from disclosure: The CFA is not litigation privileged

23. The First Applicant submits that the Public Body's argument that the CFA is litigation privileged is a new issue, not raised in its 2014 PBIS, and as such should be disregarded.

24. In addition, the First Applicant submits that the claim of litigation privilege should also be disregarded because the dominant purpose of the CFA *"is a financial arrangement and the terms and conditions of the retainer, not the preparation for trial."* Litigation privilege the First Applicant argues, citing the *Lizotte* decision, is for information *"whose dominant purpose is preparation for litigation"* and is intended to maintain *"a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate."* The Public Body has, the First Applicant submits, not established that the disclosure of the CFA would reveal information about the Public Body's *"investigation and preparation"* for trial of the CRRA Action and, therefore, litigation privilege does not apply.

The CFA does not reveal the substance of legal services

25. With respect to the Public Body's argument that the CFA falls *"squarely and literally"* under s. 27(1)(b), the First Applicant submits:

- The Public Body's argument that previous decisions by the Commissioner's Office are incorrect at law has already been rejected by the External Adjudicator in the 2017 Order.
- Adjudicators have consistently held that the reliance on s. 27(1)(b) of the *FOIP Act* requires that the *"prepared"* information must have a substantive content with respect to the provision of legal services
- With respect to the Public Body's assertion that the CFA falls under both exceptions: legal privilege (s. 27(1)(a)) as well as the provision of legal services (s. 27(1)(b) and (c)), the First Applicant relies on an explanation provided by the Director of Adjudication who said:

> *To say, for example, that legal advice prepared by a lawyer relates to a matter involving the provision (as a service) of that legal advice by that lawyer is to say something grammatically and logically incoherent.*

> *As well, if the converse were true, if it were the case, for instance, that section 27(1)(b) covered legal advice, or information that reveals legal advice, as one kind of information prepared by a public body or a public body's lawyer in relation to a matter involving the provision of legal services, the protection of solicitor-client privilege for public bodies under section 27(1)(a) would be largely redundant.*
> [Order F2015-31, at paras. 74-75]
> [Emphasis in original]

- The First Applicant relies on a decision where the adjudicator faced the same issue; a public body had claimed s. 27(1)(a) and s. 27(1)(b) over records, which records had not been produced to the adjudicator who held that:

> *… in the absence of the records, I must rely on a public body's evidence and arguments. When that evidence is internally contradictory, as is the case when it asserts that both sections 27(1)(a) and (b) apply to the same information, I am limited in my ability to give weight to it, with the result that the public body may not meet its burden under section 71 of the FOIP Act. If a public body fails to meet its burden under section 71, then I must require it to give the Applicant access to the record.*
> [Order F2017-54, at para. 115]

- Therefore, the First Applicant submits that the Public Body has not provided sufficient evidence to determine if the CFA includes information about the substance of legal services.

Disclosing the CFA will not harm the Public Body

26. The First Applicant submits that the Public Body has failed to meet its burden of proof to establish the necessary direct link between the disclosure of the information in the CFA and a reasonable expectation of financial loss to the Province under s. 25(1)(c)(i) in the CRRA Action.

27. In its evidence, the Public Body relied on a transcript of the Minister of Justice describing an email s/he received from the former President of the Law Society, who discouraged the release of the CFA as *"unusual and ill advised"* as it would *"almost certainly assist the defendants in fighting the case."* The First Applicant argues this evidence should be given no weight as it is hearsay based on legal advice from the new counsel to the Public Body in this Inquiry. Furthermore the External Adjudicator already ruled in the 2017 Order that the identity of an applicant has no bearing on an assessment under the *FOIP Act*.

28. The First Applicant dismisses the Public Body's reliance on *Imperial Oil* as the Court there was dealing with reasonable expectation of harm under s. 16(1)(c) not s. 25(c)(i) [sic] and submits that once again the Public Body has failed to meet its burden of proof.

The [name of outside law firm group] consented to the disclosure of the CFA

29. The Public Body argues that disclosure of the CFA would directly affect the outside law firm group and that after being given notice of the Inquiry it refused to consent to the disclosure of their information in the Records at Issue. But the First Applicant counters that:

- The correspondence from a law firm sent on behalf of the law firm group dated August 21, 2012, referred to in the 2017 Affidavit of Records, did not refuse disclosure of the CFA but was instead silent on the issue.
- In December 2012, the Calgary Herald reported that the managing partner of the lead law firm in the group publicly stated the firm had *"no formal objection"* to the public release of the CFA.
- The First Applicant submits the case law supports the proposition that a party to a government contract should not expect the terms of the contract will be insulated from public disclosure, thus s. 16 is not engaged in relation to the CFA.

30. The First Applicant argues that the Public Body has asked the External Adjudicator to speculate that the business interests of the outside law firm group, created for the purpose of the CRRA Action, would be directly affected. The First Applicant submits, this is not sufficient to prove risk of harm that is beyond merely possible or speculative and thus the Public Body's s. 16 argument should be rejected and no additional notice to the affected third parties should be ordered.

The Public Interest continues to demand disclosure

31. The First Applicant submits that the Public Body's argument that s. 32 only applies to situations involving an emergency and risk of significant harm to the environment or health and safety has been rejected by the External Adjudicator in the 2017 Order as the Public Body's argument ignores the fact that s. 32(1)(a) and s. 32(1)(b) of the *FOIP Act* are disjunctive.

32. Therefore, the First Applicant argues that the only test is whether it has met the burden of proof that disclosure of the CFA is clearly in the public interest, which it submits it met in its 2014 First AIS.

33. In the 2017 Order the Public Body was invited to rebut the First Applicant's submission regarding public interest, which it has failed to do and the Public Body should not now be permitted to make that argument for the first time in its sur-rebuttal.

34. The First Applicant submits that the only argument advanced by the Public Body against disclosure in the public interest is the *ad hominem* attack by the affiant in the 2017 Affidavit of Records, where s/he suggests that because the First Applicant acts for a defendant in the CRRA Litigation, confidential information about legal strategy would be revealed if records were disclosed. The First Applicant argues that the Public Body's resorting to *ad hominem* arguments reveals that its misunderstanding of the statute, which appears to underpin its assertions of statutory exceptions in this Inquiry.

35. In that regard, the First Applicant submits that the statute provides a right of access to any person, and citing the 2017 Order, it states *"who an applicant is or what s/he intends to do with the information to which s/he seeks access is not a relevant consideration in rendering an access to information decision."*

36. The First Applicant submits that the Public Body's refusal should be dismissed as disclosure of the Records at Issue are clearly in the public interest.

37. In conclusion, the First Applicant states the Public Body has failed to meet its evidentiary burden of proof or provide any credible basis for refusing access to the CFA and other related records and, on that basis, respectfully requests disclosure forthwith.

G. Public Body Rebuttal Submission [2018 PBRS]

[para 53] The following is a detailed overview of the Public Body's Rebuttal Submission [2018 PBRS] dated and received on January 17, 2018, which it refers as its *"Reply to the Rebuttal Submissions of the Applicants"*:

1. The Public Body submits that much of the First Applicant's 2017 First ARS relate to the CFA though *"it now raises other arguments regarding waiver of privilege and the applicability of s. 32 of the Act."* The Public Body states that while it continues to rely on its 2014 PBIS with respect to the CFA but because the First Applicant has raised additional arguments in its rebuttal, it will respond briefly. [**NOTE:** The Public Body's submission could be misunderstood. Both of the Applicants raised the issues of waiver and public interest in their respective initial submissions: 2014 First AIS and 2014 Second AIS.]

Waiver of privilege

2. The Public Body submits that the External Adjudicator advised in correspondence (September 8, 2017) that waiver would only be added as an issue if the Public Body continued to insist on relying on the Opinion Letter, which had been ruled as inadmissible in the 2014 Decision/Order. Because the 2014 Decision/Order is under judicial review, the Public Body argues there can be no live issue regarding waiver. [**NOTE:** The 2014 Decision/Order ruled the Opinion Letter inadmissible. The Public Body has continued to rely on the Opinion Letter despite the fact the Public Body applied for judicial review, which has yet to be heard. The 2014 Decision/Order commented on the issue of waiver, as *obiter*, but made no finding with respect to waiver.]

3. But because the Applicants raised waiver in their rebuttal submissions, the Public Body provides a response and reserves the right to file further materials with respect to the issue of waiver. [**NOTE:** As a result of the Public Body submitting it was reserving the right to file further materials, the External Adjudicator proceeded to request additional submissions on the sole issue of waiver, which the parties provided and will be discussed *infra*.]

Waiver of privilege due to statements made by public officials

4. The Public Body provides nothing further as it states that it canvassed this argument in its 2014 PBIS, on which it continues to rely.

Waiver of privilege over the Opinion Letter

5. The issue of waiver was first raised by the External Adjudicator in the 2014 Decision/Order about the admissibility of the Opinion Letter, when she opined that providing the Records at Issue to the author may have resulted in waiver of legal privilege. As waiver was not an issue in the PEO, neither party provided argument or evidence so the comments were made without meaningful input from the parties.

6. In its 2017 First ARS, the First Applicant echoes the External Adjudicator's *obiter* now arguing privilege has been waived by virtue of the Records at Issue being provided to the author of the Opinion Letter.

7. The Public Body submits it has not waived privilege over the Refused Records. It reviews both express and implied waiver, arguing that the former requires knowledge of the privilege and a voluntary intention to waive the privilege, while the latter, which is rare and has no application here, is *"usually only found where there is an indication that a party is attempting to take unfair advantage or present a misleading picture by selective disclosure,(3) a principle that has no application to these matters"*, relying on *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), CanLII 7258 (ONSC), [*Transamerica Life*] at paras. 41-42.

8. Relying on *U of C, Chambre,* and *Lizotte,* the Public Body states that the narrow view of waiver is consistent with the principles enunciated by the SCC: a caution to Courts and Legislature from doing anything to displace privilege, and the concepts of fairness and consistency for Courts in deciding if waiver has occurred. Citing from a BCCA decision, in part:

> *While I favour full disclosure in proper circumstances, it will be rare, if ever, that the need for disclosure will displace privilege.*
> [*Hodgkinson v. Sims,* 1988 CarswellBC 437, at paras. 19-20]
> [Emphasized portion in original reproduced]

9. The Public Body submits it has consistently claimed legal privilege over the records now listed in the Exhibited Index since the access to information requests were first made and there is no evidence of an express intention by the Public Body to waive privilege. [**NOTE:** To be clear, the size and content of the Records at Issue have changed significantly between the time of the Public Body's decisions in response to the access to information requests and the time the Exhibited Index was provided with the 2017 Affidavit of Records.]

Waiver of privilege alleged by Second Applicant

10. The Public Body refers to the Second Applicant's submission that because some information has been leaked and disseminated into the public sphere, privilege has been waived over those records. The Public Body states it is presuming the Second Applicant is referring to the June 10, 2016 Records at Issue.

11. It is trite law that privilege belongs to the client, in this case the Public Body, who submits it has not authorized disclosure or waiver over records leaked to the press. Further, the June 10, 2016 Records at Issue were provided to the External Adjudicator without *"waiving privilege in an effort to be transparent."* In circumstances where the Public Body did not pick and choose to disclose certain records, it submits that there can be no express or implied waiver of privilege, which it continues to assert. [**NOTE:** The June 10, 2016 Records at Issue were provided to and accepted by the External Adjudicator on a non-waiver basis. The June 10, 2016 Records at Issue are not under consideration during the continuation of the Inquiry.]

Section 32: The Public Interest override

12. The Public Body submits that the First Applicant's interpretation that s/he has met his/her burden under s. 32 if disclosure of the records is for any reason clearly in the public interest is a fundamental misreading of the test for public interest. The Public Body argues s. 32 is only triggered where there is potential for severe harm, relying on Order 2001-028, a portion of which it cites is as follows:

> *Section 32 [previously section 31] is often referred to as the public interest override of the FOIP Act. As action 32(1)(a) … states, <u>there must be a risk of significant harm.</u> The Applicant did not offer any specific evidence regarding what harm he was alleging.*
> *…*
> > *<u>Section 31 … imposes a statutory duty on the head of a public body to release information of certain risks under "emergency-like" circumstances (i.e. 'without delay').</u>*
>
> *The Public Body argues that there is nothing within the information that constitutes <u>"emergency-like" circumstances</u> and that the Applicant has not offered any evidence about a possible risk.*
> [Order 2001-028, at paras. 20-22]
> [Emphasis in <u>original</u>]

13. Further, the Public Body refers to three publicly funded inquiries that it submits fully investigated the issue regarding the selection process of the outside law firm group retained for the HCCR litigation. The Public Body makes particular reference to the most recent decision by (Acting) Ethics Commissioner Fraser who found no evidence of wrongdoing and no breach of the conflict of interest legislation during the selection process of the outside law firm group.

14. The Public Body submits that there is no scandal that requires further investigation and while there may be lingering public interest in the outcome of the Ethics Commissioner probes, it is insufficient to meet the s. 32 test.

Burden of Proof

15. The Public Body argues that in addition to the Opinion Letter, the admissibility of which is currently disputed, it has submitted three affidavits, which *"provide ample additional information and context regarding the background for how the Refused Records were created, and why privilege has been claimed."* This affidavit evidence and the updated Index of Records, created in accordance with *ShawCor,* Alberta Rules of Court and the *OIPC Privilege Practice Note*, provide more than sufficient evidence of what is required at this time to a claim of privilege in any civil litigation matter in Alberta.

Identity of the Applicants

16. Responding to the First Applicant's claim that inappropriate emphasis has been placed on its identity, the Public Body states: *"The Public Body wishes to clarify that no decisions with respect to exemptions were ever made with regard to the identity of the Applicant."*

17. Agreeing that identity of an applicant is not a relevant factor, the Public Body states the only relevant analysis is whether any of the Records at Issue fall under any exceptions under the statute arguing that because the requested records relate to the ongoing tobacco litigation, most have been exempted on the basis of both solicitor client privilege and litigation privilege.

Exercise of Discretion

18. The Public Body concludes by stressing that the primary issue in the Inquiry is whether the Public Body has properly exercised its discretion in refusing to release records withheld under s. 27(1)(a). Relying on a decision of the Alberta OIPC, the Public Body submits that the fundamental importance of solicitor client privilege and litigation privilege to the functioning of the legal system means keeping legal privilege as close as possible to absolute, a portion of which decision is as follows:

> *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 s. 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 para. 32]

19. The Public Body submits it has properly exercised its discretion to withhold the Refused Records.

H. Public Body Supplementary Submission on Waiver [2018 PBSS Waiver]

[para 54] The following is a detailed overview of the Public Body's Supplementary Submission on the issue of waiver of privilege [2018 PBSS Waiver] dated and received on February 9, 2018.

Introduction

1. The Public Body submitted that by letter dated January 26, 2018 the Office of the Information and Privacy Commissioner invited the parties to provide supplementary submissions on the issue of waiver of privilege. [**NOTE:** The invitation for submissions came from the External Adjudicator not from the *"Office of the Information and Privacy Commissioner."* Refer to paras. 4-5 of the 2017 Order.]

2. The Public Body submits that the issue of waiver had not been raised by the Applicants in the Inquiry and it was not until it was raised by the External Adjudicator in the 2014 Decision/Order, therefore, neither party [sic] had provided argument or adduced evidence on the point. [**NOTE:** The issue of waiver was initially raised by the First Applicant in its 2014 First AIS, at paras. 89-93, to which the Public Body responded in its 2014 PBIS, at paras. 29-34 regarding whether the Public Body had waived privilege by making public statements about the CFA. There are three parties in this Inquiry.]

3. The Public Body states that *"in order to provide a fulsome evidentiary record on the issue"* it submits its 2018 PBSS Waiver along with an affidavit of in-house counsel sworn February 9, 2018 [2018 Waiver Affidavit].

No Evidence of Waiver

4. The Public Body references evidence [Opinion Letter] that it provided with its 2014 PBIS, which has since been ruled inadmissible in the 2014 Decision/Order.

5. In addressing the sole issue of waiver, the subject of these supplementary submissions, the Public Body states it *"took pains to articulate the very narrow basis upon which [*author of the Opinion Letter*] was allowed access to the Refused Records."* [**NOTE:** The Public Body did not provide any evidence with, or make submissions in, its 2014 PBIS regarding the basis on which the Records at Issue were provided to the author of the Opinion Letter.]

6. The Public Body then provides details of the Non-Disclosure clause of the Retainer with the author of the Opinion Letter, including particulars set out in the 2018 Waiver Affidavit at para. 7 and in Exhibit A, regarding restricted access to the Province's information, summarized as follows:

   - author agreed not to disclose or publish any of the Province's information without prior consent
   - author acknowledged the "Privileged Documents" were highly confidential and agreed to make reasonable security arrangements
   - author agreed to return or deliver the information including any copies upon completion of the contract or upon request
   - author agreed that the information may only be disclosed as required by law/court order with advance notice to the Province, and
   - author agreed no press release/public announcement/commentary without prior approval of the Province.

7. In addition to the precautions regarding the author of the Opinion Letter, the Public Body quotes from affidavits previously submitted as evidence it *"has continued to expressly maintain privilege over the Refused Records"* listed as: 2014 FOIP Advisor Affidavit, at para. 5; 2014 FOIP Director Affidavit, at para. 18; 2017 Affidavit of Records, at para. 25.

There is no evidence of an intention to waive privilege

8. Relying on the *S. & K.* case cited in the *Lee* decision, the Public Body argues that the foundation of waiver is knowledge of the privilege and intention to waive that privilege.

9. The Public Body submits that it was aware of the need to maintain confidentiality of the Records at Issue and took pains to protect them as discussed by providing them to the author on the narrowest terms and, on that basis, argues there is no evidence it evinced an intention to waive either solicitor client privilege or litigation privilege when it provided access to the author of the Opinion Letter.

10. Referring to the strict conditions on which the City of Vancouver had provided unredacted settlement agreements, over which privilege had been claimed, to two levels of government, the Public Body submits that in that case the conditions were sufficient evidence for the adjudicator to find the City had treated the privileged records with care sufficient to avoid waiver and ensure strict confidentiality of the information.

11. Citing from Order F15-09, the Public Body relies on this BC privacy decision as a precedent where a public body's disclosure of some information (in that case, the disclosure was about the existence of legal advice) did not waive privilege over all of the communication, as follows:

> *However, given the circumstances, this is not a case where waiver of part of a privileged communication should be held to be waiver as to the entire communication. There was nothing to indicate that when the CRD disclosed what it did about the privileged communications with its solicitor that it intended to mislead or cause unfairness, nor is there any indication that it did in fact have that effect. In my view, merely disclosing the existence and gist of the legal advice in order to explain that the advice had informed the CRD's actions should not amount to an implied waiver over all of the privileged communications contained in*

> *the Record. This finding is consistent with court decisions and other BC Orders, which have held that disclosing that legal advice was received and relied on, or revealing the mere gist, summary or conclusion of that advice is not sufficient to imply a waiver over the whole of the privileged communications absent any unfairness. Further, this approach reflects the fundamental purposes of freedom of information legislation because it recognizes the need for accountability on the part of public bodies without impinging on their right to maintain confidentiality over privileged communications.*
> [Order F15-09, at para. 20]
> [Emphasis added by Public Body]

12. Relying on the *Solosky* test as cited in the *Lee* decision, the Public Body submits that *"providing a record on a confidential basis, does not automatically amount to a waiver of privilege, as stipulation that the privileged document be treated in confidence is sufficient to demonstrate a lack of intention to waive privilege."*

13. The Public Body submits that if there was waiver, it would only be a limited waiver for the specific purpose of providing an opinion as to whether the Records at Issue are privileged and not intended as a waiver to the world at large.

14. The Public Body submits that it has made a concerted effort to meet its evidentiary burden under the statute by submitting four affidavits [2014 FOIP Advisor Affidavit, 2014 FOIP Director Affidavit, 2017 Affidavit of Records and the 2018 Waiver Affidavit (in-house counsel)]. Due to the lack of specific protection under the *FOIP Act* regarding waiver over privileged records, the Public Body submits it has met its obligation of transparency while continuing to maintain privilege over the Records at Issue, as it is entitled to do.

15. Citing from a BC decision, the Public Body relies on the precedent for the proposition that it ought not to be penalized for making good faith efforts at transparency, as follows:

> *If a public body makes partial disclosure of privileged material in an effort to follow a "policy of transparency", this should not be weighed against it in terms of assessing the public body's conduct for the purpose of determining an intention to waive privilege. In this sense, the underlying motivation of the public body for partially disclosing privileged legal advice, as opposed to its motivation for seeking it in the first place, is relevant to an assessment of whether waiver of privilege has occurred. To hold otherwise would prejudice the public body for taking action which is in fact consistent with the express purpose of FIPPA, which is "to make public bodies more accountable to the public."*
> [Order F07-05, at para. 26]

Conclusion

16. The Public Body submits that this is not a case where it has disclosed some materials while refusing others behind a claim of privilege and, therefore, this is not a case where fairness and consistency require disclosure of information revealed to the author of the Opinion Letter.

17. The Public Body asserts that the evidence in the Inquiry demonstrates two things: first, it has been unwavering in its assertion of both legal privileges over the Refused Records and more importantly, second, there has never been any evidence of an intention to waive privilege by the Public Body over the Refused Records.

i. Affidavit of [name of in-house counsel] [2018 Waiver Affidavit]

[para 55] At Tab 1 of its 2018 PBSS Waiver, the Public Body attached the 2018 Waiver Affidavit sworn February 9, 2018. The 2018 Waiver Affidavit provides the following evidence:

1. The affiant indicates s/he is employed by Alberta Justice and Solicitor General as a lawyer.

2. As found in his/her 2017 Affidavit of Records, the affiant re-states his/her responsibilities with respect to the CRRA Litigation and in that capacity swears s/he has personal knowledge of the facts and matters deposed to except where based on information and belief, in which case verily believes the same to be true.

3. The affiant refers to the Opinion Letter provided by the author on July 2, 2014 through the Public Body's former counsel. [**NOTE:** As the 2014 Decision/Order found the Opinion Letter inadmissible, its purpose and contents will not be discussed in this Order. The sole relevant issue of this 2018 Waiver Affidavit as part of the 2018 PBSS Waiver is in relation to waiver.]

4. The affiant states the author of the Opinion Letter was provided with the *FOIP Act,* the *Solicitor-Client Privilege Adjudication Protocol* and the *"Privileged Documents."* [**NOTE:** The affiant refers to *"Privileged Documents"* and the Public Body refers to the *"Refused Records."* What records were given to the author of the Opinion Letter. For a discussion of what records were given to the author of the Opinion Letter, refer to paras. 62-63 of the 2014 Decision/Order.]

5. The affiant states s/he was involved in the preparation of the Retainer between the Province of Alberta and the author, which s/he indicates included giving careful consideration as to how best to provide access to the author given the information had been withheld from the Applicants on the basis of a claim of legal privilege. [**NOTE:** No evidence was proffered by the Public Body during the PEO exchange of submissions with respect to any terms, conditions or protections included in the author's Retainer. Refer to paras. 69 and 73 of the 2014 Decision/Order.]

6. The affiant goes on to list what s/he cites as paras. 10(a)-(e) of the *"Non-Disclosure Clause"* in the author's Retainer, which s/he states were *"to ensure the confidentiality"* of the Records at Issue and *"to preserve the legal privilege."* [**NOTE:** To be clear, the paragraph cited is incorrect. In Exhibit A, para. 6, not para. 10, is entitled *"Non-Disclosure of Information"* and contains the subsections replicated in the 2018 Waiver Affidavit.]

7. The affiant attaches the executed Retainer as Exhibit A to the 2018 Waiver Affidavit. [**NOTE:** Exhibit A refers to the author as the *"Expert"* but s/he was not proffered as an expert during the PEO exchange of submissions or when the Opinion Letter was submitted into evidence. In that regard, refer to paras. 70-73 of the 2014 Decision/Order. In addition, one of the terms of the Retainer states the *"Expert warrants that [*s/he*] has the qualifications and expertise to perform the Services"*, which provision was not entered into evidence during the PEO exchange of submissions.]

8. The affiant indicates s/he has been advised by the Public Body's former counsel and does verily believe that the author of the Opinion Letter attended at his/her office to review the Records at Issue and did not make copies or take any records outside the office. [**NOTE:** The language in the Retainer, including the Non-Disclosure section, makes no reference to viewing the Records at Issue at the office of the former counsel as a condition and, in fact, employs language such as *"shall return or deliver the Province's Information, including all copies."*]

9. The affiant states s/he swears the affidavit for consideration by the Information and Privacy Commissioner [sic]. [**NOTE:** This is another example of where, the Public Body fails to be clear about the important separation between the Commissioner and her External Adjudicator, where the latter is delegated under the *FOIP Act* because the former, the Commissioner, has declared a conflict of interest. Refer to paras. 4-5 of the 2017 Order.]

I. First Applicant Supplementary Rebuttal Submission on Waiver [2018 First ASRS Waiver]

[para 56] The following is a detailed overview of the First Applicant's Supplementary Rebuttal Submission on the issue of waiver of privilege [2018 First ASRS Waiver] dated and received on February 22, 2018.

Part I: Overview

1. The First Applicant submits that the Public Body waived privilege when it provided the CFA to the author of the Opinion Letter. The First Applicant argues that the Public Body's evidence and submissions on waiver fail to rebut its 2017 First ARS.

Part II: Argument

A. The 2018 Waiver Affidavit does little to clarify Retainer terms

2. The First Applicant references the affidavit evidence of in-house counsel submitted by the Public Body [2018 Waiver Affidavit], in which s/he swears to the contents of the Retainer with the author of the Opinion Letter, a copy of which Retainer is attached for the first time in the Inquiry.

3. The First Applicant points out two deficiencies in the Retainer noted *supra* which, it argues, renders it unclear meaning it should be given little weight:

    - the Retainer signed by the Acting Deputy Minister has 29 clauses while the Retainer signed by the author of the Opinion Letter has 25 clauses, which raises the issue of was there a meeting of the minds, and
    - the affiant of the 2018 Waiver Affidavit quotes clause 10 of the Non-Disclosure clause while in the exhibited Retainer it is clause 6.

B. [Name of author of Opinion Letter] was retained to provide an expert opinion

4. The First Applicant submits that the exhibited Retainer, assuming it contains what was agreed to, confirms, by its terms, the author of the Opinion Letter was retained as an expert and that s/he warrants s/he has the qualifications and expertise to review the Records at Issue and provide a report to that effect.

5. Referencing para. 19 of its 2017 First ARS, the First Applicant reinforces its earlier submission that the Records at Issue reviewed by the author to draft the Opinion Letter are not privileged relying on case law that use of an expert opinion in evidence results in a waiver of privilege. [Refer to *Chernetz v. Eagle Copters Ltd.,* 2005 ABQB 712 [*Chernetz*], at para. 10]

C. Intention not required

6. Replying to the Public Body's submission that waiver requires intention, the First Applicant submits that case law confirms that while intention is a relevant factor other policy considerations come into play, referring to *Pinder v. Sproule*, at para. 64. The First Applicant argues that the Public Body's continued reliance on the Opinion Letter, as expert evidence to establish privilege, provides such a policy basis because *"fairness demands no less."*

D. Alberta Justice case law is distinguishable

7. The First Applicant submits that the case law relied on by the Public Body to argue that the manner in which it provided the Records at Issue to the author does not automatically amount to a waiver is completely distinguishable.

8. In the case at hand, the First Applicant argues that it is unfair for the Public Body to continue to rely on the Opinion Letter while simultaneously continuing to assert privilege over the Records at Issue.

9. The First Applicant submits that *"it defies credulity for Alberta Justice to submit that retaining [*the author*] to opine on the ultimate issue in this Inquiry is consistent with its "obligation of transparency as mandated by the Act"."* In that regard, the First Applicant goes on to cite paras. 152 and 169(2) of the 2014 Decision/Order.

Part III: Conclusion

10. In conclusion, the First Applicant submits that if the CFA is privileged, which it argues it is not, the Public Body waived privilege by providing the Records at Issue to the author for his/her review and completion of his/her Opinion Letter and that the CFA be disclosed forthwith.

[**NOTE:** The Second Applicant, who had provided a submission on waiver in his/her 2014 Second AIS, did not provide a supplementary submission on the issue of waiver though s/he was invited to do so.]

V. DISCUSSION OF ISSUES

[para 57] This has been a long and complex Inquiry involving multiple phases and decisions. In the preceding parts of this Interim Decision/Order, I reviewed, in detail, the submissions of all the 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 two Applicants. What follows in the Discussion is an evaluation and consideration of the major issues arising from the evidence and submissions. I have attempted to integrate within the Discussion, mention of what has already transpired during this Inquiry to provide historical context, staying clear of reconsidering any matter that has already been the subject of a decision or order. The evidentiary standard I have employed throughout is a balance of probabilities in deciding whether either the Public Body or the Applicants have met their respective burdens of proof under the *FOIP Act [*Refer to *FH v. McDougall* 2008 SCC 38*].*

[para 58] Two orders have already been issued in this Inquiry. The issue of legal privilege was touched on during the phase of the Inquiry dealing with the PEO, which resulted in the Decision F2014-D-03/Order F2014-50 [2014 Decision/Order]. The issues in the Inquiry remain, for the most part, the same as the issues considered during the June 10, 2016 Records at Issue phase of the Inquiry, which resulted in Order F2017-61 [2017 Order]. The 2017 Order specifically left open the issue of public interest until the Inquiry continued involving the entire set of Records at Issue. When the Inquiry was reactivated, other aspects of the issues, particularly in relation to the s. 16 exception and waiver, required further consideration and discussion. The history behind the evolution of these issues have been detailed *supra.* In an effort to avoid unnecessary repetition in this Interim Decision/Order, where appropriate and relevant, I will refer to sections of the 2014 Decision/Order and the 2017 Order.

A. Section 27

[para 59] The exceptions that will be the focus of this Interim Decision/Order are the s. 27(1) discretionary exception and the s. 16(1) mandatory exception. I begin with s. 27(1)(a).

i. ***Section 27(1)(a)***

[para 60] 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 61] In the 2014 Decision/Order, I briefly discussed the issue of the legal privilege exception found in s. 27(1)(a). In that regard, I refer to paras. 74-85 of the 2014 Decision/Order.

[para 62] In the 2017 Order in this Inquiry, I discussed the issue of legal privilege, both solicitor client privilege and litigation privilege, at length. In that regard, I refer to paras. 27-56 of the 2017 Order.

[para 63] As I have emphasized throughout, there is absolutely no doubt that legal privilege is of fundamental importance to our justice system, a *"privilege [*that*] must be sedulously protected."* [*Alberta v. Suncor* Inc., 2017 ABCA 221 [*Suncor*].

> *Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. It is said that anyone who represents himself or herself has a*

fool for a client, yet a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible":

> *[S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by case basis.*
> *…*

It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised. The privilege belongs to the client not the lawyer. In Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, at p. 188, McIntyre J. affirmed yet again that the Court will not permit a solicitor to disclose a client's confidence.
[*Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 SCR 574, at para. 9] [*Blood Tribe*]

[para 64] In keeping with the discussion in the previous orders, it is important to stress what is expected of the responsible authorities under the *FOIP Act.* In that regard, I rely on what the SCC has decided regarding the respective duties of a public body in making a decision in response to an access request and of a commissioner in reviewing that decision:

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".*
…
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.*

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

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

[*Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23, at paras. 66-69] [*Criminal Lawyers' Association*]
[Emphasis in original and added]

[para 65] The first question is whether the Public Body has satisfied its burden of proof under s. 71(1) of the *FOIP Act* to demonstrate it has properly relied on s. 27(1)(a). This question must be answered in the affirmative in order to move on to the second part of the review with respect to whether the Public Body has properly exercised its discretion in applying the discretionary exception.

[para 66] What information is required in order for a public body to meet its evidentiary burden to establish solicitor client privilege? A former commissioner answered that question as follows:

> *An illustration of the kind of information that will be satisfactory to establish a solicitor-client privilege claim is found in Ansell Canada Inc. v. Ions World Corp., [1998] O.J. No. 5034 (Ct. J.). In that case, the Court quoted prior cases asserting that* ***a party cannot avoid production by giving an "unadorned assertion that the documents are subject to solicitor and client privilege". It said that the degree of detail required "should include the function, role and status of the receiver and sender of the documents in question and their relationship to the party to the action, the grounds for the claim of privilege, and a description of each document consistent with the law which renders it privileged"*** *(paras. 10, 19). See also the "Record Form" portion of the Protocol, and accompanying instructions.*
> [Decision P2011-D-003, at para. 127]

[para 67] Since this matter was referred to Inquiry by the Commissioner, the SCC has issued two key decisions [*U of C; Lizotte*]. Some of the Public Body's evidence was submitted prior to the SCC decisions and some followed. Following the release of these SCC decisions, the OIPC issued the *OIPC Privilege Practice Note* to reflect the recent decisions, the Alberta Rules of Court and the *ShawCor* decision. In the 2017 Notice, the Public Body was urged to provide evidence as part of its submissions to meet these requirements. The 2017 Affidavit of Records with Exhibited Index was evidence provided by the Public Body in this Inquiry after the recent SCC decisions, which the Public Body indicated was intended to meet the requirements.

[para 68] In the past when the Records at Issue were routinely provided during an inquiry, any deficiencies, gaps or mistakes in the accompanying index could usually be resolved satisfactorily by comparing the information in an index with the record itself. This was not possible in this Inquiry, with so few records available, so greater reliance needed to be placed on the 2017 Affidavit of Records and Exhibited Index. The various iterations of the index for the Records at Issue in this Inquiry, from the time of the one that accompanied the access to information decisions to the Exhibited Index, underwent substantive changes, including a major change to reflect the fact that the Records at Issue expanded from 564 pages to 2,570 pages.

[para 69] In my opinion, the change in how inquiries are conducted is significant. Adjudicators are now wholly dependent on the evidence provided by a public body in an affidavit of records, an exhibited index and any other evidence submitted, in order to make findings and to issue an order about records they have never viewed (except where a public body elects to make an application for an *in camera* submission that may include records). However, if an affidavit of records and the attached index are lacking in information that accurately describes each specific record (without revealing any privileged information), a public body leaves itself vulnerable to being unable to meet its burden of proof under s. 71(1) of the *FOIP Act*. As the Findings *infra* demonstrate, based on what the Public Body has submitted, sufficiently clear, convincing, and cogent evidence has been provided making it possible to decide that the s. 27(1)(a) exception has been properly relied on for some of the Records at Issue. As the Findings *infra* report, I find that the Public Body has satisfied its burden of proof that it has properly relied on s. 27(1)(a) for the Records at Issue described under Findings *infra*, at paras. 9.A and 9.C.i. In the case of other records, however, I have been unable to determine whether the Public Body has properly relied on s. 27(1)(a) because it has failed to provide sufficiently clear, convincing, and cogent evidence to meet its burden of proof. These Records at Issue are described in detail in the subparagraphs under Findings *infra,* at para. 9.B.

[para 70] In both the 2017 Notice and the 2017 Amended Notice and subsequent correspondence, I alerted the Public Body to the importance of addressing the evidentiary requirements for each specific Record at Issue. A discussion of those evidentiary requirements is warranted as they go to the core of the Findings in this Inquiry.

[para 71] The insufficiency of the evidence in the Exhibited Index has been compounded by the Public Body's decision to populate some of the column spaces in the Exhibited Index with the word "REDACTED". 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 maximize the amount of information that can be disclosed to an applicant, in accordance with s. 6(2), and is consistent with the purpose of the statute as set out in s. 2(a) of the *FOIP Act.* In this regard, it is acknowledged that caution must be exercised when redacting while processing an access request that involves a claim that the information is legally privileged. [Refer to *British Columbia (Attorney General) v. Lee,* 2017 BCCA 219 [*Lee*]]

[para 72] The Public Body's use of REDACTED in the Exhibited Index to the 2017 Affidavit of Records is not, however, a technique used by public bodies in preparing evidence it submits to decision-makers. In the 2017 Affidavit of Records, the affiant fails to provide a complete explanation as to what purpose the redactions serve in demonstrating the Public Body has met its burden of proof. At para. 16 of its 2017 PBSS, the Public Body provided the following as the only explanation for its use of REDACTED:

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

[para 73] The result of populating the Exhibited Index with REDACTED is that the descriptors for many Columns for the Records at Issue are lacking any substantive evidentiary content. There are 53 Records at Issue where REDACTED is in one or more columns, which specific records are described under Findings at para. 9.B.ii *infra.* A prime example of the challenge faced is the Record at Issue at Doc Count 451: the only information provided in the Exhibited Index for this record is in the Section(s) of the Act Column and the Privilege Column, all the remaining columns are shown as REDACTED.

[para 74] 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 submit anything into evidence that itself is privileged or that would reveal legally privileged information (other than *in camera*). In this case, the Public Body elected not to provide any evidence *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 or information from which a person could ascertain legally privileged information. Indeed, the *ShawCor* decision specifically provides that the description should be done without revealing information that is privileged.

[para 75] *ShawCor* stipulates, however, that each record is to be described in a way that indicates how the record fits within the privilege or privileges in order to assist in assessing the validity of the claim that the information meets the *Solosky* test for solicitor client privilege and/or the dominant purpose test for litigation privilege discussed *infra*. By choosing to populate key Columns in the Exhibited Index 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 2017 Affidavit of Records. This approach has left the descriptions for some of the Records at Issue deplete, resulting in the Public Body failing to provide sufficient (or any) evidence in accordance with the *ShawCor* decision.

[para 76] In other instances where REDACTED appears, the affiant provides some information in other Columns including the date of the record, the People/Organizations who are the authors/senders, and the People/Organizations who are the recipients and for some information those people or

organizations copied on the communique, but the information remains insufficient to meet the burden of proof. The specific Records at Issue where the Public Body has REDACTED information in the Exhibited Index are described under Findings, at para. 9.B.ii *infra.* In all instances where REDACTED has been applied, I have been unable to determine that the tests for solicitor client privilege or litigation privilege have been met on a record-by-record basis as required.

[para 77] By way of comparison, to demonstrate what may constitute sufficient evidence, is where the descriptors have not been redacted but rather the Exhibited Index has been populated with information that relates specifically to sworn affidavit evidence in the 2017 Affidavit of Records. This combination of evidence enables me to determine that legal privilege applies. For example, at para. 12 of the 2017 Affidavit of Records, the affiant provided specifics where s/he refers to Records at Issue that involve communications containing legal advice exchanged between outside legal counsel [name of law firm provided] who, the affiant attested, was retained to provide legal advice on and assist in negotiating the CFA and employees of the Public Body, as follows:

> *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.*

[para 78] The affiant explained that retaining outside counsel with the requisite expertise was necessary because the Public Body rarely relied on contingency fee agreements. The argument advanced by the First Applicant that the outside counsel was acting as a consultant rather than as a lawyer is rejected. Rather, based on the descriptions of these Records at Issue in the 2017 Affidavit of Records and the Exhibited Index, I find communications between the Public Body and the identified outside law firm were with respect to the provision of legal advice about the CFA. The specific Records at Issue describing legal advice with counsel from the outside law firm meets the Public Body's burden of proof and are included in the records described under Findings, at para. 9.A *infra.*

[para 79] The Public Body could have considered using this kind of REDACTED evidence in a different way in order to comply with *ShawCor*. The Public Body could have made an *in camera* application to enable it to provide the decision-maker (and not the parties) with a complete or partial unredacted version of the Exhibited Index. 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 on which the Public Body relied. 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 80] At para. 24 of its 2017 PBSS, the Public Body, referring to 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 81] In Order F2017-28, the adjudicator details 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 82] The Public Body elected not to submit any *in camera* evidence either as a means to provide a copy of the unredacted version of the Exhibited Index 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) had been applied or to provide records over which s. 24(1) and s. 27(1) had been applied redacting the privileged portion of the record. The Public Body also did not provide me with any redacted pages for those Records at Issue where it claimed s. 16(1), s. 21(1)(a), s. 24(1)(a), s. 24(1)(b), s. 25(1)(c), s. 27(1)(b) and s. 27(1)(c) alongside s. 27(1)(a) *in camera*, which would have afforded me with the opportunity to see the context of the record over which it had claimed legal privilege, along with the other exceptions, without revealing any privileged information. Order F2017-28, discussed *supra* and *infra,* comments on the utility or helpfulness of submitting information in a record into evidence, after redacting the privileged information, to aid in providing context to the privileged information that has been withheld, taking care not to include anything that could reveal legally privileged information.

[para 83] The Public Body, in this Inquiry, took a quite 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 key Column(s) in the Exhibited Index. Redacting information from the Index exhibited to the 2017 Affidavit of Records, in this case, has proven to be unhelpful to the Public Body in meeting its burden. 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 ABJ or Doc Count number) and/or provides any description in his/her affidavit for any specific Record at Issue where the descriptors have been REDACTED as to how legal privilege applies.

[para 84] 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* discussed *infra*), 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 85] In the case of inquiries under the *FOIP Act*, the Alberta Rules of Court are considered instructive rather than prescriptive. The relevant Rules 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 86] 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.*
> [Emphasis added]

[para 87] While *ShawCor* states that it will depend on the circumstances as to whether the description will require more or less information to be sufficient and concedes that oftentimes a brief description will suffice, I find that a redacted description constitutes *no* description at all. In the case of the few redacted records where scant information has been provided, I find the description insufficient. For all of the Records at Issue in the Exhibited Index where REDACTED has been used in lieu of a description, I find that the Public Body has failed to provide sufficient information to demonstrate legal privilege for any of the specific Records at Issue, described under Findings, at para. 9.B.ii *infra.*

[para 88] The *OIPC Privilege Practice Note* goes on to lay 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 89] Recognizing the extent to which reliance needed to be placed on the 2017 Affidavit of Records and its Exhibited Index, when the latter appeared not to meet *one* of the basic requirements set out in *ShawCor* and the Alberta Rules of Court: *"each record must be numbered in a convenient order with all pages of the Records at Issue accounted for",* I alerted the Public Body to give it the opportunity to

know of my concerns in advance of the date set for its rebuttal submission [2018 PBRS]. The courtesy alert to the Public Body on January 4, 2018, copied to the Applicants, regarding the fact that some of the pages of the Records at Issue were not accounted for, read as follows:

> *An issue has arisen with respect to the Index attached as Tab A to [*in-house counsel*]'s Affidavit [Tab A Index], which affidavit is found at Tab A of your Supplementary (Initial) Submission in Inquiry #F6525/#F6761. Your updated Index of the Records at Issue, unfortunately,* ***does not appear to meet one of the necessary requirements*** *as set out in the Alberta Rules of Court and the ShawCor decision;* ***each record must be numbered*** *in a convenient order with all pages of the Records at Issue accounted for, …*
> [Emphasis added]

[para 90] The Public Body responded on January 17, 2018, a portion of which letter read as follows:

> *At the outset we must respectfully dispute your assertions that the revised Index of Records is not compliant with the Alberta Rules of Court and the ShawCor decision. Each document has been separately and sufficiently described or identified.* ***Each page is separately numbered on the documents*** *and there has been no bundling as you describe.*
>
> *That said, and in an effort to remove an issue that we do not think will assist the process, we have revised the Index using a different software program to include a column for page counts and end document numbers. We enclose a PDF and searchable Excel versions of this revised Index,* ***which forms part of the Public Body's submissions.***

[para 91] To be clear, the inference in the Public Body's response that I had made any kind of premature determination about the Exhibited Index in advance of the exchange of submissions being concluded could be misconstrued. As the Records at Issue were not available to me, there was no way of determining that each page was numbered on the record itself, as suggested by the Public Body, thus the need for the courtesy notification before the conclusion of submissions. After the Public Body provided a revised Exhibited Index, I was satisfied that each page of the Records at Issue had been accounted, as is required.

[para 92] The Public Body submitted that for all the Records at Issue where it claimed legal privilege, it intended to claim both solicitor client privilege and litigation privilege. At para. 9 of its 2017 PBSS, the Public Body explains this as follows:

> *In the case at hand almost all of the information that has been withheld by the Public Body in this inquiry has been done so on the basis of section 27(1)(a) of the Act - "information that is subject to any type of legal privilege, including solicitor client privilege." As set out in the affidavit of [*name of in-house counsel*], which includes an updated Index of Records (discussed further below),* ***all of the records that have been withheld on the basis of legal privilege include both solicitor client and litigation privilege. This is because the records relate to communications between solicitor and client that entail the seeking or giving of legal advice that are intended to be confidential by the parties, and, all of which were prepared for the dominant purpose of prosecuting the CRRA Litigation.***
> [Emphasis added]

[para 93] Where it has claimed s. 27(1)(a), the Public Body has applied both solicitor client privilege and litigation privilege to all of those Records at Issue in the Privilege Column of the Exhibited Index except for one Record at Issue where only litigation privilege was claimed [Doc Count 517]. In fact, the Public Body has claimed both legal privileges in the Privilege Column for Records at Issue where s. 27(1)(a) has not been claimed in the Section(s) of the Act Column of the Exhibited Index, as described under the Findings at paras. 9.B.iii, 9.B.iv, 9.B.v, and 9.D.ii *infra.*

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

[para 94] Claiming both legal privileges apply, in and of itself, will not necessarily be a problem. It is completely conceivable that a specific record could legitimately contain information protected by both solicitor client privilege and litigation privilege. The descriptions provided in the 2017 Affidavit of Records and Exhibited Index, however, pay limited attention to making a distinction as to what information falls under which legal privilege for each Record at Issue and, importantly, how the information in each specific record fits under either legal privilege. In the case of solicitor client privilege, the well-established text is as follows:

> *...privilege can only be claimed document by document, with* ***each*** *document being required to meet the criteria for the privilege —****(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.***
> [*Solosky v. The Queen*, [1980] 1 SCR 821, at p. 837]
> [Emphasis added]

[para 95] In the case of litigation privilege, the SCC recently said the following regarding the dominant purpose test:

> *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.*
> [*Lizotte,* at para. 1]

[para 96] The *Lizotte* decision from the SCC also assists in distinguishing between the two kinds of legal 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.*
> *…*
> *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).*

[*Lizotte,* at paras.19, 22]

[para 97] In looking at the actual wording of the access to information requests, it is difficult to understand how *all* of the responsive Records at Issue over which legal privilege has been claimed fall within the legal definition of both solicitor client privilege and litigation privilege. Further, the 2017 Affidavit of Records and Exhibited Index do not support this claim for all the Records at Issue where both have been applied. It is interesting to note that in its 2014 PBIS, the Public Body submitted first that it is patently evident that s. 27(1)(b) and s. 27(1)(c) squarely and literally describe the information in the CFA and related Records to which the Applicants seek access and that both are sufficient to justify its decision to refuse disclosure. As an alternative it submits that *"if it were necessary to consider whether section 27(1)(a) also applies, Alberta Justice submits that the information in the Contingency Fee Agreement (and related records) is subject to legal privilege."*

[para 98] The Public Body devoted much of its attention to the CFA essentially proposing that by its very nature, the CFA is an agreement that in essence falls under the rubric of information that can be withheld as being subject to legal privilege. There are competing authorities that demonstrate there is no consistency in how financial arrangements between lawyers and clients fall under legal privilege [Refer to *Descôteaux, Burr, Imperial Tobacco,* and Order F13-15 for just a few cases cited by the parties in this Inquiry.] Without the ability to review the records themselves [as was not the case for the adjudicator in Order F13-15], I am not prepared to draw any conclusion for any of the Records at Issue based solely on their description referencing the CFA. This would make an assumption about the extent to which the CFA is legally privileged without consideration being given as to whether the contents of each specific record described in whole or in part as the CFA are privileged [Refer to *Imperial Tobacco,* at paras. 77-98].

[para 99] The combination of the gaps, errors, and deficiencies noted *supra,* the lack of *in camera* evidence, and the redactions has resulted in the 2017 Affidavit of Records and Exhibited Index not meeting the evidentiary requirements in accordance with *ShawCor,* Alberta Rules of Court and the *OIPC Privilege Practice Note* to meet the tests for legal privilege for *some* of the Records at Issue, which are described under Findings at paras. 9.B.i, 9.B.ii, 9.B.iii, 9.B.iv, 9.B.v, 9.C.iii, 9.D.i, 9.D.ii, 9.E, and 9.G *infra.*

[para 100] I am unwilling to issue an order in this Inquiry 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 under s. 71(1) of the *FOIP Act* to provide sufficiently clear, convincing, and cogent evidence that the information in each specific Record at Issue is subject to legal privilege. Therefore, I have made an Interim 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.

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

[para 101] For those Records at Issue where I have been able to decide that the Public Body has properly relied on s. 27(1)(a) described under Findings, at para. 9.A *infra*, I turn now to the issue of whether the Public Body has properly *applied* the legal privilege exception by exercising its discretion to deny access to the Applicants.

[para 102] The *FOIP Act* grants the Applicants a right of access to information subject to limited and specific exceptions as set out in the statute. A rebuttable presumption in favour of granting access has been recognized in the Supreme Court of Canada:

> *Section 1 sets forth the purpose of the FIPPA. Reflecting the public interest in access to information,* ***it establishes a presumption in favour of granting access.*** *Chief Justice McLachlin and Justice Abella explain in Ontario v. CLA:*
>
> > *Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society.*
> >
> > *...Open government requires that the citizenry be granted access to government records when it is necessary to meaningful public debate on the conduct of government institutions. [Emphasis added; paras. 1 and 37.]*
>
> *However, s. 1 also recognizes that* ***the presumption must be rebuttable in a limited number of specific circumstances according to the mandatory or optional exemptions provided for in the Act.***
>
> *The scheme of the Act reflects its purpose. The head of the institution that controls or has custody of the requested records, and who has knowledge of their content and the impact of their release, has the primary responsibility for determining whether one of the exemptions applies to the requested records. In the case of a discretionary exemption, he also has the responsibility of determining whether that exemption should be invoked. However, the Act gives the ultimate power over releasing the information to the IPC, subject to judicial review.*
> [*John Doe v. Ontario (Finance),* 2014 SCC 36, at paras. 41-42] [*John Doe*]
> [Emphasis in original and added]

[para 103] The exercise of discretion with respect to s. 27(1)(a) is treated as distinct from other discretionary exceptions. At para. 35 of its PBRS, the Public Body addresses the issue of the exercise of discretion and 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 by relying on s. 27(1)(a) 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 104] As discussed *supra,* the first step is whether proper reliance has been placed on s. 27(1)(a). In turning to the second step, review of discretion, the Public Body cited 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 105] Section 27(1)(a) provides a public body with the right to protect legally privileged information by granting it the discretion to refuse to disclose that information. The Public Body here has exercised its discretion to refuse to disclose any information to which the Applicants seek access where it claims the Records at Issue are protected by solicitor client privilege 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 106] For the Records at Issue not available to the External Adjudicator, s. 27(1)(a) is the only discretionary exception for which there are Findings detailed *infra*. For the Records at Issue made available to the External Adjudicator, the application of the other discretionary exceptions are detailed under Findings in the Table at para. 9.G. I find there is some evidence that the Public Body has considered the identity of one of the Applicants, an irrelevant consideration, in exercising its discretion to deny access to the Applicants. As a result, in the case of some of the Records at Issue reviewed [Doc Counts 502, 504 and 794], the Public Body will be ordered to reconsider the application of s. 24(1) pursuant to the Order *infra*.

> *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 107] Similarly, where the Public Body is unable to establish that s. 27(1)(a) properly applies under the Interim Decision and it decides to go on to consider other discretionary exceptions already claimed in the Exhibited Index, it must do so without taking into account any irrelevant considerations in the exercise of discretion.

> ***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 108] Evidence that the Public Body considered the identity of one of the Applicants, however, 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 submitted, 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 at para. 9.A *infra*, I find the Public Body has properly applied the s. 27(1)(a) exception by exercising its discretion to refuse to access to the Applicants as to do so is in the public interest. This will apply equally for those Records at Issue that fall under the Interim Decision if the Public Body successfully meets its burden of proof to demonstrate that s. 27(1)(a) applies for those Records at Issue where it has failed to do so.

iii. and iv. Sections 27(1)(b) and 27(1)(c)

[para 109] None of the other discretionary exceptions relied on by the Public Body for Records at Issue not provided to the External Adjudicator are being disposed of in this Order as this will be unnecessary should the Public Body satisfy the terms set out in the Interim Decision with respect to s. 27(1)(a). At paras. 7-16 of its 2014 PBIS, the Public Body's provided submissions with respect to the non-legal exceptions in s. 27(1)(b) and s. 27(1)(c) as discussed *supra.* In the event the Public Body fails to meet its burden of proof with respect to s. 27(1)(a) for the Records at Issue that fall under the Interim Decision and decides to rely on the other exceptions under s. 27(1), I make reference to the discussion *supra* with respect to s. 24(1) and the discussion in a previous decision in this Inquiry, *infra*.

[para 110] In the 2017 Order in this Inquiry, I discussed the issue of the non-legal privilege exceptions under s. 27(1), at length. In that regard, I refer to paras. 64-91 of the 2017 Order. Once again, based on the content of the access to information requests, it is difficult to understand how *all* of the responsive Records at Issue over which both legal privileges have been claimed also fall within the two non-legal exceptions under s. 27(1)(b) and s. 27(1)(c), which are considered distinct from legally privileged information falling under s. 27(1)(a).

B. Mandatory Exceptions

i. Section 16(1)

[para 111] The mandatory exception in s. 16(1) of the *FOIP Act* as relied on by the Public Body reads as follows:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*
>
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party,*
>
> *(b) that is supplied, explicitly or implicitly, in confidence, and*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
>
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
>
> *(iii) result in undue financial loss or gain to any person or organization, or*
>
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[para 112] For every record where the Public Body claimed s. 16(1), it has also applied s. 27(1)(a) and, therefore, none of these Records at Issue were available for review. The descriptions in the Exhibited Index provide little, if any, evidence to support a finding that the s. 16(1) three-part test has been met.

[para 113] At paras. 57-58 of its 2014 PBIS, the Public Body stated the following with respect to the application of s. 16:

> *The Contingency Fee Agreement directly affects the financial interests of the other party to it - the Province's lawyers in the tobacco recovery litigation. The applicants refer to these lawyers being the successful group in obtaining the retainer from the Province to prosecute the tobacco recovery litigation. The financial interests and competitive position of the Province's chosen lawyers would be directly affected by the disclosure of the Contingency Fee Agreement.*
>
> *Some of the records relate to information provided by other prospective law firms, and disclosure of that information could reasonably be expected to affect their financial interests and competitive position.*

[para 114] The Public Body did not provide any evidence with its 2014 PBIS to substantiate this submission.

[para 115] In concluding its submission with respect to s. 16 in its 2014 PBIS, the Public Body stated the following:

> *Alberta Justice respectfully submits that, if there is any doubt about whether section 16 applies,* ***all of the outside lawyers involved in this matter should be given notice*** *of this Inquiry and be given the opportunity to make submissions about whether section 16 applies to the information relating to them.*
> [2014 PBIS, at para. 59]
> [Emphasis added]

[para 116] Specifically, at paras. 56-59 of its 2014 PBIS, the Public Body submitted that notice needed to be given by me to all affected third parties. Following that claim, at paras. 177-189 of the 2014 Decision/Order, I laid out the requirements for notification to be given by the Public Body to the affected third parties, which discussion was a result of the Public Body stating that notice was an outstanding issue [Refer to para. 181 of the 2014 Decision/Order].

[para 117] Considerable time and attention has been devoted to the issue of s. 16(1) in this Inquiry, albeit a significant portion of the discussion was based on the Public Body's representation that notice to affected third parties remained an outstanding issue. For previous discussion regarding s. 16(1) during this Inquiry can be found:

- in the 2014 Decision/Order at paras. 177-189]; and
- in the 2017 Order at paras. 153-188, 207-218 and paras. 226-230].

[para 118] When those decisions were issued it was not known that the affected third parties had received notice of the access requests and that the Public Body had their responses in hand. The previous discussion need not, for the most part, be repeated or reproduced here but it is important to note why s. 16 was given this attention in the previous decisions. Section 16 is a mandatory exception and s. 30(1) imposes a duty on the Public Body to give notice to affected third parties where disclosure of their information could reasonably be expected to harm their business interests, as defined in s. 16(1).

[para 119] The issue of notice became moot when at para. 29 of its 2017 PBSS and at para. 22 of the 2017 Affidavit of Records, the Public Body and the affiant, respectively, revealed that the affected third parties identified in the Records at Issue had been given notice. At paras. 27-29 of its 2017 PBSS, the Public Body provided the following submission with respect to s. 16:

> *Some of the records listed in the updated Index of Records have also been withheld on the basis of section 16 of the Act. This is a mandatory provision which requires a Public Body to refuse to disclose records that would reveal commercial, financial, labour relations, scientific or technical*

information of a third party, that could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiation position of the third party.

The records to which section 16 has been claimed involve the financial interest of the Province's lawyers in the HCCR Litigation. Disclosure of the CFA would directly affect these lawyers. Other documents relate to information provided by other prospective law firms and disclosure of that information could reasonably be expected to affect their financial interests and competitive position.

Furthermore, ***all of the affected third parties identified in the records have been given notice of this inquiry,*** *and all have refused to consent to disclosure of all or part of their information in the records.*[(17)]
[Emphasis added]

Footnote 17 reads as follows:
*Affidavit of [*in-house counsel*], Exhibits B-F. Given that the names of these third party law firms have now been disclosed, the Public Body is now releasing 17 additional records to which section 17 is no longer applicable. These records were previously "partially released", and had redacted information which is now public. These records are located at Tab B to these Submissions.*
[Emphasis added and in original]

[para 120] At paras. 21-22 of the 2017 Affidavit of Records, the affiant stated:

From my review I also found that the records in Exhibit "A" identified by s. 16 are records that contain commercial, financial, or technical information of third parties. The records were supplied in confidence and the disclosure of them could reasonably be expected to harm the competitive position of the third parties.

All of the Third Parties identified in the records have been given notice of this inquiry, all of which have refused to consent to the disclosure of all or part of their information found within the records. *These responses are attached as follows:*
[The affiant lists Exhibits B-F, which exhibits are correspondence from five law firms/groups.]
[Emphasis added]

[para 121] The correspondence received by the Public Body from the affected third parties, exhibited to the 2017 Affidavit of Records [Exhibits B-F inclusive], was in response to notice from the FOIP Manager on August 1, 2012. The notice was sent shortly after the FOIP Manager received the access to information requests. A copy of the notice sent out by the FOIP Manager was not provided to me but on reviewing the exhibited correspondence, the following is clear: the affected third parties received notice of the access to information requests pursuant to s. 30 of the *FOIP Act,* they were provided with copies of the Records at Issue that contained their commercial, financial and/or technical information, and they were invited to provide their consent to disclosure or to make representations explaining why the information should not be disclosed. There is no evidence that the affected third parties received notice of the Inquiry after it was constituted in 2014 or that they provided any further responses beyond those in 2012. The reason this is important is because the 2012 notice to the affected third parties (and accompanying Records at Issue containing their business information) would have only involved 564 pages of records [Doc Counts 1-179], the complete complement of Records at Issue at the time. There is, therefore, no evidence from any of the affected third parties for any of their business information in the remaining pages of the Records at Issue [Doc Counts 180-805], which they would not have received or commented on.

[para 122] Despite the delay in making this evidence available during the Inquiry, what is required at this point is for me to consider the evidence that has been submitted and decide whether the Public Body has met its burden of proof under s. 16(1) for all the Records at Issue where it has been relied on. I will provide a brief framework of the analysis required and avoid repeating discussion available in previous orders, referred to *supra*.

[para 123] With respect to the correspondence from the affected third parties, attached as Exhibits B-F of the 2017 Affidavit of Records, I make the following observations:

- Only one affected third party, whose response is at Exhibit F, did not object to disclosure of the materials supplied by the Public Body, with one disclaimer, stating as follows:

  > *We have no objection to your disclosure of the material enclosed with your letter of August 1, 2012, except for the identity of past or present clients of [*name of law firm*] mentioned on pages 1, 2, and 3 of our letter to [*name of senior government official*] dated November 15, 2012.*

- The remaining affected third parties provided substantive responses laying out in detail how s. 16 applied to their business information under the three-part statutory test [commercial, technical or financial; supplied in confidence; and disclosure would result in harm] and to which portions of their respective proposals should be withheld on the basis of s. 16 of the *FOIP Act.* In addition to s. 16 and s. 27(1)(a), some responses provided remarks on the s. 27(1)(b), s. 27(1)(c), and s. 24 exceptions.

- The affected third parties, who provided their respective responses in 2012, had been provided with the information that affected their business interests, contained in the Records at Issue, by the Public Body. Their exhibited response letters provided direct evidence in meeting the three-fold test under s. 16(1).

- At the time the evidence was prepared and provided by the affected third parties in August 2012, the Public Body gave the range of the pages for the Records at Issue to be 1-564 pages [Doc Counts 1-179]. That means the evidence provided by the affected third parties in Exhibits B-F does not relate to information in the complete complement of Records at Issue, which is now 2,570 pages, and would, as a result, not provide any evidence with respect to some of the Records at Issue [Doc Counts 180-805].

- With respect to the statutory test for s. 16, the following is a summary of what is contained in the responses provided by the affected third parties regarding their business information in the applicable Records at Issue:

  1. It is financial information regarding the provision of legal services at a particular cost and the use and distribution of a law firm's resources in providing those legal services;

  2. The commercial and technical information of each law firm regarding the unique method it uses to conduct its business of bidding on large scale litigation, involves confidential detail as to how each law firm proposes to perform in relation to the litigation and includes specific legal analysis regarding issues identified as relevant to the litigation, summarized as work plans and legal analysis;

  3. The financial, commercial and technical information was supplied specifically on the basis that it was confidential and subject to legal, commercial and proprietary privilege. The law firms believed their information would be treated confidentially because it was their understanding the bidding proposal was highly confidential, limited to a number of qualified law firms and concerned a large and high-profile litigation process; *and*

  4. The law firms highlighted and, in some cases, referred to, the parts of the Records at Issue that contained their business information, the release of which they submitted could be expected to harm their competitive position or interfere significantly with the ability of their law firm to negotiate in similar competitions in the future.

[para 124] Section 16(1) is a mandatory exception that obliges a public body to refuse access to information in a record where the disclosure of the information meets the three-part harms test. In order to demonstrate that this mandatory exception does, in fact, apply to the Records at Issue, the Public Body must provide evidence demonstrating, on a balance of probabilities, that *all* three conditions set out in the statute are met:

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

[para 125] With respect to the outcomes referred to in Part 3 *supra,* in order to satisfy the harms test, there must be evidence that disclosure could reasonably be expected to:

> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
>
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
>
> *(iii) result in undue financial loss or gain to any person or organization, or*
>
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute*
> [*FOIP Act, s. 16(1)(i)-(iv)*]

[para 126] The rationale behind the mandatory exception to disclosure is well understood:

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

[para 127] Further relevant decisions regarding the interpretation to be given to the three-part harms test in s. 16(1) can be found in the 2017 Order at paras. 153-188.

[para 128] On a thorough review of responses from the affected third parties [Exhibits B-F], I find the Public Body has provided sufficiently clear, convincing, and cogent evidence to meet its burden of proof for the statutory test for the s. 16 mandatory exception for *some* of the Records at Issue where claimed, which records the Public Body must refuse to disclose to the Applicants.

[para 129] The Doc Counts for the Records at Issue where s. 16(1) has been claimed are divided into three sections under Findings *infra,* as follows:

- The first section [para. 9.C.i] lists those Records at Issue where the Public Body has properly relied on and properly applied s. 27(1)(a) to refuse disclosure, in which case, it is unnecessary to consider the application of s. 16(1). For a limited number of the latter Records at Issue, however, the Public Body has established both exceptions have been properly relied on and properly applied [Section 16 Doc Counts asterisked].

- The second section [para. 9.C.ii] lists those Records at Issue where the Public Body has not met its burden to demonstrate that legal privilege has been properly applied but has met its burden of proof that s. 16(1) has been properly claimed.

- The third section [para. 9.C.iii] lists the Records at Issue where the Public Body has failed to meet its burden with respect to both the s. 27(1)(a) and s. 16(1) exceptions, which records will fall under the Interim Decision.

[para 130] One observation with respect to the CFA which is a central responsive record to the access to information requests. Contained in the expanded pages for the complete Records at Issue [Doc Counts 180-805], there are instances in the Exhibited Index of where the Title of the record is "*Retainer and Contingency Fee Agreement"* [examples: Doc Counts 205, 256, 276, 301, 319], *"Retainer and Contingency Fee Agreement - unexecuted"* [examples: Doc Counts 210, 252, 311], or *"Retainer and Contingency Fee Agreement - draft"* [examples: Doc Counts 217, 231] where s. 16(1) has consistently been claimed. No evidence has been provided by the Public Body that any of these Records at Issue were provided to the affected third parties. During the phase of the Inquiry dealing with the June 10, 2016 Records at Issue, the Public Body used the CFA as its only example of how the s. 16 exception applied. The Public Body had, at the time of making the access to information decisions, confirmed with the First Applicant by phone that the CFA was located at pages 551-564 [Doc Count 179], which pages did *not* form part of the June 10, 2016 Records at Issue. At the time, I raised this matter with the Public Body to offer it the opportunity to provide another record from the June 10, 2016 Records at Issue as an example for s. 16, which it did not provide. These pages continue to be identified in the Exhibited Index as the *"Retainer and Contingency Fee Agreement"* at Doc Count 179. As this Record at Issue was not part of the 2017 Order, it will fall under this Order *infra* but only with respect to the application of s. 27(1)(a) and not s. 16(1), as the latter exception has not been claimed by the Public Body.

ii. Section 17

[para 131] One brief comment with respect to the s. 17 mandatory exception. On November 15, 2017, in tandem with providing the responses received by the Public Body from the affected third parties in 2012, the Public Body released 17 additional records to the Applicants, which were attached to its 2017 PBSS. In footnote 17 quoted *supra,* the Public Body, after referring to Exhibits B-F, states that *"[*g*]iven that the names of these third party law firms have now been disclosed, the Public Body is now releasing 17 additional records to which section 17 is no longer applicable."* On review of the newly released records to which s. 17 had previously been applied to redact personal information [names of individuals] s. 17 was not used to redact names of *third party law firms.* Section 16 has not been applied to any of the released records located at Tab B of the 2017 PBSS. The remaining Records at Issue where s. 17 has

continued to be applied, some of which have been made available to the External Adjudicator, are described under Findings in the Table, at para. 9.G *infra*. As the Table under Findings *infra* sets out, the Public Body has released most of the records where it had relied on s. 17. For those Records at Issue where s. 17 continues to be claimed but which records were not released or made available (and for a few noted in the Table under Findings *infra*), it is unclear if the Public Body intended to continue to claim or instead to withdraw its reliance on the s. 17 exception. In its 2017 PBSS after listing legal privilege as an issue, the Public Body posed the following question as the second issue, without reference to s. 17:

> *(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 of Records?*

[para 132] The few remaining Records at Issue where the Public Body has continued to rely on s. 17, also a mandatory exception, are described under Findings *infra.*

C. Section 32: Public Interest Override

[para 133] Section 32 of the *FOIP Act* imposes a duty on a public body 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 134] The use of *"or"* at the end of s. 32(1)(a) indicates that the Legislature intended for (a) and (b) to be read disjunctively not conjunctively. This approach to the interpretation of s. 32(1) gives the language its grammatical and ordinary sense. This is consistent with what I said at para. 206 of the 2017 Order:

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

[para 135] Were the Public Body's argument to be accepted, that would mean the subparagraphs in s. 32(1) would be read conjunctively replacing the *"or"* with *"and."* Taking a purposive approach, a conjunctive reading seems inconsistent with what the public interest override is intended to achieve. If s. 32 were to be given a conjunctive reading, it could greatly tie the hands of a public body, whose statutory duty and authority to disclose information in the public interest would be restricted. There would have to be risk of significant harm to a person or group of persons, as a necessary pre-requisite to relying on the public interest override, hampering a public body's ability to rely on its own good judgment in disclosing information pursuant to s. 32. A disjunctive reading gives public bodies greater flexibility to disclose information when, for any reason, there is a compelling public interest to do so.

[para 136] 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 137] Should the Applicants satisfy their burden of proof under s. 32, in the case of those Records at Issue where the Public Body has met its burden under s. 27(1)(a), I find the s. 32 public interest override will not apply. Notwithstanding the statutory language in s. 32(2), I find the public interest override will not apply to records protected by legal privilege and that the public interest is served by preserving legally privileged information. 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 s. 32(2) public

interest override to set aside legally privileged information, 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 138] That is distinct from when a public body elects to release information pursuant to s. 32, which may include its legally privileged information, as s. 27(1)(a) gives it the discretion to do so. In the *Criminal Lawyers' Association* decision, the SCC considered the issue of the constitutionality of the public interest override given the exclusion of the legal privilege exception [s. 14(1) in Ontario] from its scope. While the s. 32 provision in the Alberta statute does not specifically exclude s. 27(1)(a) from its scope, my finding that s. 32 will not override legal privilege is consistent with the Court's reasoning:

> *The public interest override in s. 23 would add little to this process. Section 23 simply provides that exemptions from disclosure do not apply "where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption." But a proper interpretation of s. 14(1)* ***requires that the head consider whether a compelling public interest in disclosure outweighs the purpose of the exemption, to prevent interference with law enforcement. If the head, acting judiciously, were to find that such an interest exists, the head would exercise the discretion conferred by the word "may" and order disclosure of the document.***
> *…*
> ***The same analysis applies, perhaps even more strongly, to the exemption for documents protected by solicitor-client privilege.*** *Section 19 of the Act provides that a head "may refuse to disclose a record that is subject to solicitor-client privilege … or in completion of or for use in litigation." The purpose of this exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship …*
> [*Criminal Lawyers' Association,* at paras. 49 and 53]
> [Emphasis added]

[para 139] I turn to the question of whether or not the Applicants have met their burden of proof to establish that, on a balance of probabilities, the s. 32 public interest override should be applied to the information in some or all of the Records at Issue. In order to do so, the evidence and submissions of the Applicants have been thoroughly examined and evaluated to determine if they have provided sufficiently clear, convincing, and cogent evidence to meet their burden of proof of a *"compelling public interest."* It is well established that meeting this burden of proof "*is not a burden that will be easily met."*

> *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]

[para 140] In that regard, it is incumbent on an applicant who argues that s. 32 should be applied to override all other discretionary and mandatory exceptions to disclosure (other than for legal privilege as discussed *supra*) to provide sufficiently clear, convincing, and cogent *evidence.* It is not enough to provide otherwise persuasive submissions and supportive case law to advance their argument. The role of an adjudicator is to make a decision based on all the relevant evidence submitted and to consider whether that evidence is sufficient. In my opinion, a decision-maker is obliged to take into account only the evidence submitted during the Inquiry. In order for an adjudicator to be able to decide that s. 32 override applies, applicants must submit sufficiently clear, convincing, and cogent evidence to satisfy the test of *compelling public interest*.

[para 141] In order to meet their burden of proof, the Applicants made submissions and provided some evidence, detailed *supra,* highlights of which include the following:

- The Applicants argue there is an overwhelming public interest in disclosure of the Records at Issue, which relate to the possible future allocation of billions of dollars of public funds. In the name of transparency, accountability and participation in the democratic process, principles which the *FOIP Act* is intended to promote, the public ought to have access to the information. The Second Applicant stated it as follows:

  > *The politicians involved in this case have not been forthcoming with the public and have not shown they can be trusted to provide the public with accurate information, even though this legal action potentially represents tens of billions of dollars to Alberta taxpayers. There are still numerous troubling questions about how the contract was awarded.*

The monetary benefits to the public are potentially significant. The public clearly would be interested to know if the tobacco-litigation decision was in their best interest. This matter is clearly in the public interest under Section 32.

- Relying on Order 98-013, the Applicants argue that the Commissioner has held that one of the primary purposes of the legislation is *"to ensure that the public has the right to scrutinize how its tax dollars are being managed."* Disclosure of the Records at Issue could reveal significant compensation to the selected law firm group.

- At least two Alberta cabinet ministers have publicly referenced the relatively low contingency fee contained in the Records at Issue. Disclosure is required so the public can scrutinize whether the selected law firm group was an economically sound means to pursue the CRRA Litigation in keeping with the language in *Dagg* regarding meaningful participation and accountability: *"through public scrutiny of the potential future allocation of public funds."*

- Based on the claim there is a compelling public interest, the appropriate form of disclosure in this Inquiry should be to make the Records at Issue publicly accessible, rather than only disclosing them to the Applicants.

- There continue to be *"troubling questions"* surrounding the selection of counsel in the CRRA Litigation process as researched by the Applicants and as reported in the media and in the Ethics Commissioner investigation report. The exhibited evidence submitted in support consisted of news articles, Ethics Commissioner Wilkinson Investigation Report (December 2013), a statement from the Minister of Justice dated January 7, 2013, briefing notes, memorandum, emails and a link to Communications NB.

- Citing Order 99-017 a parallel is drawn with a case where the Commissioner found that information about the extent of the government's involvement in Alberta Treasury Branches' refinancing of the West Edmonton Mall was a matter of compelling interest. The Commissioner ultimately found that because the public body had instructed the Auditor General to release his/her report on the refinancing to the public, complied with the requirement for disclosure under the public interest override.

- The two access to information decisions from other provinces relied on by the Public Body that on their face are similar: BC Order F13-15 and *Hayes,* the First Applicant argues are distinguishable because public interest was not considered in either case.

[para 142] Both Applicants, in particular the Second Applicant, provided some evidence and made submissions with respect to concerns regarding the selection process of the lawyers for the CRRA Litigation, detailed *supra*. With respect to the submissions that the selection process of the lawyers for the CRRA Litigation continues to be a matter of compelling public interest, I turn to the case cited, which involved an inquiry regarding information about the financing of the West Edmonton Mall. There the adjudicator found the matter to be of compelling public interest. The adjudicator went on, however, 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, 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.*
>
> *However, the Executive Council instructed the Auditor General to prepare a report and to release that report. In Order 96-011, I said that disclosure of information, rather than records, was the*

likely outcome under section 31(1)(b). In my view, disclosure of the Auditor General's Report and the information contained in the report satisfies the requirement for disclosure under section 31(1)(b). I do not believe that disclosure of the foregoing records under section 31(1)(b) would accomplish any greater purpose than disclosure of the information contained in the Auditor General's Report.

Since the Executive Council gave instructions to release the Auditor General's Report, I find that there is compliance with the requirement of section 31(1)(b) to disclose the information. Therefore, the Public Body is not required to disclose the records under section 31(1)(b). [Order 99-023, at paras. 94-96]

[para 143] I find the evidence submitted by the Applicants falls short in providing sufficiently clear, convincing, and cogent evidence of compelling public interest under s. 32 with respect to any outstanding *"troubling"* questions regarding the selection process. Even if the Applicants had met their burden of proof in this regard, relying on Order 99-023, I find that the issue of the disclosure of information regarding the selection process has been satisfied through another process; Ethics Commissioner Wilkinson Investigation Report (December 2013), whose report was made public. No further purpose would be served by ordering the disclosure of information regarding the issue of the selection process.

[para 144] In its 2014 First AIS, the First Applicant's submissions regarding the applicability of the public interest override focussed on the issue of the compensation terms of the CFA and why disclosure of the CFA was necessary to enable the public to measure what the CFA says against public representations made government. No further evidence was submitted by the First Applicant with its 2017 First ARS. I find the evidence submitted by the Applicants falls short in providing sufficiently clear, convincing, and cogent evidence of compelling public interest under s. 32 with respect to the question of the use of public funds and the terms of the financial compensation under the CFA.

[para 145] I make the following findings with respect to the Applicants' claim the s. 32 public interest override applies to the Records at Issue:

- The Applicants bear the onus to provide sufficiently clear, convincing, and cogent evidence to satisfy the test of *compelling public interest* in order to establish that s. 32 applies to the information, a burden that will not be easily met;

- As discussed in the 2017 Order, s. 32(1)(a) and (b) of the *FOIP Act* must be given a disjunctive reading;

- The Applicants' submissions regarding public interest focussed on two aspects: the selection process of the lawyers to conduct the CRRA Litigation and the financial compensation terms under the negotiated CFA;

- I find that the evidence submitted by the Applicants for both aspects falls short in providing sufficiently clear, convincing, and cogent evidence to satisfy the *"compelling public interest"* test under s. 32;

- I find that even if the Applicants met their burden of proof with respect to there being a compelling public interest in one of the aspects: the selection process of the CRRA law firm group, because the matter has been the subject of a public report by Ethics Commissioner Wilkinson, there would be no added benefit to a release of information pursuant to s. 32; and

- The onus did not shift to the Public Body to demonstrate whether its decision to deny access to the information was rationally defensible as the Applicants did not meet their burden of proof under s. 32.

D. Waiver

[para 146] The issue of waiver arose in two contexts during the Inquiry; first, whether by making public statements about the terms of the CFA the government representatives and/or the Public Body waived privilege and second, whether the Public Body waived privilege based on the way in which the Records at Issue were provided to the author of the Opinion Letter (ruled inadmissible in the 2014 Decision/Order). Throughout the discussion on waiver, I will rely on the decision from the BCSC, which provided the test for waiver of privilege as follows:

> ***Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.*** *Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost …*
> [*S. & K.,* at para. 6]

[para 147] The *Lee* and *S. & K.* decisions were applied in a BC decision in addressing the issue of implied waiver, as follows:

> *Waiver of privilege can be explicit or implicit and is established where it is shown that the privilege holder knows of the existence of the privilege and voluntarily shows an intention to waive that privilege.*[45] *As the BC Court of Appeal recently stated, "the foundation of waiver is knowledge and intention."*[46]
>
> *The principles of fairness and consistency may require a finding that there has been an implied waiver. This can occur, for example, where part of a privileged communication has been disclosed and fairness requires that the opposing party be permitted to examine the entire communication.*[47] *However, in circumstances where fairness has been held to require implied waiver, there must still be some "manifestation of voluntary intention to waive privilege."*[48]
> [Order F17-35, at paras. 55-56]

i. Waiver and public statements made about the CFA

[para 148] Initially the issue of waiver was raised by the First Applicant at paras. 89-93 of its 2014 First AIS and by the Second Applicant at p. 5 of his/her 2014 Second AIS.

[para 149] In its 2014 First AIS, the First Applicant submitted that even if the Public Body has properly claimed solicitor client privilege over the entire Records at Issue (which it did not concede), the government has waived the privilege because it disclosed information from the Records at Issue in public statements made.

[para 150] Turning to the *Imperial Tobacco* decision in the Supreme Court of Newfoundland Labrador also dealing with tobacco related health care cost recovery, the First Applicant submitted that the Chief Justice emphasized *"the importance of government accountability to the waiver issue in the access to information context"* when he said:

> *Here,* ***the partial disclosure was not inadvertent.*** *It was done deliberately to achieve a political result - to demonstrate to the public that the government was acting in a fiscally responsible manner in the way in which it was conducting the litigation. It was ostensibly promoting itself as complying with principles of transparency …****The problem, however, with releasing only selected parts of a fee agreement in these circumstances is that the public whom the government is trying to reassure about its fiscal responsibility, has no way of judging whether the government's assertions are correct unless they see the whole document. Other provisions of the document might contain terms that detract from what has been***

disclosed or make the overall arrangement not as advantageous or fiscally responsible as represented.

Having decided to go down the road of wrapping itself in the twin flags of fiscal responsibility and transparency with a view to convincing the public of the appropriateness of its actions, it is not unreasonable to assume that the government was essentially saying that its financial arrangements with its lawyers were an "open book" and should be used as a basis for public judgment on its decisions. As such, it cannot pick and choose as to how much it will disclose in its "defence". Otherwise, it would be tantamount to saying "you can't see all the evidence; just trust us". *That would be contrary to the purpose stated in the Assistant Deputy Minister's affidavit of being "more open, transparent and accountable".*
[*Imperial Tobacco*, at paras. 112-113]
[Emphasis added]

[para 151] At para. 91 of the 2014 First AIS, the First Applicant provides examples of public statements made by the Newfoundland Labrador government which, in that case, disclosed the following: *"(1) contingency fee method of payment; (2) the percentage of the contingency fee; and (3) that external counsel would cover all costs and disbursements in relation to the claim until it was resolved."*

[para 152] The First Applicant argues that the type of information disclosed by the Newfoundland Labrador government is comparable to the kind of type of information which has been the subject of public disclosure in this Inquiry, as follows:

> *Similarly, cabinet ministers of the Government of Alberta have claimed: (1) Alberta is paying "the lowest contingency fee of any province"; (2) [t]he* [selected law firm group] *offered the lowest cost of all bids received"; (3) "[i]f this lawsuit is not successful, the Alberta taxpayers pay nothing"; and (4) that it was "in the best interests of taxpayers" to retain the* [selected law firm group]. *At the same time, the Government of Alberta has refused to disclose the terms of the Records at Issue. Like the Government in Imperial Tobacco, the Government of Alberta is in essence saying to the public "you can't see all the evidence; just trust us." Without seeing the terms of the Records at Issue, the public has no means of judging whether the Government's assertions are correct.*
> [2014 First AIS, at para. 92]

[para 153] Relying on the *S. & K.* and the *Imperial Tobacco* decisions, the First Applicant argues:

> *Through the above-mentioned disclosure of the relative contingency fees and specific terms of payment if the lawsuit is "not successful", the Government of Alberta has voluntarily evinced an intention to waive any privilege it believes exists over the financial terms contained in the Records at Issue. As a result, the Government of Alberta has waived any solicitor-client privilege over the financial terms in the Records at Issue and those terms must therefore be disclosed.*
> [2014 First AIS, at para. 93]

[para 154] At paras. 29-35 of its 2014 PBIS, the Public Body responded to the First Applicant's submissions regarding waiver arguing that various statements by representatives of the government do not evince an intention to waive solicitor client privilege over any of the Records at Issue. Citing a passage from the Alberta Hansard, the Public Body argues this is evidence that there was no intention to waive its privilege. For ease, the citation from Alberta Hansard is reproduced:

> *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.
[2014 PBIS, at para. 29]

[para 155] The passage from the Alberta Hansard reports that the Minister of the Public Body received advice from a former President of the Law Society to the effect that releasing information about a CFA would assist defendants in an ongoing lawsuit and, therefore, would be unusual and ill advised. Clearly this passage is evidence that is consistent with the Public Body's decision not to release Records at Issue over which it claimed privilege. However, the passage does not specifically address the issue of waiver. The third party opinion read into Hansard does not directly address the issue of whether particular public statements made by the government constitute waiver over specific records. I find that this evidence does not rebut the argument advanced by the First Applicant that the Public Body has waived privilege over information in specific records described as the CFA, which information has been the subject of public statements.

[para 156] The *Hayes* decision held that similar public statements by government about CFAs constituted partial waiver:

> *As for the other facts disclosed in the press release, viz., that they were hired on a contingency fee basis and what the potential percentages are, that is information which could find its way into the public domain … In my view the disclosure of a discrete term of the agreement containing information which may be in the public domain in any event* ***constitutes a partial waiver but does not evince an intention to waive privilege over the whole agreement.***
>
> *Having found that there was a partial waiver by the Province, I must now consider the question of whether or not fairness and consistency demand that full disclosure of the agreement be made in this case. In their text Solicitor-Client Privilege in Canadian Law,* (1993) Manes and Silver state at p. 192:
>
> > *1.04 Unless the communication is severable because it deals with different subject matters, where there is a partial waiver of a privileged communication, the whole communication must be disclosed. Furthermore, a party is not entitled to disclose only those parts of a document which are to the party's advantage.*
>
> ***In order to determine whether or not a partial waiver demands full disclosure in the interests of fairness and consistency the Courts should examine all the circumstances to determine whether or not the partial disclosure could be misleading.***
> [*Hayes,* at paras. 20-22]
> [Emphasis in original and added]

[para 157] In that case because the contingency agreement had been filed with the Court, Judge Grant had the opportunity to review it. Based on his review of the agreement, the Judge found full disclosure was not required for fairness and consistency because he was satisfied the information released was severable and its disclosure would not be misleading [*Hayes,* at para. 23].

[para 158] The Public Body relied on a BC decision as a precedent that where a public body's disclosure of some information (in that case, the disclosure was about the existence of legal advice) did not waive privilege over all of the communication, as follows:

> *However, given the circumstances,* ***this is not a case where waiver of part of a privileged communication should be held to be waiver as to the entire communication.*** *There was nothing to indicate that when the CRD disclosed what it did about the privileged communications with its solicitor that it intended to mislead or cause unfairness, nor is there any indication that it did in fact have that effect. In my view, merely disclosing the existence and gist of the legal advice in order to explain that the advice had informed the CRD's actions should not amount to an implied waiver over all of the privileged communications contained in the Record. This finding is*

> *consistent with court decisions and other BC Orders, which have held that disclosing that legal advice was received and relied on, or revealing the mere gist, summary or conclusion of that advice is not sufficient to imply a waiver over the whole of the privileged communications absent any unfairness. Further, this approach reflects the fundamental purposes of freedom of information legislation because it recognizes the need for accountability on the part of public bodies without impinging on their right to maintain confidentiality over privileged communications.*
> [Order F15-09, at para. 20]
> [Emphasis added]

[para 159] The Public Body relies on *Hayes* and the BC decision arguing public statements by government representatives were not sufficient to evince an intention to waive privilege over similar agreements. The Public Body argued that these decisions are in line with this Inquiry but went on to submit that even if public statements amount to partial waiver over various aspects of the CFA, the Public Body submits this does not amount to waiver over all the remaining information:

> *Alberta Justice also submits that, even if some of the comments made by members of Government to disclose some aspects of the Contingency Fee Agreement constitute a partial waiver to the extent of that information, this does not justify disclosure of any of the other information about the Contingency Fee Agreement.*
> [2014 PBIS, at para. 32]

[para 160] Waiver over aspects of the CFA will not necessarily amount to waiver over the whole of the CFA or all of the Records at Issue. The foundation of waiver is knowledge and intention. Fairness and consistency will require implied waiver where there is some manifestation of voluntary intention to waive privilege. The *Imperial Tobacco* decision said:

> *In principle, a contingency fee agreement which provides for the scope of the retainer, the fees payable and the manner of their payment in discharge of the retainer would not be expected to provide a means of ascertaining the nature of legal advice passing between lawyer and client, nor would it contain the type of information going to the merits of the matter at issue that would be necessary for the lawyers to have in order to be able to give legal advice.*
> *…*
> *What was being talked about at the press conference and subsequent interviews was the manner in which government was going to pay for retained legal services. That is the very thing that a contingency fee agreement can be expected to address. In their public statements government officials and the lawyer gave no indication that they were under any constraint as to the degree of information they felt able to disclose in response to questioning. They can be taken therefore to have approached the discussion of the subject matter of the contingency fee agreement as if it was in the public domain. It would have been a simple thing for the government officials to state, as part of their public statements, that they were limited in what they were able to discuss because the actual agreement contained other information on which legal advice was to be based and to disclose it would prejudice the government's position.*
> [*Imperial Tobacco,* at paras. 96 and 114]

[para 161] At para. 32 of its 2014 PBIS, the Public Body acknowledged that public statements that disclosed parts of the CFA could constitute partial waiver: *"Alberta Justice also submits that, even if some of the comments made by members of Government to disclose some aspects of the Contingency Fee Agreement constitute partial waiver to the extent of that information, this does not justify disclosure of any other information about the Contingency Fee Agreement*." In a similar case, the adjudicator found:

> *Public announcements about the existence of BC Action, the identity of the Province's lawyers, and that a consortium had been hired reveal facts that would, in due course, become part of the usual public record in a lawsuit. On the other hand, by disclosing how the lawyers would be paid (i.e., fee-for-service, contingency basis and percentages), the Province revealed details of communication that would normally not be disclosed outside the solicitor-client relationship. By*

doing so, I find the Province waived privilege over that part of the information that pertains to how the lawyers would be paid.
[Order F13-15, at para. 25]

[para 162] I agree with the Public Body that the public statements made do not necessarily constitute waiver over *all* of the Records at Issue, given the stature of legal privilege. I find it unnecessary, in these circumstances, to consider whether or not fairness dictates a waiver over the all the Records at Issue. It is conceivable that the public statements referencing terms of the CFA referred to information within the CFA that the Public Body did not consider to be legally privileged, as certainly public disclosure of this information establishes that the *Solosky* criteria that the communication must remain confidential no longer attached.

[para 163] With respect to whether by making public statements about the terms of the CFA, the Alberta government and/or the Public Body waived privilege, I make the following findings:

- The content of the public statements made by the Alberta government were specific and related to the terms of the CFA: lowest of any province with similar health recovery lawsuits, if unsuccessful taxpayers do not pay fees or disbursements, and lowest bid received;

- I find that the Alberta government representatives who made public statements about the CFA were authorized to speak on behalf of the Public Body or the Alberta government;

- While the Exhibited Index refers to many of the records with reference to the CFA in one way or the other, the Public Body specifically advised the First Applicant by phone (a recording of which was tendered into evidence in the Inquiry) that the CFA is located at pages ABJ000551-ABJ000564 [Doc Count 179] in the Exhibited Index;

- The majority of the Records at Issue that refer to the CFA have claimed s. 16(1) alongside s. 27(1)(a). But the Public Body did not claim any mandatory exceptions for Doc Count 179, in particular, it did not claim s. 16;

- The June 10, 2016 Records at Issue that were provided to me included records over which legal privilege had been claimed. The package did not include Doc Count 179;

- During the phase of the Inquiry regarding the June 10, 2016 Records at Issue, the Public Body made its argument regarding the application of s. 16 by referring to the CFA at Doc Count 179. This was an error as Doc Count 179 was not part of the June 10, 2016 Records at Issue.

- The Exhibited Index reveals that the Public Body has claimed exceptions *"25(1)(c)(i), 27(1)(a) and 27(1)(b)"* for Doc Count 179;

- With respect to s. 25(1)(c)(i), the Public Body submitted that in order to prove that disclosure of information could reasonably be expected to result in financial loss to the Public Body or the Alberta government, it was not required to provide evidence to that effect and, in fact, no evidence was proffered regarding the application of s. 25(1)(c)(i). I find that the Public Body has failed to meet its burden of proof to establish that it properly relied on or applied s. 25(1)(c)(ii) for Doc Count 179;

- As described in the Findings *infra,* the Public Body has not satisfied its burden of proof with respect to s. 27(1)(a) for Doc Count 179. Regardless, as decided *infra* to the extent to which there is any information that is subject to legal privilege, that privilege has been partially waived;

- I find that the public statements made by the Public Body or the Alberta government revealed information contained in the CFA and in doing so waived its legal privilege over some of the information in this record. This finding does not apply to the entire Record at Issue at Doc Count 179 or to any other Records at Issue;

- I find the public statements made about some of the specifics of the CFA amount to a manifestation of voluntary intention to waive privilege. That is, partial waiver over specific information about which public comment was made. Specifically, information in Doc Count 179 that confirms the term(s) of the CFA about the contingency fee arrangement/rate, the term(s) that confirms the non-payment of fees and disbursements if the lawsuit is unsuccessful and the term(s) that confirms the contingency fee is the lowest in the country when compared with other jurisdictions where tobacco recovery litigation is being pursued;

- Without the Records at Issue available to conduct a review, it is for the most part, impossible to identify with any certainty where the information that was publicly disclosed is located in the Records at Issue. I find, however, that the CFA, based on direct evidence from the Public Body, is found at Doc Count 179; and

- I find the Alberta government representatives speaking publicly constitutes partial waiver over those terms of the CFA about which public statements have been made. In the result, the Public Body has waived its privilege over some of the information in the Record at Issue at Doc 179, the release of which will form part of the Order *infra*.

ii. Waiver and the provision of the Records at Issue to the author of the Opinion Letter

[para 164] The second context in which the issue of waiver arose was during the phase of the Inquiry challenging the admissibility of evidence proffered by the Public Body. Shortly after the exchange of the 2014 initial submissions, the First Applicant raised its PEO regarding the admissibility of evidence submitted by the Public Body with its 2014 PBIS. During the phase of the Inquiry dealing with the PEO, the issue of waiver arose in the course of deciding whether the evidence to which the First Applicant had objected was admissible. The Public Body had provided the Records at Issue to an outside third party to obtain an opinion (not tendered as a legal opinion or as an expert opinion) regarding whether the Records at Issue were protected by legal privilege. The Public Body did not submit any information regarding the basis on which it had provided the Records at Issue to the author at the time the Opinion Letter was submitted into evidence with its 2014 PBIS.

[para 165] In the 2014 Decision/Order, I raised and discussed the issue of waiver as it related to the evidence proffered by the Public Body, to which the Applicants had objected. In that regard, I refer to paras. 83-117 and 169 of the 2014 Decision/Order, which are reproduced, in part, as follows:

> *The Public Body seeks to defend its decisions not to disclose the Records at Issue to the Applicants based primarily on its reliance on the legal privilege exceptions in s. 27(1) of the FOIP Act, which it has applied to the majority of the Records at Issue that have been withheld. To do so, the Public Body has chosen to solicit an opinion from an outside person, the author, and may have, inadvertently, gone beyond what will interfere the least with the privilege in accordance with the Descôteaux formula or because to do so was absolutely necessary as required by the Goodis decision.*
>
> *The FOIP Act provides the framework for the Commissioner or her delegate that permits incursion on legal privilege solely for the purpose of giving effect to the purposes of the statute. [Central Coast, at para. 50; Newfoundland and Labrador (Information and Privacy Commissioner), at para. 84] How the Public Body has chosen to proceed in this Inquiry is not the procedure set down by statute for the independent review and examination of the Records at Issue and is, in fact, a major deviation. This gives rise to the issue of waiver, to which I now turn.*
>
> *For the sake of clarity, the discussion of waiver in this Decision relates solely to a matter arising during the Preliminary Evidentiary Objection.*
> *…*
> *As the "client" in relation to any Records at Issue that may be protected by solicitor-client privilege, the Public Body is the "owner" of the privilege and the only one who can waive it.*

As to the effect of the filing of the experts' reports and legal opinions in the other proceedings and the reference to them in affidavits and transcripts in those other proceedings, waiver must be done by or on behalf of the party that owns the privilege.

> *[Western Canadian Place Ltd. v Con-Force Products Ltd., 1997 CanLII 14770 (ABQB),* at para. 26*]*
> *[Emphasis added]*

It appears that the Public Body has not taken any precautions with respect to the disclosure of the Records at Issue to the author. While evidence in administrative tribunals does not need to be in affidavit form or sworn under oath or affirmed, given the fact that the Records at Issue may be protected by legal privilege, caution may have dictated that the author provide his or her evidence in affidavit form and state therein the instructions s/he received from the Public Body with respect to protecting the Records at Issue against disclosure and the obligation to respect their confidentiality. The Public Body chose not to put the Opinion Letter in affidavit form, which it was not required to do, despite having proffered other evidence with its Initial Submissions regarding legal privilege that are in affidavit form. Had the Public Body put protections in place vis a vis the Records at Issue, it may have been prudent to have the conditions the author agreed to, if there had been any, attested to in an affidavit to demonstrate an intention to protect the Records at Issue from disclosure, particularly information over which the Public Body has claimed legal privilege.

There is no evidence that any safeguards were put in place by the Public Body in its retainer with the author of the Opinion Letter who was given access to the original Records at Issue.

> *Once a document is disclosed, it is exposed for all purposes, and nothing can be done to make it secret again.*
> *[Imperial Oil Limited v Alberta (Information and Privacy Commissioner), 2014 ABCA 231,* at para. 37*; citing Alberta (Provincial Treasurer) v Pocklington Foods Inc.,1993 ABCA 69,* at paras. 21-31*; Alberta (Information and Privacy Commissioner) v Alberta Federation of Labour, 2005 ABQB 927,* at para. 34*]*

In the Interprovincial Pipe Line case, the Court discussed waiver for a limited purpose. In that case, unlike here, there was a statutory obligation to provide privileged information to outside auditors for the purpose of a legislated purpose where there was no intention to waive the privilege. Courts have cautioned how to approach such situations.

> *If the doctrine of limited waiver is to be relied on in future in similar circumstances, it would appear to me to be* ***the prudent course of action to set forth in writing the client's intent regarding limited waiver in any disclosure to its auditors of solicitor-client privileged information and in the formal arrangement between the client and its auditors.***
> *[Interprovincial Pipe Line Inc. v MNR, [1996] 1 FC 367,* at p. 12*]*
> *[Emphasis added]*

While there is no indication the Public Body intended to waive its privilege, there is also not a scintilla of evidence that the Public Body gave any attention to making adequate provision for protection of the Records at Issue in its retainer with the author. And, unlike in the Interprovincial Pipe Line case, here there was neither a legal obligation nor the legal authority to provide the privileged information to an outside person. In the Opinion Letter the author makes no reference to the importance of the confidentiality of the Records at Issue generally or to any protections s/he was asked to observe regarding the purported privilege of the Records at Issue in the Inquiry specifically.

…

Is there the potential that the release of the Records at Issue to a third person without legislative authority or requirement to do so and absent any protections to safeguard the Records at Issue

embodied into the retainer of the author of the Opinion Letter could constitute waiver of the privilege over the Records at Issue? This is problematic and potentially detrimental. ***I do not, however, need to decide if there has been waiver or limited waiver at this stage.*** *How the potential for waiver relates to the fairness imperative for all parties becomes the next consideration, to which I now turn.*
[2014 Decision/Order, at paras. 83-85, 89-93, and 99]
[Emphasis in original and added]

[para 166] At para. 169 of the 2014 Decision/Order, I made it clear that I was not making any finding with respect to whether the conduct of the Public Body amounted to waiver or limited waiver, by stating:

> *I am exercising my discretion to find the Opinion Letter inadmissible in the Inquiry. I base the exercise of my discretion on the following grounds (which have been discussed in detail supra), all of which I consider to be compelling reasons to find the Opinion Letter inadmissible:*
>
> 1. *By disclosing the Records at Issue to an outside person in order to solicit an opinion without any legislative protections or terms and conditions in the retainer of that person, the Public Body may have waived privilege. Given the unquestionable stature of legal privilege, I am not prepared to place the potentially legally privileged Records at Issue at further risk. Even if what has transpired to date amounts to limited waiver, I find the potential for future difficulties were the Opinion Letter to remain in evidence, with respect to achieving fairness for the Applicants, very problematic, unnecessary and thus to be avoided. The admission of the Opinion Letter poses too high a risk of the potential for waiver of the legal privilege claimed over the Records at Issue. I make no finding with respect to whether or not releasing the Records at Issue to the author of the Opinion Letter constitutes waiver or limited waiver. I find, however, that in order to preserve the integrity of the Records at Issue over which legal privilege has been claimed, the Opinion Letter should not be admitted into evidence in the Inquiry.*

[para 167] On June 10, 2016 the Public Body provided a portion of the Records at Issue including records over which it claimed legal privilege. The Public Body's cover letter accompanying the June 10, 2016 provided, in part, as follows:

> ***NON-WAIVER***
>
> *The Ministry is providing the enclosed records to your office on the following understanding:*
>
> *(a) The provision of the enclosed records to your office* ***is without prejudice*** *to the Ministry's position that the Ministry is not required under the proper interpretation of section 56(3) of the Act to produce any records to your office with respect to which the Ministry asserts legal privilege, including solicitor-client privilege.*
>
> *(b) The Ministry* ***does not waive any legal privilege, including solicitor-client privilege, vis-à-vis your office (or External Adjudicator)*** *with respect to any of the other records which the Ministry has declined to produce to the External Adjudicator.*
>
> *(c) The Ministry* ***does not waive any exception (including but not limited to solicitor-client and any other legal privilege)*** *to the disclosure of any of the enclosed records to the applicants. The Ministry continues to assert that the enclosed records are excepted from disclosure to the applicants.*
>
> [Emphasis in original and added]

[para 168] I accepted the June 10, 2016 Records at Issue on a non-waiver basis as set out by the Public Body in its cover letter. I have consistently held that by providing these Records at Issue to me, the Public Body has not waived its legal privilege over the small number of records provided on June 10, 2016 to the extent they contained legally privileged information. The adjudication of the June 10, 2016

Records at Issue was completed and resulted in the 2017 Order, which the Public Body has since made an application for judicial review, which has yet to be heard. The portion of the records that were the subject of the 2017 Order are not part of the remaining Records at Issue being considered during this part of the Inquiry.

[para 169] The Public Body provided additional Records at Issue in January 2017 resulting in the issuance of the 2017 Notice, signalling the continuation of the Inquiry. All parties were advised that if the Public Body continued to rely on Opinion Letter evidence that I had ruled was inadmissible, the possibility of waiver raised as *obiter* in the 2014 Decision/Order would be added as an issue in the Inquiry.

[para 170] As stated in the 2014 Decision/Order, the issue of waiver as it related to the Opinion Letter that was ruled inadmissible was intended solely for that phase of the Inquiry triggered by the PEO. In the 2017 Notice to the parties, I alerted the parties to the conditions on which another aspect of waiver would be added an issue as the Inquiry moved forward. The history was outlined in my January 26, 2018 correspondence to the parties, as follows:

> *This letter acknowledges receipt of the Public Body Reply to the Rebuttal Submissions of the Applicants [Reply] dated January 17, 2018. In the usual course of an Inquiry, after all the final submissions have been exchanged, all parties would be receiving a communique advising that the exchange of submissions was concluded and that a decision would be forthcoming.*
>
> *The deviations throughout this Inquiry have caused considerable delay in concluding the matter. It is disappointing to have to correspond with the parties at this juncture regarding one further issue. After five years since the filing of the requests for access to information, for me to propose a further step is unfortunate but I believe necessary to ensure the Inquiry has the benefit of comprehensive arguments from the parties.*
>
> *In its Reply, the Public Body stated at para. 18:*
>
> > ***However, as the Applicants have raised the issue of waiver in their submissions, the Public Body provides the following response, reserving its right to file further materials with respect to the issue of wavier*** **[sic].**
>
> *Immediately after making that statement, the Public Body went on in its Reply to provide argument and case law regarding the issue of waiver.*
>
> ***The only question at this time is how to respond to the Public Body's claim to having a right to file further materials. It is not necessary to comment on whether the Public Body has the right it claims, but rather will rely on my discretion regarding procedural matters related to the conduct of an Inquiry in deciding how to proceed.***
>
> *In the Notice of Continuation of the Inquiry dated September 20, 2017, I stated the following:*
>
> > *Should the Public Body attempt to continue to rely on the unsworn letter report [dated July 2, 2014] that was submitted as part of its 2014 Initial Submission (held to be inadmissible evidence in the 2014 Decision/Order) and fail to comply with the evidentiary requirements outlined above, I propose to add the following as Issue #9 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.*

In correspondence to all of the parties dated September 22, 2017, I once again notified the parties that ***if the Public Body failed to provide the substantive evidence laid out in detail in the Notice of Continuance and continued to rely on the Opinion Letter, that the following would be added as an issue in the Inquiry.*** *That letter stated the following:*

> *As the Notice of Continuance states, should the Public Body attempt to continue to rely on the unsworn letter, I proposed to add an Issue #9 in the Inquiry regarding waiver, as follows:*
>
> > *Should the Public Body attempt to continue to rely on the unsworn letter report [dated July 2, 2014] that was submitted as part of its 2014 Initial Submission (held to be inadmissible evidence in the 2014 Decision/Order) and fail to comply with the evidentiary requirements outlined above, I propose to add the following as Issue #9 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.*

Both Notices to the parties made it clear that there were two requirements *(conjunctive) that the Public Body had to meet or the issue of waiver, as outlined, would be added as an issue. In its Supplementary (Initial) Submission, the Public Body met one of the two requirements by providing substantive evidence attesting to legal privilege in affidavit form.*

With respect to the second requirement, however, the Public Body has elected to continue to rely on the Opinion Letter as part of its evidence in its Supplementary (Initial) Submission, which was its decision to make. In that regard, at para. 26, the Public Body Supplementary (Initial) Submission dated November 15, 2017 stated:

> *In addition to the affidavits of … submitted as evidence in this inquiry, the Public Body continues to rely on the report prepared by retired Justice [*name*], and its submissions regarding that report dated September 12, 2014, recognizing that the decision of the External Adjudicator regarding the admissibility of that report has been judicially reviewed and is currently stayed. [Emphasis added]*

*The First Applicant in this Inquiry has addressed the issue of waiver in its Rebuttal Submission in response to the Public Body's Supplementary (Initial) Submission. In [*his/her*] Rebuttal Submission, the Second Applicant has chosen to rely on the submissions of the First Applicant with respect to all issues.*

To be clear, admissibility of the Opinion Letter is the subject of Decision F2014-D-03/Order F2014-50 [2014 Decision/Order] and is not presently an issue in this Inquiry. In the 2014 Decision/Order, I made no finding or decision as to whether there had been a waiver of privilege and, therefore, the issue of waiver is live and not res judicata. ***The issue with respect to waiver is clearly stated in both notices supra and does not relate to the Opinion Letter itself. The issue is whether the Public Body has waived legal privilege over any of the Records at Issue.***

> ***With a view to procedural fairness, I am responding to the Public Body's reservation to file further materials by inviting it to make one further submission on the sole issue of waiver. Similarly, with fairness in mind, after the Public Body provides its Supplementary Reply Submission in regard to the issue of waiver, both of the Applicants, if they elect to do so,*** *will have the opportunity to provide a Supplementary Rebuttal Submission, again, on the sole issue of waiver. I urge the parties to contain their respective submissions to the sole issue of waiver as outlined in the Notices they received.*
>
> *I would appreciate all of the parties providing their respective submission in accordance with …*
> [Emphasis in original and added]

[para 171] With its 2017 PBSS, the Public Body provided the 2017 Affidavit of Records and Exhibited Index but also continued to rely on the evidence ruled inadmissible in the 2014 Decision/Order. At para. 26, the Public Body indicated its intention to continue to *"rely on the report prepared by retired Justice* [*name*], *and its submissions regarding that report dated September 12, 2014."* arguing the order was stayed pending the judicial review application (which has yet to be heard). The 2017 PBSS did not address the issue of waiver limiting its submission to the two issues it stated at para. 11 of its 2017 PBSS, listed *supra*.

[para 172] In its 2018 PBRS, the Public Body provided a reply to the issue of waiver, though it stated that the issue of waiver was not part of the Inquiry. The Public Body submitted, at the time the exchange of submissions were coming to a close, it was claiming the right to file further materials, as follows:

> *However, as the Applicants have raised the issue of waiver in their submissions, the Public Body provides the following response, reserving its right to file further materials with respect to the issue of wavier* [sic].
> [2018 PBRS, at para. 18]

[para 173] This claim resulted in my soliciting additional submissions from all the parties solely on the issue of waiver. On February 9, 2018, the Public Body provided its 2018 PBSS Waiver. The Public Body's submission included an affidavit of in-house counsel [2018 Waiver Affidavit]. Exhibited to the 2018 Affidavit from in-house counsel was a copy of the *"the retainer agreement"* [Retainer]. The affiant swore the following, at para. 6:

> *I was involved in the preparation of the retainer between the Province of Alberta and* [author of the Opinion Letter]. *Careful consideration was given about how best to provide access to the Privileged Documents, given that they were being withheld from the Applicants because of legal privilege.*

[para 174] The affiant goes on in his/her 2018 Waiver Affidavit to reproduce the Non-Disclosure clause in the Retainer. The clauses s/he reproduces is cited by the affiant as clause 10(a) through (e). In Exhibit A, the Non-Disclosure clause, in fact, appears at clause 6(a) through (e), not clause 10.

[para 175] On a review of the evidence provided by the Public Body, I make the following observations:

- A copy of the Retainer is attached to the 2018 Waiver Affidavit as Exhibit A.
- Exhibit A referred to as a Retainer is an agreement documenting that the author of the Opinion Letter was retained to provide services, not a legal opinion.
- All nine pages of the copy of the Retainer to which the author of the Opinion Letter is signatory are provided.
- The author of the Opinion Letter is referred to and signs the Retainer agreement as the *"Expert."*
- The signatures for the author and the representative of the Province appear on different last pages of the Retainer and the content of the signed pages is not the same on the respective signed pages.

- On a complete read of the exhibited information, not all of the paragraphs match: the author's copy has 25 paragraphs while the other copy signed by the government representative has 29 paragraphs.
- The copy of the Retainer to which the signature of the author of the Opinion Letter is affixed includes the Non-Disclosure clause attested to by the affiant in his/her 2018 Waiver Affidavit.

[para 176] Some of the observations *supra* are included because the Retainer refers to the author of the Opinion Letter as an *"Expert"*, which s/he was not put forward or qualified as when the Public Body introduced the Opinion Letter into evidence and in order to acknowledge that the First Applicant provided submissions regarding the deficiencies in the Retainer. The latter raise issues that are beyond my delegated authority.

[para 177] For the purpose of this Inquiry, the only issue for me to decide is whether I am satisfied, on a balance of probabilities, that the Public Body's conduct did or did not constitute waiver of its legal privilege as a result of how the Records at Issue were provided to the author of the Opinion Letter.

[para 178] At para. 10 of its 2018 PBSS Waiver, the Public Body cited the *Lee* decision arguing that the foundation of waiver is knowledge and intention: waiver of privilege will usually be established where the owner of the privilege knows of its existence and voluntarily evinces an intention to waive it. The Public Body argued that it *"took pains"* to maintain confidentiality over the privileged information when it provided the Records at Issue to the author of the Opinion Letter. Further, the Public Body argued that there is no evidence it did anything to evince an intention to waive legal privilege *vis à vis* the provision of some of the Records at Issue [564 pages] to the author of the Opinion Letter.

[para 179] The Public Body attached the exhibited Retainer to the 2018 Waiver Affidavit, in which the affiant attested to the protections that were put in place in providing the records to the author of the Opinion Letter, which it provided with its 2014 PBIS. Because this evidence did not accompany the Opinion Letter when it was entered into evidence in 2014 and was not tendered until 2018, I pose a question: Is there any other evidence to demonstrate, to borrow language from para. 14 of the 2018 PBSS Waiver, that the Public Body has *"consistently treated the records with the utmost care in order to avoid waiver and to ensure strict confidentiality of the information"*?

[para 180] In answering the question, while the June 10, 2016 Records at Issue are the subject of the 2017 Order and those records do not form part of this Interim Decision/Order, the prior conduct of the Public Body in this Inquiry is instructive. The correspondence from the Public Body accompanying those records, which included information over which legal privilege had been claimed, has been reproduced *supra* at para. 167 but for emphasis is included in part as follows.

> ***(b) The Ministry does not waive any legal privilege, including solicitor-client privilege, vis-à-vis your office (or External Adjudicator) with respect to any of the other records which the Ministry has declined to produce to the External Adjudicator.***
> [Emphasis added]

[para 181] The provision of the June 10, 2016 Records at Issue to the External Adjudicator did not waive legal privilege over those records that were the subject of the 2017 Order. The Public Body provided them to me, and they were accepted by me, on a non-waiver basis.

[para 182] Subsequently, on September 7, 2016, after the issue of waiver had been raised, the Public Body's correspondence referred back to the June 10, 2016 cover letter, as follows:

> *With respect to the suggestion that the Ministry has waived privilege:*
>
> *(a) The Ministry has specifically not waived privilege. I refer you to my letter to you dated 10 June 2016, which unequivocally asserts the Ministry's non waiver of privilege. The Ministry's position has not changed.*

[para 183] In addition, as noted in the review of the submissions *supra,* the Public Body referred to the affidavit evidence where it *"continued to expressly maintain privilege over the Refused Records",* listed as: the 2014 FOIP Advisor Affidavit, at para. 5; the 2014 FOIP Director Affidavit, at para. 18; and the 2017 Affidavit of Records, at para. 25.

[para 184] With respect to whether the Public Body waived privilege based on the way in which the Records at Issue were provided to the author of the Opinion Letter, I make the following findings:

- It may have been an oversight on the part of the Public Body that it did not include evidence of the Retainer as an integral part of the Opinion Letter when it was proffered into evidence with its 2014 PBIS to establish the basis on which the Records at Issue were given to its author. The reason why this is important is because by failing to provide evidence about the Non-Disclosure clause as part of the Opinion Letter is inconsistent with the Public Body's later conduct. One example, referred to *supra,* is how clear the Public Body was with respect to the basis on which it provided the June 10, 2016 Records at Issue over which it had claimed legal privilege to me. Failure to include provide information about the protections *vis à vis* the Opinion Letter is the one example of where the Public Body has not been clear and forthcoming, in a timely fashion, about demonstrating the steps it has taken to protect its legally privileged information;

- Proof of the steps the Public Body took to protect the Records at Issue, over which it had claimed legal privilege, when they were provided to an outside third party, such as the Non-Disclosure clause of the Retainer, ought to have been treated as an integral part of the Opinion Letter. Failure to do so leaves the Public Body open to the suggestion that it has failed to be able to demonstrate that it consistently protected legally privileged records;

- The Retainer identifies the author of the Opinion Letter as the "Expert", which, based on a decision in the 2018 First ASRS Waiver [*Chernetz*, at para. 10], may also explain why the Public Body was reluctant to provide the Retainer as part of the Opinion Letter. After all, the Public Body did not proffer or qualify the author as an expert when the Opinion Letter was submitted into evidence. It was not until the 2017 PBSS that the Public Body referred to the author as an expert, and then only once;

- The Non-Disclosure clause in the Retainer is evidence that the Public Body provided the records over which it had claimed privilege on a confidential basis and as such is sufficient to support a finding that the Public Body did not explicitly or implicitly intend to waive privilege when it provided the author of the Opinion Letter with the 564 pages of Records at Issue in 2014;

- The terms of the Retainer exhibited to the 2018 Waiver Affidavit, in particular, the Non-Disclosure clause, are consistent with the Public Body's declarations throughout this Inquiry in its correspondence and in its submissions, that it had knowledge of the legal privilege, had no intention to waive its privilege and took reasonable precautions to protect its privileged information;

- Notwithstanding the Public Body's failure to reference the Non-Disclosure clause of the Retainer at the time the evidence was submitted, as discussed *supra,* I find that in 2018, the Public Body provided me with sufficiently clear, convincing, and cogent evidence to support the finding that the Public Body did not explicitly or implicitly intend to waive legal privilege over any of the 564 pages of Records at Issue when it provided records to the author of the Opinion Letter; and

- In the 2014 Decision/Order, I made no finding with respect to the issue of waiver of legal privilege and, therefore, my findings with respect to waiver herein do not affect the 2014 Decision/Order that held the Opinion Letter is inadmissible.

VI. FINDINGS

[para 185] I make the following findings in this Inquiry for Case Files #F6525 and #F6761:

1. I find that the Public Body has provided sufficiently clear, convincing, and cogent evidence to discharge its burden of proof under s. 71(1) of the *FOIP Act* with respect to its reliance on the exception under s. 27(1)(a) for the Records at Issue described at para. 9.A *infra*. For those Records at Issue where the Public Body has properly relied on and properly applied solicitor client privilege and/or litigation privilege, I find the Public Body has properly exercised its discretion to withhold the legally privileged records from the Applicants because the public interest is served by preserving legal privilege. I find that for those Records at Issue where the Public Body has met its burden of proof to establish that one or both legal privileges apply under s. 27(1)(a) described at para. 9.A *infra*, it will be unnecessary to consider s. 16(1) for those Records at Issue described at para. 9.C.i and para. 9.C.ii *infra*. For some of the latter Records at Issue described at paras. 9.C.i *infra*, I find the Public Body has met its burden of proof with respect to s. 27(1)(a) *and* s. 16(1) for the Doc Counts marked with an asterisk. None of these Records at Issue will fall under the Interim Decision.

2. I find the Public Body has failed to provide sufficiently clear, convincing, and cogent evidence to discharge its burden of proof under s. 71(1) of the *FOIP Act* with respect to its reliance on the exception under s. 27(1)(a) for the Records at Issue described at para. 9.B.i *infra.* The Records described at para. 9.B.i *infra* will fall under the Interim Decision except those where the Public Body has met its burden of proof with respect to s. 16(1), as discussed in the paragraphs that follow *infra*.

3. In its 2014 PBIS, the Public Body argued that if there was any doubt about the application of s. 16, all the affected third parties should be given notice of the Inquiry. With its 2017 PBSS the Public Body provided evidence as Exhibits B-F to the 2017 Affidavit of Records. With respect to the s. 16(1) mandatory exception, notwithstanding claims otherwise, there is no evidence that the Public Body provided the affected third parties with *notice of the Inquiry.* I find the Public Body did provide the affected third parties with notice of the access to information requests. It is clear from the contents of the correspondence from the affected third parties that they received the notice pursuant to s. 30 of the *FOIP Act* indicating the Public Body was possibly considering giving access to Records at Issue containing their information (though a copy of the Public Body's notice was not submitted into evidence). In the exhibits to the 2017 Affidavit of Records, the Public Body submitted the correspondence it received in August 2012 from five affected third parties (Exhibits B-F), all refusing to provide their consent to the disclosure of all or part of the Records at Issue containing their business information. Despite the Public Body's delay in producing this evidence in the Inquiry (over 5 years from when it was provided to the Public Body in 2012 and when it was provided by the Public Body in 2017), I find the information of the affected third parties provided in Exhibits B-F of the 2017 Affidavit of Records is relevant and sufficiently clear, convincing, and cogent evidence to discharge the burden of proof under s. 16(1). For some of the Records at Issue where the Public Body has failed to meet its burden of proof that one or both legal privileges apply under s. 27(1)(a), described at para. 9.B.i *infra,* I find the Public Body has, on the basis of the exhibited evidence submitted with the 2017 Affidavit of Records, provided by the affected third parties, met its burden of proof with respect to its reliance on the s. 16(1) mandatory exception for the Records at Issue described at paras. 9.C.i and 9.C.ii *infra.* These Records at Issue have properly been withheld from the Applicants and will not fall under the Interim Decision.

4. For some of the Records at Issue where the Public Body has failed to meet its burden of proof that legal privileges apply under s. 27(1)(a), described at para. 9.B.i *infra,* I find the Public Body has failed to provide sufficiently clear, convincing, and cogent evidence to discharge its burden of proof with respect to the s. 16(1) mandatory exception for some of the Records at Issue, described at para. 9.C.iii *infra.* These Records at Issue will fall under the Interim Decision.

5. Where the Public Body relied on and applied s. 27(1)(a) to the Records at Issue it also relied on other mandatory and discretionary exceptions, including s. 16(1) as discussed *supra*. Some of the Records at Issue have been disclosed to the Applicants, the release of which has spanned from the time of the

access to information requests (98 pages in August/September 2012, 154 pages in September 2016, 1 page in June 2017) to the time of the 2017 PBSS, when the Public Body attached 20 additional pages of records at Tab B. Some of the Records at Issue were provided to the External Adjudicator as a package in January 2017, details of which are outlined in the Table at para. 9.G *infra.* Of these 40 pages of records provided by the Public Body, at the time of the writing, the package actually contains *10 Records at Issue* as laid out in the Table *infra* (this is because the other records in the Table are not part of the Inquiry: including records that are described as non-responsive, some of which have been referred to another forum; records that have been released to the Applicants; and records that were June 10, 2016 records, which are the subject of the 2017 Order). This finding is with respect to the application of the s. 17 mandatory exception for those Records at Issue made available to me (where s. 27(1)(a) has not been claimed). The Public Body has withdrawn its reliance on s. 17 for the majority of these Records at Issue where it was claimed, which have now been disclosed to the Applicants and were attached as Tab B of the Public Body's 2017 PBSS. There are a number of Records at Issue [Doc Counts 60, 61, 507], described in the Table at para. 9.G *infra,* where the Public Body continues to claim s. 17 despite the record containing the same kinds of personal information contained in the records disclosed to the Applicants. Because s. 17 is a mandatory exception, these Records at Issue will fall under the Interim Decision. There is one exception. For the Record at Issue [Doc Count 43-44 which has the Privilege Column populated], I find the Public Body has properly relied on and properly applied the mandatory exception under s. 17(4)(d) by disclosing the redacted record to the Applicants, as described in the Table at para. 9.G. *infra.*

6. This finding is with respect to those Records at Issue made available to me where a discretionary exception has been applied, detailed in the Table at para. 9.G *infra*, I find that the Public Body has taken an irrelevant consideration (the identity of one of the Applicants) into account in the exercise of its discretion in applying the discretionary exceptions. The Records at Issue where the Public Body has relied solely on s. 24(1), as described in the Table at para. 9.G *infra,* will fall under the Order. This will enable the Public Body to properly exercise of its discretion, taking into account only relevant considerations. With respect to the Record at Issue where the Public Body has redacted information pursuant to s. 25(1)(c), the Order *infra* confirms the Public Body's decision.

7. With respect to s. 32, I find the First Applicant erred in arguing that because it had the records available to them, the Public Body had the burden of proof. A party claiming that the public interest override applies bears the burden of proof and is required to submit sufficiently clear, convincing, and cogent *evidence*, not merely provide submissions, in order to meet its burden of proof under s. 32. I find the Applicants have failed to meet their burden of proof 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 does not apply. In this Inquiry, as a result, the onus did not shift to the Public Body to demonstrate whether its decision to deny access to the information was rationally defensible as the Applicants failed to meet their burden of proof.

8. There are two considerations with respect to waiver: the Public Body issuing public announcements disclosing the content of some of the Records at Issue over which legal privilege had been claimed and the terms on which the Public Body provided the Records at Issue to the author of the Opinion Letter. These have been discussed in detail *supra.*

    a. I find the Applicants provided sufficiently clear, convincing, and cogent evidence to meet their burden of proof to establish that the Public Body waived legal privilege over specific information in the CFA. There may be many Records at Issue where the CFA can be found, as attested to by the affiant in the 2017 Affidavit of Records, which may contain the same specific information. The one Record at Issue for which I have direct evidence, evidence that comes from the Public Body, is that the Record at Issue titled *"Retainer and Contingency Fee Agreement",* at pages ABJ000551-ABJ000564 [Doc Count 179] is the CFA. In that regard, I find the Public Body knew of the existence of the privilege and voluntarily evinced an intention to waive the privilege by making public statements

regarding specific provisions in the CFA. At no time has the Public Body claimed s. 16 for this Record at Issue; and

b. The admissibility of the Opinion Letter is the subject of the 2017 Order. Despite being ruled inadmissible based on findings that did not include waiver, the Public Body continued to rely on the Opinion Letter as evidence (though it does not form part of the evidence I have considered during this part of the Inquiry). The parties were advised that if the Public Body elected to pursue this position that the issue of waiver (discussed as *obiter* in the 2017 Order) would be added as an issue. As a result supplementary submissions were solicited from the parties in early 2018 with respect to the sole issue of waiver. Attached as Exhibit A to the 2018 Waiver Affidavit submitted by the Public Body with its 2018 PBSS Waiver is the executed Retainer with the author of the Opinion Letter, discussed *supra.* Despite the Public Body's delay in producing this evidence in the Inquiry (over 4 years from when the Retainer was executed with the author of the Opinion Letter in 2014 and when it was provided by the Public Body in 2018), I find, based on the terms of the Non-Disclosure clause in the Retainer exhibited to the 2018 Waiver Affidavit, the Public Body provided sufficiently clear, convincing, and cogent evidence to establish that it did not waive legal privilege over any of the Records at Issue [564 pages] over which it has claimed s. 27(1)(a) that were provided to the author of the Opinion Letter. The terms of the exhibited Retainer were consistent with the Public Body's declarations throughout this Inquiry, in both its correspondence and in its submissions, that it had knowledge of the legal privilege, had no intention to waive its privilege and took reasonable precautions to protect its privileged information, with the exception as outlined in para. 8.a *supra*.

9. The 2017 Affidavit of Records together with its Exhibited Index of the Records at Issue (Exhibit A) and the other exhibits attached made up of the correspondence from the affected third parties (Exhibits B-F) have been carefully examined with respect to the descriptors for evidence for each Record at Issue for the following factors in relation to the claim of legal privilege:

- who are the parties to the communication
- are the professional roles of the correspondents specified
- is the Record at Issue dated and are Records at Issue listed and described to demonstrate a continuum of correspondence on sequenced dates
- is the exception(s) listed in the Exhibited Index the same as the exception(s) applied by the FOIP Director, Manager or Advisor when processing the access requests
- is affidavit evidence from the FOIP person who processed the access to information request available
- how is the Record at Issue described: do the descriptors include the grounds for the claim of privilege
- is any Record at Issue that has been released where s. 27(1)(a) has not been claimed described in the same manner
- does the descriptor refer to seeking legal advice or discussion of pending or ongoing litigation (without citing the legally privileged information or information that would reveal legally privileged information)
- is a person identified as a lawyer who is a party to the exchange described as acting in the capacity as a solicitor or as a policy advisor
- where identified as being a lawyer is information provided as to whether the person is acting as a 'solicitor' versus as a representative of the 'client' public body
- have any columns been REDACTED, and if yes, what information remains to describe the record
- does the descriptor in the Exhibited Index reveal that the specific Record at Issue is marked as privileged, confidential or private
- is there any other evidence that the Record at Issue was intended to be confidential

- do the descriptors include the function, role and status of the receiver and sender or any of the named individuals
- does the information provided make it clear when in-house counsel or senior government officials are providing legal advice (s. 27(1)(a)) versus policy advice (s. 24(1))
- has solicitor client privilege and/or litigation privilege been referred to in the Record at Issue (without citing the legally privileged information)
- has the Privilege Column been populated and, if so, by solicitor client privilege, litigation privilege or both
- have pleadings or Court documents been referred to or described that are part of pending or ongoing litigation
- is the information for one record in the Exhibited Index where the record has been withheld identical to information in another record that has been fully released and are the exceptions claimed the same
- does the 2017 Affidavit of Records support the evidence for each specific Record at Issue in the Exhibited Index
- what other evidence is submitted that may be relevant to the issue of legal privilege, for example in this Inquiry, the information provided in Exhibits B-F of the 2017 Affidavit of Records from the affected third parties that assists to identify parties to a communique and to establish the exceptions claimed.

When the 2017 Affidavit of Records and its Exhibited Index and other exhibits 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 as to whether, on a balance of probabilities, the Public Body is sufficiently clear, convincing, and cogent to meet its burden of proof under s. 71(1) of the *FOIP Act.*

A. Section 27(1)(a) (Solicitor Client and/or Litigation Privileges properly relied on and properly applied)

[**NOTE:** Records at Issue over which solicitor client privilege and litigation privilege have been claimed where the Public Body has met its burden of proof by providing sufficiently clear, convincing, and cogent evidence to meet the *ShawCor* evidentiary test to demonstrate the *Solosky* and *Lizotte* tests for solicitor client privilege and/or part of a continuum of communications that fall within solicitor client and/or litigation privileges. This evidence is made up of the 2017 Affidavit of Records and the Exhibited Index and other exhibits. For these Records at Issue, it is unnecessary to consider the application of any other mandatory or discretionary exception(s).]

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:

18, 27-28, 30-32, 34-35, 39, 55, 62, 64-69, 96, 98, 102, 104, 108-110, 139-143, 165-168, 207-208, 213-216, 225-228, 235-238, 241-242, 255, 257-265, 267-275, 281-293, 300, 302, 306-310, 313, 316-318, 321-324, 331-334, 338-340, 343, 349-352, 358, 360, 366, 372-378, 384, 394-396, 402-403, 412, 416-417, 419-422, 424-425, 429, 432, 440, 443-445, 448, 454-457, 460, 474, 481, 498, 509-510, 512, 518-519, 534, 538-539, 544, 547-549, 551, 553-555, 558, 561, 564, 579-580, 584-585, 588, 593, 595-596, 603, 611, 617-618, 621, 626, 632-633, 638-658, 661, 663-676, 678-695, 697-700, 702-723, 726-730, 732-735, 737, 739-745, 750, 756-757, 759-763, 766-768, 776-780, 782, 787-788, 793, 795, 803

B. Section 27(1)(a) (Insufficient Evidence of either Solicitor Client Privilege and/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 all 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. In addition, the Title Column describes information that would not fall within legal privilege. In the case of one record marked with an asterisk, the Public Body has claimed only Litigation Privilege in the Privilege Column with no explanation. It appears that the senior government officials involved in the process of the selection of a law firm to pursue the CRRA Litigation, who have been identified as lawyers, were acting in their senior administrative capacity and not as legal counsel to the Public Body. The affiant of the 2017 Affidavit of Records, at paras. 5-10, claimed these individuals were at all times acting as legal counsel but the affiant did not refer to any specific Records at Issue in making that claim. The Public Body did not submit any other evidence to support that claim, such as affidavits from the three senior government officials. In making determinations regarding the records under para. 9.B, I have taken the factors referred to *supra* into account. This section also provides details to assist the Public Body under the Interim Decision]

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:

i. Insufficient evidence of either solicitor client privilege and/or litigation privilege

   3-6, 9-10, 13-16, 19-20, 23, 40-42, 45-54, 57-59, 73-76, 80-81, 90-92, 97, 99-100, 105-107, 111-121, 150-151, 153, 155, 158-160, 162-164, 169-179, 184-194, 200, 205-206, 209-210, 217, 220-224, 229, 231, 233-234, 240, 243, 245-246, 249, 251-252, 256, 266, 276, 278-279, 294, 297, 299, 301, 303, 305, 311, 314, 319, 325, 330, 335-337, 341, 344, 346-347, 353, 355-356, 359, 361, 363-364, 367, 369-370, 379, 381, 383, 385, 387-389, 391, 393, 397, 399, 401, 404-411, 413-414, 418, 423, 426, 428, 430-431, 433-439, 441-442, 446-447, 449-453, 458-459, 461-473, 475-476, 478-480, 482-483, 487-494, 500-501, 505, 508, 511, 514, 517, 520, 522, 525-527, 529-531, 535, 537, 540-541, 543, 545-546, 550, 556, 559-560, 562-563, 565, 567-568, 570-571, 573, 575-576, 578, 582-583, 586, 589-592, 594, 597, 599, 602, 604, 606-607, 609-610, 612, 614, 616, 619-620, 623, 625, 627, 629, 631, 634, 637, 660, 662, 677, 696, 701, 724-725, 731, 736, 746-749, 751, 753-755, 758, 765, 769-775, 781, 791, 797-798, 805

ii. Of the Records at Issue at para. 9.B.i *supra***,** the following 54 records have information REDACTED in one or more Columns in the Exhibited Index:

   206, 221, 224, 229, 249, 266, 336-337, 359, 411, 413, 418, 433-434, 436-439, 441-442, 446-447, 449-453, 458-459, 461-472, 475, 505, 559, 575, 594, 610, 637, 696, 724-725, 736, 749, 754

iii. Records at Issue where Privilege Column populated but Public Body has claimed s. 24(1)(a) or s. 24(1)(b) and s. 27(1)(c)(ii) but not s. 27(1)(a) (Records not available to External Adjudicator):

   181-182

iv. Records at Issue where Privilege Column populated but Public Body has claimed s. 24(1)(a) or NR but not s. 27(1)(a) (Records available to External Adjudicator):

   502, 532

v. The following Records at Issue shown as RELEASED in 2017 Affidavit of Records Exhibited Index but where the Privilege Column populated with Litigation Privilege/Solicitor Client Privilege (excluding June 10, 2016 Records at Issue shown as released):

   152, 154, 212, 219, 230, 232, 239, 244, 248, 250, 254, 277, 280, 296, 298, 304, 312, 315, 320, 327, 342, 345, 348, 354, 357, 362, 365, 368, 371, 380, 382, 386, 390, 392, 398, 400, 415, 427, 499, 515,

521, 523, 528, 536, 542, 557, 566, 569, 572, 574, 577, 587, 598, 600, 613, 615, 624, 628, 630, 738, 764

C. Section 27(1)(a) (Legal Privilege) and s. 16(1) (Disclosure harmful to Third Party Business Interest) claimed

[**NOTE:** This section deals with Records at Issue where the Public Body has relied on and applied both s. 27(1)(a) discretionary exception and the s. 16(1) mandatory exception. For all the Records at Issue where the Public Body claimed s. 16(1), it also claimed legal privilege pursuant to s. 27(1)(a). This section is divided into three parts. The first subsection lists the Records at Issue where the Public Body has applied both s. 27(1)(a) and s. 16(1), has met its burden of proof under s. 27(1)(a) and, in some cases s. 16(1), and, therefore, the Records at Issue do not fall under the Interim Decision. The second subsection lists the Records at Issue where the Public Body has failed to meet its burden of proof under s. 27(1)(a) but has met its burden of proof under s. 16(1) based on exhibited evidence from the affected third parties. These Records at Issue also do not fall under the Interim Decision. The third subsection is where the Public Body has failed to meet its burden of proof for both s. 27(1)(a) and s. 16(1) and, therefore all these Records at Issue will fall under the Interim Decision. It is important to remember that at the time the evidence was prepared by the affected third parties in August 2012, the range of the pages for the Records at Issue was 1-564 pages [Doc Counts 1-179].]

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:

i. Section 27(1)(a) has been established for all the records and s. 16(1) for those records marked with an asterisk. These Records at Issue will not fall under the Interim Decision:

   66, 102*, 108*-110*, 139*-141*, 142-143, 165*, 166, 167*-168*, 282, 291-292, 300, 302, 310, 313, 316, 318, 324, 338, 340, 429, 440, 509-510, 512, 538-539, 547-548, 551, 558, 561, 579, 584, 588, 638-640, 642-648, 673-674, 697-698, 712-723, 726-729, 732-733, 737, 740-742, 744, 750, 777, 782, 787-788, 793, 795

ii. Records at Issue where the application of s. 27(1)(a) has not been established but the Public Body has met its burden of proof under s. 16(1) based on evidence it provided including exhibited letters from the affected third parties. These Records at Issue will not fall under the Interim Decision:

   81, 116-117, 150, 162-164, 169-177

iii. Records where the application of s. 27(1)(a) has not been established and the Public Body has failed to meet its burden of proof under s. 16(1). Note that for these Records at Issue where the Public Body has claimed s. 16(1), some of the records could not have been provided to the affected third parties as they did not form part of the Records at Issue in August 2012 [In 2012 Records at Issue did not include Doc Counts 180-805]. For the remainder, the burden of proof has not been met based on the evidence of the descriptors in the 2017 Affidavit of Records Exhibited Index and in the exhibited letters from the affected third parties. These Records at Issue will fall under the Interim Decision:

   80, 118-121, 158-160, 178, 184-194, 205, 210, 217, 223, 231, 234, 243, 246, 249, 252, 256, 266, 276, 279, 294, 297, 301, 311, 314, 319, 325, 341, 344, 347, 353, 356, 361, 364, 367, 370, 379, 381, 383, 385, 389, 391, 397, 399, 414, 426, 430, 434, 436-439, 441, 447, 449, 451, 453, 459, 462, 466, 468, 475, 520, 522, 527, 535, 541, 545, 550, 556, 560, 562-563, 565, 568, 571, 576, 586, 597, 599, 612, 614, 627, 629, 701, 731, 749

D. Records at Issue where s. 27(1) claimed but the professional role or title is not specified in the description in the Exhibited Index or in the 2017 Affidavit of Records for the person(s) named

[**NOTE:** For these Records at Issue, the Public Body has claimed s. 27(1)(a) but because the professional role or title of the person named is not included in the descriptors in the Exhibited Index or in the 2017 Affidavit of Records, neither legal privilege has been proven. In some cases, the exception may apply, but because the Public Body has failed to provide the professional title or role for some individuals, it is unknown in what capacity they were party to the record. For other Records at Issue where a professional title or role for one person is absent, there is sufficient other evidence, for example from the exhibited letters from the affected third parties, to establish legal privilege or the provision of advice or other (legal) services, and, therefore, those Records at Issue are not listed here. Section 27(1)(a) has been claimed for all of these Records at Issue and the Privilege Column populated. This section has been provided to assist the Public Body under the Interim Decision to provide information that makes the professional role or title for the persons referred to in the Exhibited Index.]

i. Section 27(1)(a) claimed:

   3-6, 9-10, 13-16, 19-20, 40, 45-48, 50-53, 75, 90-92, 97, 99-100, 111-113, 178, 190, 209, 423, 436, 471, 493, 501, 508, 511, 535, 537, 540, 546, 560, 573, 583, 662, 731, 755

ii. Section 27(1)(c)(ii) claimed and Privilege Column populated (no s. 27(1)(a) in the Section(s) of the Act Column):

   181-182

E. Records at Issue where the Public Body has failed to claim *any* exception(s) for the Record at Issue

[**NOTE:** This Record at Issue has *not* been provided to the External Adjudicator. The Public Body has failed to claim any exception in the 2017 Affidavit of Records Exhibited Index, including in either the Section(s) of the Act Column or in the Privilege Column, both of which are blank. This Record at Issue will fall under the Interim Decision. There are no redactions for this record and the descriptors match those of many other Records at Issue where legal privilege has been claimed.]

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

479

F. Records included in the 2017 Affidavit of Records Exhibited Index that are *not at issue in this Inquiry*

[**NOTE:** Records identified as non-responsive are no longer at issue in this Inquiry as they have been referred to another forum. Of these Records at Issue, the records that were provided by the Public Body to the External Adjudicator in January 2017 are marked with an asterisk. In addition, the records from the June 10, 2016 Records at Issue phase of the Inquiry included in the 2017 Affidavit of Records Exhibited Index, which are the subject of the 2017 Order, are also no longer at issue in the Inquiry. As records that fall under these two categories, listed *infra,* they are not Records at Issue in the Inquiry. To be patently clear, *none of these records fall under the Interim Decision or the Order*.]

Referring to the records by Doc Count number (Column 1) and where shown as more than one record, the numbers are inclusive:

i. Records Identified by Public Body as non-responsive [NR], which have been referred to another forum:

   2*, 26*, 161*, 484-485, 486*(shown as NR but fully disclosed to the Applicants), 635-636

ii. June 10, 2016 Records at Issue disposed of pursuant to 2017 Order (some which have already been disclosed to the Applicants):

   21, 70-72, 77-79, 83, 134-135*, 147-149, 180, 195
   [For additional information refer to para. 139 of the 2017 Order]

G. Records provided to the External Adjudicator

[**NOTE:** This section deals solely with the findings related to those records provided to the External Adjudicator. But as the Observations and Order Column of the Table *infra* indicates, there is no disposition for some of these records as they no longer remain at issue. The explanation is threefold.

First, the Public Body included in the January 2017 package, records (purposefully not referred to as Records at Issue by me) that were part of the June 10, 2016 Records at Issue phase of the Inquiry, which have been disposed of in the 2017 Order and are no longer at issue. These records are described at para. 9.F.ii *supra.* Including these records without identifying them as no longer at issue in the 2017 Affidavit of Records Exhibited Index, leaves the impression they continue to form part of the Records at Issue. Some of the June 10, 2016 records were included in the package provided to the External Adjudicator [Doc Counts 134-135], while others where s. 27(1)(a) has been claimed were not included in the package but are listed in the Exhibited Index [Doc Counts 147-149], and others have been released [Doc Counts 180 and 183]. None of the June 10, 2016 records form part of this Interim Decision/Order as all June 10, 2016 Records at Issue are already the subject of the 2017 Order.

Second, the Public Body also included records in the January 2017 package that the Public Body continues to describe as non-responsive [NR] in the Exhibited Index. These records are described at para. 9.F.i *supra.* It was confirmed with the parties, including the Applicants and the Public Body at para. 5 of the 2017 Order, that the issue of non-responsive is no longer an issue in this Inquiry. [Refer to Issues in the Inquiry *supra*]. All parties are aware that the issue related to how the Public Body defined the parameters of the Records at Issue by designating some records as NR and limiting the temporal scope of the access requests has been referred to another forum. Including these records without identifying them as no longer at issue in the Exhibited Index leaves the impression they continue to form part of the Records at Issue. No record to which NR has been applied, to all part or part of a record, falls under this Interim Decision/Order, except the Record at Issue at Doc Count 532, which Record at Issue has been found to be responsive and was not part of the records referred to another forum.

And thirdly, at Tab B of its 2017 PBSS, the Public Body attached Records at Issue previously redacted and withheld in part pursuant to s. 17 of the *FOIP Act.* These 20 pages of unredacted records were attached by the Public Body to its 2017 PBSS. Previously these 20 pages of records were included in the package provided to the External Adjudicator in January 2017 when they were still Records at Issue. The Public Body has since disclosed the records in full to the Applicants with its 2017 PBSS and thus they are no longer at issue in the Inquiry.

Explanatory Note: Details about the package of records provided by the Public Body to the External Adjudicator in January 2017 are as follows:

1. In January 2017, the Public Body provided the External Adjudicator with 33 records (40 pages) for which the Public Body claimed it was not asserting legal privilege pursuant to s. 27(1)(a) but it had populated the Privilege Column for some.

2. Records classified as NR where those records have been referred to another forum - 4 records (4 pages) [Doc Counts 2, 26, 161, 486].

3. Records that were part of the June 10, 2016 Records at Issue, the subject of the 2017 Order - 2 records (2 pages) [Doc Counts 134, 135].

4. Records at Issue RELEASED in full to the Applicants by the Public Body with its 2017 PBSS - 17 records (20 pages) [Doc Counts 33, 36, 37 (2 pages), 95, 122, 124, 125, 126, 127, 129, 130, 136 (2 pages), 137, 138, 144, 145, 146] marked in the Table below with an asterisk.

5. Total number of Records at Issue available to the External Adjudicator provided by the Public Body that remain at issue for the purpose of this Interim Decision/Order - **10 Records at Issue** (13 pages) [Doc Counts 43, 44, 60, 61, 502 (2 pages), 504, 507 (3 pages), 532, 533, 794 (2 pages)].

The details of the records that are not at issue and my findings with respect to the 10 Records at Issue are detailed in the Table *infra* but note the findings are only for those records that remain Records at Issue in the Inquiry:

Count of pages of records provided to the External Adjudicator - asterisk indicates records at Tab B of 2017 PBSS	2017 Affidavit of Records Exhibited Index (Nov 2017) NOTE: The details in the three columns below are how the PUBLIC BODY describes the records in the Exhibited Index			External Adjudicator Observations	ORDER
	Count	Doc ID	Section(s) of the Act		
1	2	ABJ000003	Non-responsive	One of the NR records referred to another forum. No longer at issue in the Inquiry	**Not at issue: referred to another forum**
2	26	ABJ000037	Partially Released. Contains Non responsive and 16, 17(1)	Public Body has only applied NR to the Applicants' redacted copy with no other exceptions referred to; One of the NR records referred to another forum. No longer at issue in the Inquiry	**Not at issue: referred to another forum**

Count of pages of records provided to the External Adjudicator - asterisk indicates records at Tab B of 2017 PBSS	2017 Affidavit of Records Exhibited Index (Nov 2017) NOTE: The details in the three columns below are how the PUBLIC BODY describes the records in the Exhibited Index			External Adjudicator Observations	ORDER
	Count	Doc ID	Section(s) of the Act		
3*	33	ABJ000048	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1) and s. 17(4)(g)(i) as represented in January 2017 Index; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**
4*	36	ABJ000052	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1) and s. 17(4)(g)(i) as represented in January 2017 Index; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**

Count of pages of records provided to the External Adjudicator - asterisk indicates records at Tab B of 2017 PBSS	2017 Affidavit of Records Exhibited Index (Nov 2017) NOTE: The details in the three columns below are how the PUBLIC BODY describes the records in the Exhibited Index			External Adjudicator Observations	ORDER
	Count	Doc ID	Section(s) of the Act		
5*-6*	37	ABJ000053-ABJ000054	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated. First 2 pages redacted pursuant to s. 17 were partially released to the Applicants; the third page [Doc Count 38] was the only record fully released by the Public Body to the Applicants in 2012 and 2016 as represented in the January 2017 Index; properly represented in the 2017 Affidavit of Records as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**
7	43	ABJ000060	17(1), 17(4)(d)	Privilege Column populated with Litigation Privilege/Solicitor Client Privilege; no claim for s. 27(1)(a); caution to be exercised because the Public Body populated the Privilege Column: On examination of the record, the Public Body has properly relied on and applied s. 17(4)(d) to redact information in the record	Confirm the Public Body's decision to rely on and apply s. 17(4)(d) to release the redacted Records at Issue to the Applicants

Count of pages of records provided to the External Adjudicator - asterisk indicates records at Tab B of 2017 PBSS	2017 Affidavit of Records Exhibited Index (Nov 2017) NOTE: The details in the three columns below are how the PUBLIC BODY describes the records in the Exhibited Index			External Adjudicator Observations	ORDER
	Count	Doc ID	Section(s) of the Act		
8	44	ABJ000061	17(1), 17(4)(d)	Privilege Column populated with Litigation Privilege/Solicitor Client Privilege; no claim for s. 27(1)(a); caution to be exercised because the Public Body populated the Privilege Column: On examination of the record, the Public Body has properly relied on and applied s. 17(4)(d) to redact information in the record	Confirm the Public Body's decision to rely on and apply s. 17(4)(d) to release the redacted Records at Issue to the Applicants
9	60	ABJ000083	Partially Released - Section 17(1), 17(4)(g)(i) and 17(4)(g)(ii)	Exception relied on and applied to redact personal information pursuant to s. 17; Personal information redacted no different in kind from the information in the Records at Issue released to the Applicants in late 2017	Forms part of the Interim Decision as s. 17 mandatory exception claimed
10	61	ABJ000084	Partially Released - Section 17(1) and 17(4)(g)(i)	Exception relied on and applied to redact personal information pursuant to s. 17; Personal information redacted no different in kind from the information in the Records at Issue released to the Applicants in late 2017	Forms part of the Interim Decision as s. 17 mandatory exception claimed

Count of pages of records provided to the External Adjudicator - asterisk indicates records at Tab B of 2017 PBSS	2017 Affidavit of Records Exhibited Index (Nov 2017) NOTE: The details in the three columns below are how the PUBLIC BODY describes the records in the Exhibited Index			External Adjudicator Observations	ORDER
	Count	Doc ID	Section(s) of the Act		
11*	95	ABJ000149	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1) and s. 17(4)(g)(ii) as represented in January 2017 Index of Records; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**
12*	122	ABJ000195	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1) and s. 17(4)(g)(ii) as represented in January 2017 Index of Records; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**

Count of pages of records provided to the External Adjudicator - asterisk indicates records at Tab B of 2017 PBSS	2017 Affidavit of Records Exhibited Index (Nov 2017) NOTE: The details in the three columns below are how the PUBLIC BODY describes the records in the Exhibited Index			External Adjudicator Observations	ORDER
	Count	Doc ID	Section(s) of the Act		
13*	124	ABJ000198	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1) and s. 17(4)(g)(ii) as represented in January 2017 Index; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**
14*	125	ABJ000199	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1) and s. 17(4)(g)(ii) as represented in January 2017 Index; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**

Count of pages of records provided to the External Adjudicator - asterisk indicates records at Tab B of 2017 PBSS	2017 Affidavit of Records Exhibited Index (Nov 2017) NOTE: The details in the three columns below are how the PUBLIC BODY describes the records in the Exhibited Index			External Adjudicator Observations	ORDER
	Count	Doc ID	Section(s) of the Act		
15*-16*	126	ABJ000200-ABJ000201	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1), s. 17(4)(g)(i) and s. 17(4)(g)(ii) as represented in January 2017 Index; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**
17*	127	ABJ000202	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1), s. 17(4)(g)(i) and s. 17(4)(g)(ii) as represented in January 2017 Index; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**

Count of pages of records provided to the External Adjudicator - asterisk indicates records at Tab B of 2017 PBSS	2017 Affidavit of Records Exhibited Index (Nov 2017) NOTE: The details in the three columns below are how the PUBLIC BODY describes the records in the Exhibited Index			External Adjudicator Observations	ORDER
	Count	Doc ID	Section(s) of the Act		
18*	129	ABJ000204	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1) and s. 17(4)(g)(ii) as represented in January 2017 Index; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**
19*	130	ABJ000205	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1), s. 17(4)(g)(i) and s. 17(4)(g)(ii) as represented in January 2017 Index; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**

Count of pages of records provided to the External Adjudicator - asterisk indicates records at Tab B of 2017 PBSS	2017 Affidavit of Records Exhibited Index (Nov 2017) NOTE: The details in the three columns below are how the PUBLIC BODY describes the records in the Exhibited Index			External Adjudicator Observations	ORDER
	Count	Doc ID	Section(s) of the Act		
20	134	ABJ000210	Partially Released - Section 24(1)(a)	**THIS RECORD IS NOT AT ISSUE AS IT FORMED PART OF THE JUNE 10, 2016 RECORDS AT ISSUE, THE SUBJECT OF THE 2017 ORDER**	**No Order; record part of the 2017 Order**
21	135	ABJ000211	Partially Released - Section 24(1)(b)(i)	**THIS RECORD IS NOT AT ISSUE AS IT FORMED PART OF THE JUNE 10, 2016 RECORDS AT ISSUE, THE SUBJECT OF THE 2017 ORDER**	**No Order; record part of the 2017 Order**
22*-23*	136	ABJ000212-ABJ000213	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Record ABJ000213 was fully released to the Applicants previously (2012, 2016, 2017) but ABJ000212 was redacted and partially released (2012, 2016) and fully released (2017); Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1) and s. 17(4)(g)(ii) as represented in January 2017 Index; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**

Count of pages of records provided to the External Adjudicator - asterisk indicates records at Tab B of 2017 PBSS	2017 Affidavit of Records Exhibited Index (Nov 2017) NOTE: The details in the three columns below are how the PUBLIC BODY describes the records in the Exhibited Index			External Adjudicator Observations	ORDER
	Count	Doc ID	Section(s) of the Act		
24*	137	ABJ000214	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1) and s. 17(4)(g)(i) as represented in January 2017 Index; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**
25*	138	ABJ000215	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1) and s. 17(4)(g)(ii) as represented in January 2017 Index; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**

Count of pages of records provided to the External Adjudicator - asterisk indicates records at Tab B of 2017 PBSS	2017 Affidavit of Records Exhibited Index (Nov 2017) NOTE: The details in the three columns below are how the PUBLIC BODY describes the records in the Exhibited Index			External Adjudicator Observations	ORDER
	Count	Doc ID	Section(s) of the Act		
26*	144	ABJ000255	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1) and s. 17(4)(g)(ii) as represented in January 2017 Index; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**
27*	145	ABJ000256	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1) and s. 17(4)(g)(i) as represented in January 2017 Index; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**

Count of pages of records provided to the External Adjudicator - asterisk indicates records at Tab B of 2017 PBSS	2017 Affidavit of Records Exhibited Index (Nov 2017) NOTE: The details in the three columns below are how the PUBLIC BODY describes the records in the Exhibited Index			External Adjudicator Observations	ORDER
	Count	Doc ID	Section(s) of the Act		
28*	146	ABJ000257	**RELEASED**	2017 Affidavit of Records Exhibited Index has been properly updated; Exception on the Record relied on and applied to redact personal information pursuant to s. 17(1) and s. 17(4)(g)(ii) as represented in January 2017 Index; properly represented in the 2017 Affidavit of Records Exhibited Index as released to the Applicants in late 2017 attached at Tab B to the 2017 PBSS	**No Order: RELEASED**
29	161	ABJ000326	Non-responsive	One of the NR records referred to another forum. No longer at issue in the Inquiry	**Not at issue: referred to another forum**
30	486	ABJ001703	Non-Responsive	One of the NR records referred to another forum. No longer at issue in the Inquiry	**Not at issue: referred to another forum**

Count of pages of records provided to the External Adjudicator - asterisk indicates records at Tab B of 2017 PBSS	2017 Affidavit of Records Exhibited Index (Nov 2017) NOTE: The details in the three columns below are how the PUBLIC BODY describes the records in the Exhibited Index			External Adjudicator Observations	ORDER
	Count	Doc ID	Section(s) of the Act		
31-32	502	ABJ001724-ABJ001725	Partially Released - Section 24(1)(a)	2017 Affidavit of Records Exhibited Index is accurate for ABJ001724 as partially released but is inaccurate for ABJ001725 which has been fully released to the Applicants (2016); the Privilege Column has been populated with Litigation Privilege/Solicitor Client Privilege so caution must be exercised; Section 24(1)(a) exception properly relied on but not properly applied to ABJ001724 because the Public Body took an irrelevant consideration into account in exercising its discretion (identity of one of the Applicants)	As s. 24(1)(a) properly relied on but not properly applied, this Record at Issue ABJ001724 will form part of the Order
33	504	ABJ001727	Partially Released - Section 24(1)(a)	2017 Affidavit of Records Exhibited Index is accurate; Section 24(1)(a) exception properly relied on but not properly applied because the Public Body took an irrelevant consideration into account in exercising its discretion (identity of one of the Applicants)	As s. 24(1)(a) has been properly relied on but not properly applied, this Record at Issue will form part of the Order

Count of pages of records provided to the External Adjudicator - asterisk indicates records at Tab B of 2017 PBSS	2017 Affidavit of Records Exhibited Index (Nov 2017) NOTE: The details in the three columns below are how the PUBLIC BODY describes the records in the Exhibited Index			External Adjudicator Observations	ORDER
	Count	Doc ID	Section(s) of the Act		
34-36	507	ABJ001732-ABJ001734	Partially Released - Section 17(1)	2017 Affidavit of Records Exhibited Index is not wholly accurate; ABJ001732-ABJ001733 fully released to the Applicants (2016); ABJ001734 partially released (2016); The personal information redacted on ABJ001734 has been properly redacted and withheld from the Applicants	Confirm the Public Body's decision to rely on and apply s. 17(4)(d) to release the redacted Record at Issue (ABJ001734) to the Applicants
37	532	ABJ001812	Non-responsive	Listed as NR in the 2017 Affidavit of Records Exhibited Index; Privilege Column populated; No claim for s. 27(1)(a); Record is responsive; Not referred to another forum; Record available to External Adjudicator able to decide legal privilege does not apply	Complete Record to be released to the Applicants
38	533	ABJ001813	Partially Released 25(1)(c)	2017 Affidavit of Records Exhibited Index and January 2017 Index properly represent s. 25(1)(c) exception properly relied on and properly applied	Confirm Public Body's decision to release redacted Record to Applicants pursuant to s. 25(1)(c)

Count of pages of records provided to the External Adjudicator - asterisk indicates records at Tab B of 2017 PBSS	2017 Affidavit of Records Exhibited Index (Nov 2017) NOTE: The details in the three columns below are how the PUBLIC BODY describes the records in the Exhibited Index			External Adjudicator Observations	ORDER
	Count	Doc ID	Section(s) of the Act		
39-40	794	ABJ002550-ABJ002551	Partially Released 17(1), 24(1)(b)	The information provided in the 2017 Affidavit of Records Exhibited Index is incomplete when checked against the record itself, including individuals copied on the email including in-house counsel are not referred to; Section 17(1) does not apply to the type of information over which it has been claimed; Section 24(1)(b) exception properly relied on but Public Body has not met its burden of proof under s. 24(1)(b) that it properly applied the exception, because it took an irrelevant consideration into account in exercising its discretion (identity of one of the Applicants)	Section 17 does not apply; Section 24(1)(b) properly relied on but not properly applied, therefore, this Record at Issue will form part of Order

[para 186] 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 Applicants have met their respective burdens of proof. While this has not been an easy task in the absence of the majority of the Records at Issue, I have executed my delegated authority as the External Adjudicator by taking a reasonable, fair and diligent approach.

[para 187] After the recent rulings from the SCC regarding the Commissioner's lack of statutory power to require the production of records over which legal privilege has been claimed, it has become that much more important, in my opinion, for a public body to meet the *ShawCor* evidentiary requirements to enable an adjudicator to make an informed decision by adopting a diligent approach to:

- processing the Records at Issue by claiming the applicable exceptions and releasing records in whole or in part to an applicant(s);
- producing a comprehensive and accurate Index to accompany the Affidavit of Records; and
- submitting a body of sufficiently clear, convincing, and cogent evidence, in a timely fashion, to meet its burden of proof and to avoid unnecessary delay in the Inquiry.

[para 188] This approach has not been consistently adopted by the Public Body in this Inquiry with respect to all of the Records at Issue. The Interim Decision gives the Public Body the opportunity to adopt this approach for those Records at Issue where I have been unable to decide if the exceptions claimed have, in fact and at law, been properly relied on and applied. This is of particular importance in relation to any record where the Public Body has claimed s. 27(1)(a) of the *FOIP Act,* given that preserving and protecting legal privilege is of fundamental importance to the proper functioning of our legal system. When it asserts legal privilege, a public body needs to prepare and provide an evidentiary base to support that assertion by affording it the attention which it deserves.

VII. INTERIM DECISION

[para 189] One preliminary point regarding the Interim Decision that follows. I am unwilling to issue an Order in this Inquiry 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 in advance of completing an 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 190] 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 para. 9.B.i *supra*. 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 Applicants, 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, the Exhibited Index and other exhibits, 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 para. 9.B.i *supra* [with the exception of Doc Count 179 which falls under the Order *infra*], 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* to meet its burden of proof to satisfy the test set out in *Solosky* and other case law referred to *supra*. 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 of Records *in camera* (details of the Records at Issue that have been REDACTED described at para. 9.B.ii) and complete descriptors for the professional title or role for individuals named in the Records at Issue described at paras. 9.D.i and 9.D.ii *supra* where the Public Body continues to rely on s. 27(1)(a) or has populated the Privilege Column. For further details refer to the descriptors listed under Findings at para. 9 *supra.* The Interim Decision applies

to all of the Records at Issue described at para. 9.B.i, except where the Public Body has met its burden of proof with respect to s. 16(1), discussed *infra,* as described at para. 9.C.ii.

[para 191] In complying with this Interim Decision, there are some Records at Issue where I have found the Public Body has met its burden of proof for s. 27(1)(a) and in some instances met its burden for s. 16(1), described at para. 9.C.i. (marked with an asterisk). For other records, the Public Body has failed to meet its burden of proof for s. 27(1)(a) but has met its burden with respect to s. 16(1), described at para. 9.C.ii. To be clear, these Records at Issue will not fall under the Interim Decision as the application of either or both s. 27(1)(a) and/or s. 16(1) exceptions has been established (Refer to Order *infra*).

[para 192] There are other Records at Issue where the Public Body has failed to meet its burden of proof for either s. 27(1)(a) or s. 16(1), described at para. 9.C.iii, which Records at Issue will fall under the Interim Decision. The Public Body will be required to gather evidence and authority, specifically evidence sufficient to meet its burden of proof for s. 27(1)(a) if it continues to claim legal privilege (all of the Records at Issue described at para. 9.C.iii are included within para. 9.B.i) and/or to meet the three-part test that the s. 16(1) mandatory exception requires. The latter evidence can be similar in kind to the evidence from the affected third parties provided regarding the first 564 pages of the records.

[para 193] 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 the Interim Decision, specifically, its disposition regarding the Records at Issue, with respect to s. 27(1)(a) and/or s. 16, described *supra* at:

- para. 9.B.i (that includes Records at Issue described at para. 9.B.ii)
- para. 9.C.iii

[para 194] In addition, the Public Body has failed to claim *any* exception(s) with regard to the Record at Issue [Doc Count 479], described at para. 9.E *supra*. This record was not available to the External Adjudicator. Under the Interim Decision, the Public Body will indicate the exception(s) it has relied on and applied to this Record at Issue and make a decision with respect to access. If the Public Body decides to release the record to the Applicants, that will end the matter.

[para 195] In addition, where the Public Body has continued to claim the s. 17 mandatory exception [Doc Counts 60, 61, 794], described in the Table at para. 9.G *supra*, the Records at Issue will fall under the Interim Decision. The Public Body must withhold the redacted personal information pursuant to s. 17, unless that information is now public, as was the case for the personal information in the Records at Issue where it had removed its reliance on s. 17, which records (20 pages) were released with its 2017 PBSS, as described in the Table at para. 9.G, *supra*.

[para 196] Because of the cautious approach I have taken with respect to legal privilege, the following Records at Issue will also fall under the Interim Decision:

- para. 9.B.iii (Public Body has claimed s. 24(1)(a) or s. 24(1)(b) and s. 27(1)(c)(ii) and not s. 27(1)(a) but has populated the Privilege Column)
- para. 9.B.iv (Public Body has claimed s. 24(1)(a) and s. 27(1)(c)(ii) and not s. 27(1)(a) but has populated the Privilege Column)
- para. 9.B.v (Public Body has shown them as RELEASED but the Privilege Column has been populated; for these records, in its response to the Interim Decision, the Public Body needs to simply confirm these records were intentionally released and that the claim of privilege in the Privilege Column was in error or is no longer being claimed.)

[para 197] In complying with the Interim Decision, for those Records at Issue where it has already claimed other discretionary exceptions listed in the Exhibited Index in conjunction with s. 27(1)(a) (Records at Issue which of course have not been made available for review) and where it determines s. 27(1)(a) does *not* apply in whole or in part to some of the Records at Issue, the Public Body may elect to

rely on other exceptions it has applied (as the s. 32 public interest override is not applicable). Where it chooses to do so, the Public Body will gather evidence and authority to support its claim for the other discretionary exceptions, such as s. 24(1), s. 25, s. 27(1)(b) and s. 27(1)(c). If the Public Body decides it cannot meet its burden of proof for any of the discretionary exceptions and decides to release some or all of these Records at Issue that will end the matter. If it decides to refuse to disclose some or all of these the Records at Issue, the Public Body will provide the Applicants with its decision with reasons, taking into account only the relevant considerations, a copy of which is also to be provided to the External Adjudicator.

[para 198] The Public Body will have 90 days from the date it receives this Interim Decision to gather evidence and authority to support its claim of the mandatory and discretionary exceptions (and whatever exception it decides to apply to Doc Count 479) for the Records at Issue that fall under the Interim Decision. In complying with this Interim Decision, in addition to any other evidence it determines it needs to provide, the Public Body is to provide the additional evidence required to meet the evidentiary standards detailed supra, by upgrading the (Exhibited) Index provided on January 17, 2018, which is to be accompanied by an Affidavit of Records. The Index provided to comply with this Interim Decision must retain all existing Columns that provide an accounting for the complete set of the Records at Issue. On or before the expiry of the 90 days, the Public Body will provide a decision to the Applicants, copied to me, explaining whether it is withholding the Records at Issue and the basis for that claim.

[para 199] I reserve jurisdiction over this Inquiry with respect to the Interim Decision only. If the Records at Issue, which are the subject of this Interim Decision, are disclosed to the Applicants because the Public Body decides that the exceptions do not apply or it exercises its discretion to disclose, that will end the matter. Following the 90 days, the Inquiry will resume to decide if, based on the evidence proffered, the Public Body has satisfied its burden of proof for the Records at Issue identified *supra* that the discretionary exceptions have been properly relied on and properly applied and the mandatory exceptions require the Public Body to refuse access. Thereafter, I will make a final Order for Case Files #F6525 and #F6761.

[para 200] The final disposition of those issues I am able to decide is set out in the Order that follows in Part VIII *infra*.

VIII. ORDER

[para 201] I make this Order 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 202] 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 para. 9.A *supra.* For some of these Records at Issue, the Public Body has also claimed s. 16(1), described at para. 9.C.i *supra.* Pursuant to s. 72(2)(b), I confirm the Public Body's decision to refuse the Applicants access to these Records at Issue pursuant to s. 27(1)(a) and, pursuant to s. 72(2)(c), I confirm the Public Body is required to refuse access to the Applicants pursuant to s. 16(1).

[para 203] The Public Body has properly relied on and properly applied s. 16(1) of the *FOIP Act* for the Records at Issue, described at para. 9.C.ii *supra*. Pursuant to s. 72(2)(c), I confirm the Public Body is required to refuse access to the Applicants pursuant to s. 16(1).

[para 204] The Public Body has properly relied on and applied the s. 17 mandatory exception for the Records at Issue, described in the Table at para. 9.G *supra.* Pursuant to s. 72(2)(c), I confirm the Public Body is required to refuse access to the Applicants to the part of the records redacted pursuant to s. 17 [Doc Counts 43-44, 507].

[para 205] The Public Body has partially waived its legal privilege for some of the information in the CFA and, therefore, is ordered to given the Applicants access to parts of the Record at Issue at Doc Count 179. The parts of the Record at Issue to be released to the Applicants are to include those which contain information that has been the subject of public statements made by the Public Body or by representatives of government: specifically, information in Doc Count 179 that confirms the contingency fee arrangement/rate, confirms the non-payment of fees and disbursements if the lawsuit is unsuccessful, confirms it was the lowest bid and confirms the contingency fee is the lowest in the country when compared with other jurisdictions where tobacco recovery litigation is being pursued.

[para 206] The Public Body has properly relied on and properly applied the discretionary exception under s. 25(1)(c) of the *FOIP Act* for the Record at Issue, described in the Table at para. 9.G *supra.* Pursuant to s. 72(2)(b), I confirm the Public Body's decision to refuse access to the Applicants to the part of the record redacted pursuant to s. 25(1)(c) [Doc Count 533].

[para 207] The Public Body has properly relied on the s. 24(1) discretionary exceptions to refuse access to the Applicants [Doc Counts 502, 504, 794], described in the Table at para. 9.G *supra.* I have found that while the Public Body was authorized to claim s. 24(1), it took an irrelevant consideration into account in exercising its discretion and, therefore, has not properly applied the exception. Pursuant to s. 72(2)(b), I order the Public Body to reconsider its decision under s. 24(1).

[para 208] Pursuant to s. 72(2)(a), I order the Public Body to release the Record at Issue to the Applicants, described in the Table at para. 9.G *supra* [Doc Count 532].

[para 209] I further order the Public Body to notify me and the Applicants, in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

_____
S. Dulcie McCallum, LL.B.
External Adjudicator