ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

INTERIM DECISION F2018-D-01
ORDER F2018-38

August 30, 2018

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Numbers F6420/F6747/F6843

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Summary: Two Applicants made separate access to information requests to Alberta Justice and Solicitor General [Public Body]; the First Applicant made two requests and the Second Applicant one request. The first request from the First Applicant was for the Contingency Fee Agreement [CFA] and the second request was for other documents related to the CFA, regarding the arrangements the Province made with outside counsel to pursue litigation under the *Crown's Right of Recovery Act* [CRA Litigation] to recoup smoking-related health care costs. The Second Applicant's request was for all records related to the contract tendering process, the selection process of counsel and any requests for proposal and bids submitted connected to the CRA Litigation. In response to the access requests, the Public Body refused the Applicants access to all of the Records at Issue except for 129 pages of a 1,901 page Record. At the time this matter was sent to Inquiry, the three Case Files were consolidated into one Inquiry by the Information and Privacy Commissioner [Commissioner], with the consent of the parties, based on confirmation from the Public Body that the Records at Issue for all the Case Files were accounted for in the Index.

During the initial phase of the Inquiry in 2014, the External Adjudicator raised a Preliminary Evidentiary Issue [PEI], which resulted in the release of Decision 2014-D-04/Order F2014-51 [2014 Decision/Order]. The Public Body sought Judicial Review, which application has been adjourned *sine die.*

The Public Body applied s. 27(1)(a) of the *Freedom of Information and Protection of Privacy Act* [*FOIP Act*] to the majority of the Records at Issue claiming solicitor client privilege and/or litigation privilege and, therefore, the bulk of the Records at Issue were not provided to the External Adjudicator. The Public Body also claimed other discretionary and mandatory exceptions: s. 16(1), s. 17(1), s. 21(1)(a), s. 24(1), s. 25(1), s. 27(1)(b) and s. 27(1)(c) of the *FOIP Act*.

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

In January 2017 the Public Body provided some of the Records at Issue to the External Adjudicator, in partial compliance with the 2014 Decision/Order. This consisted of 8 Records at Issue totalling 12 pages. This prompted the External Adjudicator to issue the 2017 Notice of Continuation to the parties. Shortly

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

In addition to earlier submissions at the outset of the Inquiry in 2014, the Public Body provided a 2017 Affidavit of Records from in-house counsel with 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.

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

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

The External Adjudicator issued an Interim Decision giving the Public Body the opportunity to make a decision for the Records at Issue over which it claimed legal privilege pursuant to s. 27(1)(a) where it had not met its burden of proof in a manner that complies with legal precedents and the evidentiary requirements as set out in *ShawCor*, the Alberta Rules of Court and the *OIPC Privilege Practice Note*. The Interim Decision detailed the kind of direct evidence that was required from the Public Body to meet its evidentiary burden, details the External Adjudicator had already outlined for the Public Body in the 2017 Notice of Continuation. For those Records at Issue where legal privilege has not been established under the Interim Decision, it is incumbent on the Public Body to go on to consider the application of s. 16(1) as a mandatory exception before giving the Applicants access to the relevant records.

The External Adjudicator found the First Applicant met his/her burden of proof that the public interest override should apply in these unique circumstances. The First Applicant relied on two public reports coming out of the Office of the Ethics Commissioner and one public report solicited by the Minister of Justice from a former Supreme Court of Canada Justice (Iacobucci) as evidence to meet his/her burden of proof under s. 32(1)(b) of the *FOIP Act* with respect to how the public interest override should apply.

The External Adjudicator found that because the First Applicant had met his/her burden of proof, s. 32(1)(b) would override all the discretionary exceptions to all the Records at Issue withheld under the discretionary exceptions (s. 21(1)(a), s. 24(1), s. 25(1), s. 27(1)(b) and s. 27(1)(c)) and the relevant records should be released to the Applicants, other than any record properly withheld under s. 27(1)(a) and/or to which the mandatory exception under s. 16(1) properly applies. This will also apply to those

Records at Issue where the Public Body is unable to meet its burden of proof to establish that the records are protected by solicitor client privilege and/or litigation privilege pursuant to s. 27(1)(a) or required to be withheld pursuant to s. 16(1), in its decision under the Interim Decision.

The Public Body only relied on the s. 17(1) exception for two Records at Issue, which had been provided to the External Adjudicator. She found the exception had been properly applied to redact one record but not in the other. The External Adjudicator did not agree with the Public Body's submission that s. 16(1) should be used as an alternate exception for the Records at Issue where it had claimed s. 17(1).

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

Authorities Cited: AB: Decision F2014-D-04/Order F2014-51, OIPC External Adjudicator Order #4, Order 96-011, Order 97-018; Order 99-023; Order 2000-003, Order 2001-028, Order F2006-010, Order F2006-010, Order F2007-013, Order F2007-014, Order F2008-021, Order F2008-028, Order F2009-007, Order F2009-024, Order F2010-007, Order F2014-38/Decision F2014-D-02, Order F2014-49, Order F2015-22, Order F2017-28, **BC:** Order F13-15; **NS**: Department of Business (Re), 2016 NSOIPC 10; **ON:** Order PO-1998.

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

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

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I. BACKGROUND

[para 1] After receiving my delegation from the Information and Privacy Commissioner [Commissioner] and swearing an oath pursuant to s. 51(7) of the *Freedom of Information and Protection of Privacy Act* [*FOIP* Act], I corresponded with the parties on May 16, 2014, 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 the three 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.*

[para 2] By separate correspondence on the same date, I sought the consent of 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.

[para 3] On June 6, 2014 I sent the Notice of Inquiry [2014 Notice] to the Public Body and the Applicants. The 2014 Notice reads as follows:

This inquiry arises from three 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 two separate requests with the Public Body. The first Applicant filed the first request to access information [#F6420] to the Public Body on June 12, 2012, which reads as follows:

> *We request copies of the following records in the custody or control of the Ministry of Justice and Solicitor General, for the time period beginning September 2005 and ending as of the date of this request:*
>
> > *(a) all agreements between [*name of law firm*], or any member of that consortium;*
> >
> > *(b) all agreements between Alberta and any other law firms or lawyers retained to prosecute, or to assist in prosecuting, Alberta's lawsuit against tobacco manufacturers;*
> >
> > *(c) all agreements between Alberta and any other province or territory concerning [*name of law firm*]; and*
> >
> > *(d) all agreements between Alberta and any other province or territory concerning lawsuits against tobacco manufacturers*
> >
> > *(collectively, the "Agreements").*
>
> *We have made a broader but separate request for records in the custody or control of the Ministry of Justice and Solicitor General that relate [Emphasis in original] to the News Release and the Agreements.*

On July 12, 2012, the Public Body made a decision with respect to the first request to access information from the first Applicant, which reads as follows:

> *35 pages of records were located in response to your request. Agreements were located in response to items (a) and (d). No records were located in response to items (b) and (c). Unfortunately, access to all the information that you requested is refused under sections 21, 25, and 27 of the Freedom of Information and Protection of Privacy Act.*
>
> *Below is a list of the specific sections of the FOIP Act that were applied to the records responsive to your request.*
>
> *Pages 1 to 14 - exempted in entirety under sections 25(1)(c)(i), 27(1)(a) and 27(1)(b).*
> *Pages 15 to 35 - exempted in entirety under sections 21(1)(a)(i), 25(1)(c)(i), 27(1)(a) and 27(1)(b).*

The first Applicant filed a second request to access information [#F6843] with the Public Body on June 12, 2012, which reads as follows:

> *For the time period beginning September 2005 and ending as of the date of this request, we request copies of all records (including, but not limited to, agendas, aide-memoires, analyses, authorizations, briefing books, briefing notes, costing data, diaries, drafts, emails, guidelines, instructions, letters, manuals, memos, minutes of meetings, notes, notes to file, opinions, policy statements, presentations, reports, research papers, rules, speeches, studies, travel claims and visit/travel reports) in the custody or control of the Ministry of Justice and Solicitor General that relate [Emphasis in original] to the News Release or to any of the following records:*

*(a) all agreements between [*name of law firm*], or any member of that consortium;*

(b) all agreements between Alberta and any other law firms or lawyers retained to prosecute, or to assist in prosecuting, Alberta's lawsuit against tobacco manufacturers;

*(c) all agreements between Alberta and any other province or territory concerning [*name of law firm*]; and*

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

(collectively, the "Agreements").

We have made a separate request for copies of the Agreements in the custody or control of the Ministry of Justice and Solicitor General, which we accordingly exclude [Emphasis in original] from this request.

On December 17, 2012, the Public Body made a decision with respect to the second request to access information from the first Applicant, which reads as follows:

Some of the records requested contain information that is excepted from disclosure under Sections 16, 17, 21, 24, 25 and 27 of the Alberta Freedom of Information and Protection of Privacy (FOIP) 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 [#F6747] to the Public Body on December 7, 2012, which is summarized as follows:

All records related to the contract tendering, selection process and request for proposal connected to the Government of Alberta's Tobacco Lawsuit;

Specific documents related to the contingency fee agreement by the province. The bids submitted by law firms.

On December 21, 2012, the Public Body made a decision with respect to the second Applicant's request to access information, which reads as follows:

Some of the records requested contain information that is excepted from disclosure under Sections 16, 17, 21, 24, 25 and 27 of the Alberta Freedom of Information and Protection of Privacy (FOIP) 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 September 10, 2012, the first Applicant filed a Request for Review of the Public Body's decision to refuse access to all records responsive to [his/her] *first request to access to information. On February 14, 2013, 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] *second request to access to information.*

On January 10, 2013, the second Applicant filed a Request for Review [#F6747] 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 [all] *matters, however, this was not successful.*

On June 25, 2013, the first Applicant filed a Request for Inquiry with respect to [his/her] *first request to access information. On the same date, the first Applicant filed a Request for Inquiry with respect to* [his/her] *second request to access information. On June 7, 2013, the second Applicant filed a Request for Inquiry with respect to* [his/her] *request to access information.*

By consent of the parties, the three Requests for Inquiry regarding the Public Body's decisions in response to the three requests to access information from the Applicants were consolidated into one inquiry provided that all of the records were included in the inquiry. 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 the three requests to access information, including all the exceptions claimed. I refer the Public Body to Appendix A of the Public Body's decision letter in #F6843 that lists the pages and sections of the FOIP Act applied, which Appendix 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]

[para 4] The remainder of the 2014 Notice discussed procedural matters including the schedule for the parties' submissions.

[para 5] In accordance with the Schedule outlined in the 2014 Notice, the First Applicant provided his/her Initial Submission dated July 8, 2014 [2014 First AIS]. The Second Applicant apologized for the unavoidable slight delay but confirmed in writing on July 10, 2014 that for the purpose of his/her Initial Submissions, s/he would be relying on previously submitted documents [2014 Second AIS] that were included with the 2014 Notice. The Public Body provided its Initial Submission on August 6, 2014 [2014 PBIS], in accordance with the Schedule set out in the 2014 Notice.

[para 6] On August 22, 2014, I corresponded with all parties advising them I was raising a Preliminary Evidentiary Issue [PEI]. The parties were advised that the dates for the Rebuttal Submissions in the Inquiry were postponed until after I received Submissions on PEI from all parties and had the opportunity to consider the matter.

[para 7] All the parties were given the opportunity to submit their respective Initial and Rebuttal Submissions on the PEI to the External Adjudicator and exchange these with each other. An exchange of submissions regarding the PEI followed resulting in Decision 2014-D-04/Order F2014-51 [2014 Decision/Order]. Subsequently, the Public Body applied for Judicial Review of that Decision/Order, which application has since been adjourned *sine die*.

[para 8] By correspondence to the parties dated November 24, 2016, I notified the Minister for the Public Body (and the Applicants and the Public Body) that the completion date of the Inquiry had been extended to November 30, 2017.

[para 9] On January 19, 2017, I received correspondence from the Public Body providing two updated Indices of Records: one for Case File #F6420 and one for Case Files #F6843/#F6747, copies of which correspondence and updated Indices were also provided to the Applicants on the same date by the Public Body. The letter from the Public Body read as follows:

Re: Inquiry #F6420/#F6843/#F6747

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

I am enclosing an updated "Index of Records (Exchanged Among the Parties)" for Inquiry #F6420. All of these Records are protected by solicitor-client and other legal privilege (as well as other exceptions).

I am also enclosing an updated "Index of Records (Exchanged Among the Parties)" for Inquiry #F6843/#F6747 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 are non-responsive to the access requests. These Records are indicated by "Non-Responsive" in the enclosed Index. 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 [*name of First Applicant] *and the [*name of Second Applicant*], 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:

I. The numbering in the revised Index refers to the number at the bottom right of each Record, and ***not to the ABJ number at the bottom of the page.***

2. With respect to Record 1143, the Ministry had originally claimed exemptions under section 25(1)(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 10] On March 8, 2017, I acknowledged receipt of the updated Indices and a portion of the Records at Issue by letter to the Public Body, shared with both Applicants in the Inquiry, which read as follows:

Re: Inquiry #F6420/#F6747/#F6843: 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 24, 2016, I extended the anticipated completion date for this Inquiry to November 30, 2017 to allow the Inquiry to proceed once the Public Body made its decision with respect to complying with my Decision F2014-D-04/Order F2014-51 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-04/Order F2014-51 was completed or resolved.

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

On January 19, 2017, the Public Body corresponded with me as the External Adjudicator with copies to the parties indicating that following the decision in the University of Calgary case, it reviewed the Index of Records for this Inquiry. As a result of that review, the Public Body made a decision to provide an updated Index of Records and a portion of the Records at Issue. The updated indices included one new index for case file #F6420 and one for case files #F6843/#F6747, both of which were provided to me and the parties. The Public Body also provided me, as the External Adjudicator, with two copies of a portion of the Records at Issue for case files #F6843/#F6747, excluding those Records at Issue over which the Public Body has claimed the solicitor-client or other legal privilege exceptions, following the rulings in the SCC. The provision of this portion of the Records at Issue complies, in part, with my Decision F2014-D-04/Order F2014-51.

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

[para 11] On September 8, 2017 I issued a Notice of Continuation of Inquiry [2017 Notice] to all parties in this Inquiry. The 2017 Notice read as follows:

Re: Inquiry #F6420/#F6747/#F6843: Notice of Continuation of Inquiry

In partial compliance with my Decision F2014-D-04/Order F2014-51 [2014 Decision/Order], the Public Body has provided me with a portion of the Records at Issue in this Inquiry. On January 19, 2017 the Public Body provided two updated Indices and two copies of some of the pages of the responsive Records at Issue, the latter being the first records to be produced to the Office of the Information and Privacy Commissioner [Commissioner] in the subject Inquiry. On March 8, 2017 I confirmed that the provision of this portion of the Records at Issue complies, in part, with my 2014 Decision/Order. The portion of the records provided excluded any pages of records where the Public Body has claimed a legal privilege exception. While the Applicants received a copy of the updated 2017 Indices, the Public Body did not disclose any records to the Applicants.

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

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

1. *On January 19, 2017, the Public Body corresponded with me to advise that following the ruling in the Alberta (Information and Privacy Commissioner) v. University of Calgary [U of C] case regarding legal privilege in the Supreme Court of Canada, the Ministry had*

reviewed its 2014 Index of Records at Issue [2014 Index] for this Inquiry. The result of that review appears to be that the Ministry decided to produce and provide one updated Index of Records for #F6420 and because the record *"is a record created by or for a member of the Executive Council" another updated Index of Records for #F6747/#F6843, copies of which correspondence and updated Indices were also provided to both Applicants by the Public Body on the same date;*

2. *Included with its January 19, 2017 correspondence, the Public Body provided me with two copies of a portion of the Records at Issue for case files #F6747/#F6843, excluding those records over which the Public Body has claimed solicitor-client and other legal privilege;*

3. *The updated #F6420 Index lists 35 pages for the Records at Issue in the Inquiry. The Public Body did not provide any of these pages to me as it has claimed a legal privilege exception under s. 27(1) of the FOIP Act for all 35 pages. No pages were disclosed to the Applicants on January 19, 2017; and*

4. *The updated #F6747/#F6843 Index lists 1,901 pages for the Records at Issue in the Inquiry. The Public Body has provided 12 pages of records to me, withholding the remaining pages over which it has claimed a legal privilege exception under s. 27(1) of the FOIP Act. No pages were disclosed to the Applicants on January 19, 2017. In its 2014 Initial Submission, the Public Body confirmed that the 35 pages in case file #F6420 were included in the count of pages in the updated #F6747/#F6843 Index. I conclude, therefore, that none of the Records at Issue for #F6420 have been provided to me. The Public Body indicates that it has disclosed 129 pages of the Records at Issue, withholding 1,772 pages from the Applicants.*

With respect to the 2014 and 2017 Indices, the Public Body's correspondence dated January 19, 2017, and the records released to the Applicants in response to their access to information requests, I raise the following issues:

1. *There are some discrepancies between the Indices. For example: pages 681 and 695 are not in the FOIP Coordinator's List of Exemptions, not listed as Non-Responsive, not in the 2014 Index, but each of the pages are included within a record bundle in the 2017 Index. In its 2014 Initial Submission, the Public Body indicated that 129 pages of 1,901 total pages of Records at Issue had been disclosed to the Applicants. Based on a count of the pages provided by one of the Applicants with* [his/her] *Request for Review, the Applicants received 129 pages. The parties are requested to review the summary below to assist them in addressing any discrepancies:*

   Original total pages for the Inquiry: 1,901
   [this number includes the 35 pages in #F6420]
   Total pages Public Body disclosed to the Applicants: 129
   Total pages Public Body withheld from the Applicants: 1,772
   Of the total 1,901 pages, total number of pages given to the External Adjudicator: 12

2. *The Public Body has added additional pages to the 2017 Index of Records at Issue for case files #F6747/#F6843 indicating they are Non-Responsive and subject to litigation and solicitor-client privilege [1031, 1032-1033, 1530-1531, 1532-1533]. The Public Body has also added two additional pages listed as Non-Responsive for which it has not claimed legal privilege [1034, 1852]. The latter two pages were included in the FOIP Coordinator's List of Exemptions pages referred to there as draft or Non-Responsive [1031-1034, 1350, 1353, 1356, 1852]. For three of these pages [1350, 1353, 1356], they are shown in the 2017 Index as part of a cluster of pages where the Public Body has claimed s. 27 and other exceptions [1349-1363].*

3. *For pages 361-362, the 2014 Index indicates the Public Body has released these two pages. But in the 2017 Index the Public Body has claimed s. 27 and other exceptions for page 361. Page 361 has been released to the Applicants.*

4. *Likewise, the 2017 Index indicates that the Public Body has claimed s. 27 and other exceptions for another page. For page 888, the 2014 Index indicates the Public Body has released this page, stating in a footnote that the FOIP Coordinator's List of Exemptions was incorrect in not showing this page as released. But in the 2017 Index the Public Body has once again claimed s. 27 and other exceptions for page 888. Page 888 has also been released to the Applicants.*

5. *Some pages shown as released to the Applicants in the 2017 Index are not contained in the records provided to the Applicants at the time of the Public Body's decision in response to their access to information requests [144, 192, 207, 418, 741, 1019-1020]. In the 2014 Index the Public Body has listed exceptions for these pages. The Public Body did not indicate in its January 19, 2017 cover letter that it had released any new pages to the Applicants.*

6. *In its January 19, 2017 cover letter, the Public Body indicated the Ministry has changed its claim with respect to page 1143 of the Records at Issue, for which it initially claimed s. 25(1)(c), s. 27(1)(b) and s. 27(1)(c), to Non-Responsive. Because the 2017 Index for this page is blank, in other words, the Public Body has not included any exceptions or any reference to Non-Responsive in the Table, the Applicants should be advised this page has been provided to me.*

7. *In its January 19, 2017 cover letter, the Public Body submitted, with respect to withholding the names of lawyers (or law firms) who submitted an expression of interest, that if I find s. 17 does not apply, the Public Body argues that s. 16 should be applied. I referred to giving Notice to affected parties in my Decision/Order beginning at para. 185. As I only have access to 12 pages of a total 1,901 pages of Records at Issue, it is impossible for me to identify all the Affected Parties, which issue is discussed below in more detail.*

8. *In para. 5 of its Initial Submission, the Public Body indicated that 35 pages of responsive records for case file #F6420 are included in the 1,901 pages of responsive records for case files #F6747/#F6843. The Public Body has claimed solicitor-client and other legal privilege for all of the records for #F6420 and, therefore, no copies have been provided to me. As I do not have the advantage of having a complete set of the Records at Issue before me, I request that the Public Body clarify the following: the numbering and clusters of records in the respective indices do not appear to mesh. The reason this may be important is because these three case files were merged into one inquiry on the basis that the Public Body represented to the Commissioner's Office that the Records at Issue were identical (refer to the Public Body's letter dated November 21, 2013). Is a Table of Concordance available to clarify which page in the 2017 Index for case file #F6420 coincides with which page in the 2017 Index for case file*[s] *#F6747/#F6843?*

To be fair to both the Public Body and the Applicants, I have provided the summary above to enable the parties to consider and address these matters in their Rebuttal Submissions. *Also there may be some outstanding issues from the Issues outlined in the 2014 Notice of Inquiry. By way of example: the Applicants did not provide any submissions with respect to Issue #8: Public Interest, for which the Applicants bear the burden; in its 2014 Initial Submission, the Public Body did not address Issue #7 in the 2014 Notice of Inquiry: Non-Responsive.*

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

1. *Whether the Public Body properly relied on and applied s. 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.*

If the Public Body is successful in demonstrating it has properly relied on and applied the s. 27 legal privilege exceptions, it will be unnecessary to consider the other discretionary exceptions. However, if the Public Body is unsuccessful, the Inquiry will turn to consider the other discretionary exceptions: s. 21, s. 24, s. 25 and the mandatory exceptions claimed: s. 16 and s. 17. In the case of the latter mandatory exceptions, be advised that it will be incumbent on the Public Body to comply with s. 30(4) of the FOIP Act, by giving notice to all affected third party(ies) whose business and/or personal information has been identified by the Public Body in the pages of the Records at Issue, at the point it decides to release records over which the exceptions have been claimed. But where notice is not being given, the Public Body must still inform itself sufficiently with the information obtained from the affected third party(ies) as to how s. 16 applies to the information in the records, which evidence will be needed to supplement the Public Body's 2014 Initial Submission with respect to s. 16. To date, the Public Body has made no submissions with respect to s. 17 other than to suggest I should apply it if I find s. 16 does not apply. [**NOTE:** This sentence requires clarification: the Public Body submitted if I find s. 17 does not apply, s. 16 also applies.] *The applicability of s. 16 and s. 17 requires greater attention by the Public Body for the complete set of the Records at Issue where it has relied on these mandatory exceptions.*

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

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

1. *On December 15, 2016 the Commissioner developed, and made public, a Privilege Practice Note [PPN] to replace its former Solicitor-Client Privilege Adjudication Protocol following the Supreme Court of Canada U of C decision, a copy of which PPN is*

attached. In this Inquiry, the Public Body continues to object to the production of all of the Records at Issue over which it has claimed any legal privilege pursuant to s. 27. Therefore, it is of particular importance for the Public Body to heed the contents of the PPN to ensure it provides sufficient evidence to support all claims of privilege. In anticipation of a possible response that the PPN is a mere practice note and has no legal authority, I would remind the Public Body that the PPN is based on the Alberta Rules of Court requirements to which the Supreme Court of Canada referred in the U of C decision. On that basis, I request the Public Body to provide the following evidence:

A. *An affidavit or affidavits of the Records at Issue over which any legal privilege has been claimed from the individual, identified in the Records at Issue and in the records disclosed to the Applicants as* ***"lead in-house counsel"*** *(refer to page 1057 disclosed by the Public Body to the Applicants) in regards to the recovery of health care costs associated with tobacco litigation;*

B. *An affidavit or affidavits of the Records at Issue over which any legal privilege has been claimed* ***from 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;***

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

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

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

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

[para 12] The remainder of the 2017 Notice discussed procedural matters including the schedule for the parties' submissions. The *OIPC Privilege Practice Note* issued by the Commissioner's Office in December 2016 was attached to the 2017 Notice.

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

RE: Inquiry #F6420/#F6747/#F6843

*Further to your letter of September 8, 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. 1503-01392.

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

Re: Inquiry #F6420/#F6747/#F6843: AMENDED Notice of Continuation of Inquiry and Extension of Anticipated Completion Date

*I acknowledge receipt of [*name of new lawyer*]'s correspondence dated September 13, 2017 advising me that* [*s/he*] is *replacing [*name of former lawyer*] as counsel of record in the subject Inquiry. In addition to this notification, I request that [*name of new lawyer*] provide the Office of the Information and Privacy Commissioner of Alberta [Commissioner] with a completed Change of Contact and/or Address for Service form available on our website. For your convenience, I have enclosed a copy of the form.*

*I am delegated by the Commissioner to hear this Inquiry as an External Adjudicator. My delegation under the Freedom of Information and Protection of Privacy Act does not give me the authority to be involved in Applications for Judicial Review; only the Commissioner has that authority. Therefore, please contact Registrar [*name*], who will be able to apprise you of how to contact counsel in the Judicial Review.*

*[*Name of new lawyer*], your introductory letter was in response to my letter dated September 8, 2017 providing the parties with a Notice of Continuation of the Inquiry. The Notice of Continuation, which was shared with the Ministry's former counsel and the Applicants, was in response to the Public Body providing me with a portion of the Records at Issue and the Applicants and me with two updated Indices for the Records at Issue. As I stated in my September 8, 2017 correspondence:*

> *In partial compliance with my Decision F2014-D-04/Order F2014-51 [2014 Decision/Order], the Public Body has provided me with a portion of the Records at Issue in this Inquiry. On January 19, 2017 the Public Body provided two updated Indices and two copies of some of the pages of the responsive Records at Issue, the latter being the first records to be produced to the Office of the Information and Privacy Commissioner [Commissioner] in the subject Inquiry. On March 8, 2017 I confirmed that the provision of this portion of the Records at Issue complies, in part, with my 2014 Decision/Order. The portion of the records provided excluded any pages of records where the Public Body has claimed a legal privilege exception. While the Applicants received a copy of the updated 2017 Indices, the Public Body did not disclose any records to the Applicants.*

I recognize that you will require some time to familiarize yourself with this file and certainly appreciate you responding promptly to my September 8, 2017 letter. That being said, I also need to balance your needs as new counsel for the Public Body with the interests of the Applicants whose access to information requests date back to 2012. At pages 5-6 of the Notice of Continuation, I laid out specific demands for evidence in line with the ShawCor decision, which I appreciate may require some time and is, therefore, another factor for me to consider.

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

*[*Name of new lawyer*], should you, on your review of the Records at Issue, discover that some of the pages of records do not fit within any legal privilege exception, I urge you to provide those pages to me, making clear any other exceptions on which you are continuing to rely for those pages. Your proposal to tender this evidence, which I will refer to as the Public Body*

Supplementary Initial Submission, as a first step is, in my opinion, a sound one, subject to any objections the Applicants may have. This step will be followed by the Applicants having ample time to respond to the Public Body's newly tendered evidence in their respective Rebuttal Submission. The typical time to provide an Initial Submission is 4 weeks and a Rebuttal Submission, 2 weeks. These customary times had already been extended, as outlined in my September 8, 2017 correspondence. The new schedule, outlined below, however, modifies this further.

*Weighing the relevant considerations, I propose to modify both my September 8, 2017 timeline and [*name of new lawyer*]'s suggested timeline as follows, subject to any objections the Applicants may have:*

…

[Emphasis added]

[para 15] The remainder of the 2017 Amended Notice discussed procedural matters including the schedule for the parties' submissions. After correspondence from the Public Body regarding the need to further adjust the Schedule for the Submissions to accommodate the new lawyer and, thereafter correspondence from the Applicants to adjust the schedule accordingly, I emailed the parties on September 28, 2017, as follows:

*Thank you [*name of Applicant*] for your letter and [*name of Second Applicant*] for your email of today's date. I appreciate both of you promptly responding. I also appreciate your flexibility with respect to extending the timelines for the new counsel and to changing the Amended Schedule for Submissions to accommodate the deadline for the Public Body to provide its Supplementary Initial Submission.*

*As you may recall from [*his/her*] letter requesting the extension, [*name of new lawyer*] indicated that [*s/he*] would try to meet the deadline and would provide an update on Monday, October 23, 2017 that [*s/he*] will share with all parties.*

*I am hopeful that given [*his/her*] commitment to proceed with dispatch that [*s/he*] will be able to meet the deadline set out in the Amended Schedule. If the Public Body is unable to do so, however, of course the Amended Schedule will be adjusted accordingly to allow equitable time for the Applicants to provide their respective Rebuttal Submission. This will ensure fairness to all the parties in this Inquiry.*

[para 16] On October 16, 2017, the Public Body contacted the Registrar, which communication was confirmed by him/her in an email, as follows:

*Dear [*name of new lawyer*]:*

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 17] The Public Body continued to request additional time. On October 23, 2017, the following correspondence was sent to new counsel for the Public Body:

*Dear [*name of new lawyer*]:*

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 your letter dated September 25, 2017, you proposed to provide me with an update on today's date. Unfortunately, there, once again, seems to be some confusion.

1. *The Amended Schedule for Submissions set October 27, 2017 as the due date for the Public Body's Supplementary Initial Submission in the subject Inquiry. By your letter referred to above you were to advise me today if October 27, 2017 would be met.*

2. *Your email today provided no progress update as promised but simply defaulted to the date you originally wanted. I remind you once again, it is for an adjudicator to set the schedules taking into account all relevant factors.*

I assume you now appreciate the process under the Inquiry Procedures, a copy of which I provided to you. 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.

In reply to today's email, I wish to point out the following:

1. *You have failed to follow the process as set out in the Inquiry Procedures because you have not provided me with reasons for this request for a further extension.*

2. *What is due are Supplementary Initial Submissions for which you have been given 7 weeks to provide where the usual for doing so is 4 weeks. The reasons for allowing the Public Body this extra time were laid out in my letter of September 15, 2017.*

3. *Because you are now requesting an additional 3 weeks taking the total to nearly 10 weeks, in order to be fair to the Applicants, it will be necessary for you to follow the Inquiry Procedures and provide reasons as to why this additional time is necessary.*

Once your request is formalized with reasons, the Applicants will be given 3 days in which to object or not.

I look forward to hearing from you.

[para 18] On the same date, the Public Body responded as follows:

RE: OIPC Inquiry ##F6420/#F6747/#F6843: Procedure for Extension Requests

Dear Registrar,

I apologize for the confusion on these files. First of all our position has from the outset been that these proceedings remain formally stayed because of the outstanding judicial review application. That said, we are endeavouring to take a fresh look at matters in the hopes that it will, at a minimum, narrow the issues. The fact is we are not finished our work and cannot be finished by October 27.

We made a serious effort to estimate the time we require at the outset. The work has been and continues to be underway since I was retained. There are a number of issues and many people to be consulted before final instructions to counsel can be confirmed. We would rather work cooperatively with all involved in this process rather than take unnecessary court proceedings at this stage to confirm the stay.

Therefore we respectively request acknowledgement that November 15 be the target date for the Public Body's Supplementary Initial Submission.

[para 19] Following receipt, I replied to the Public Body on the same day, as follows:

Re: Inquiry #F6420/#F6747/#F6843: AMENDED Schedule for Submissions

As I indicated in earlier correspondence, I am heartened by the Public Body's decisions to have you take a fresh look in all respects, including narrowing the issues. Given the complexity and variation in these matters, I acknowledge that it will require the serious effort to which you make reference.

My decision to agree to the further extension, subject to any objection, is based on my hope that your having a November 15, 2017 due date for Supplementary Initial Submissions and January 17, 2018 for Rebuttal Submissions will benefit both the Applicants and myself in completing the Inquiry.

Accordingly, the Applicants' due date for their Rebuttal Submissions is hereby extended to December 20, 2017. If the Applicants object to your extension request, they have 3 days to notify me and the other parties.

In keeping with the spirit of cooperation to which you refer, I advise that I am in Edmonton and available over the next three weeks if the Public Body is open to permitting me to view the large majority of the Records at Issue at the Public Body's office (no copies to be taken away) as proposed in my Order F2014-51.

With a view to assisting you, I would like to recommend that you review the pages of the records given to the Applicants with the copies of the Records at Issue provided to me on January 19, 2017. As you may discover, some of the latter have been totally disclosed to the Applicants. For one example, see pages 1063-1064 in the Index for #F6747/#F6843 [part of Doc Count 304].

I look forward to hearing from you.

[para 20] In accordance with the final Schedule, the Public Body provided its 2017 Supplemental (Initial) Submissions [2017 PBSS] on November 15, 2017. A few days later, on November 21, 2017, the Public Body sent another updated index because pages were found to be missing. The cover correspondence from the Public Body to the External Adjudicator and the Applicants read as follows:

> *RE: OPIC* [sic] *File Numbers F6843, F6747, and F6420*
>
> *Further to our correspondence dated November 15, 2017 providing a copy of the Public Body's Supplemental Submission in the above noted matters, it has come to our attention that the Exhibit "A" to the Affidavit of [*name of in-house counsel*] which is attached to the Supplemental Submission was missing five pages.*
>
> *Accordingly, please find enclosed an electronic searchable PDF of the full Schedule "A" to the Affidavit of [*name of in-house counsel*].*
>
> *We apologize for any inconvenience or confusion this may have caused. Should you have any further questions or concerns please do not hesitate to contact the writer.*

[para 21] No new 2017 Affidavit of Records accompanied the corrected index.

[para 22] On January 4, 2018 I sought clarification from the Public Body regarding the Index attached to the 2017 Affidavit of Records. My letter read as follows:

> *Re: Inquiry #F6420/#F6747/#F6843: 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 [*name of in-house counsel*]'s Affidavit [Tab A Index], which affidavit is found at Tab A of your Supplementary (Initial) Submission in Inquiry #F6420/#F6747/#F6843. 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 ABJ000550 is listed and described as Retainer and Contingency Fee Agreement. The next entry for a record in the Tab A Index is ABJ000562. Pages ABJ000551 through to and including ABJ000561 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, 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 added]

[para 23] The Public Body provided a response on January 17, 2018, which read as follows:

RE: Inquiry #F6843/#F6747/#F6420: Request for Clarification of Tab A Index of Records at Issue

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 both PDF and searchable Excel versions of this revised Index, which forms part of the Public Body's submissions.

[para 24] The submissions from the parties were received in accordance with the revised Schedule to the 2017 Amended Notice, as modified, and will be discussed in detail *infra.*

II. RECORDS AT ISSUE

[para 25] Originally the Public Body provided two Indices with its 2014 PBIS: at Tab 1 - an Index for the 35 pages of the Records at Issue in #F6420 and at Tab 2 - an Index for the 1,901 pages of the Records at Issue in #F6747/#F6843. At para. 5 of the 2014 PBIS, the Public Body stated it had *"identified 1901 records (which include the 35 records at issue in OIPC File #F6420).* On January 19, 2017 when the Public Body first provided pages of the Records at Issue to the External Adjudicator (12 pages), the Public Body provided two separate updated Indices.

[para 26] With its 2017 PBSS, however, the Public Body provided one Index for all the Case Files #F6420 and #F6747/#F6843. The one Index provided is attached as Exhibit A to the 2017 Affidavit of Records [Exhibited Index]. The affiant states that the Index for Case Files #F6843/#F6747 includes the records for Case File #F6420. The Public Body had confirmed that the 35 pages of the Records at Issue

in #F6420 were included amongst the pages listed in the Index for the other two Case Files. On a careful review of the Exhibited Index for the 2017 Affidavit of Records, the Public Body did not identify where the 35 Records at Issue for Case File #F6420 are located in the consolidated Index. Based on what has been provided by the Public Body, the following is my best summary of the composition of the Records at Issue:

> Total number of pages: 1,901 pages [605 Records]
> Total pages [from #F6747/#F6843] disclosed (in whole or in part) to the Applicants: 129 pages
> Total pages [from #F6420] disclosed (in whole or in part) to the Applicants: 0 pages
> Total shown as RELEASED in the Exhibited Index for combined Indices: 98 Records
> Total pages [from #F6747/#F6843] provided to the External Adjudicator for review: 12 pages [8 Records at Issue]
> Total pages [from #F6420] available to the External Adjudicator for review: 0 pages.

[para 27] A review of the correspondence reproduced in the Background *supra* will highlight some of the other difficulties associated with pinning down the parameters of the Records at Issue. I consider it to be a basic and essential requirement of the Public Body's duty to meet its burden of proof to provide an accurate description of the responsive Records at Issue, particularly for a record that is made up of 1,901 pages, only 12 pages of which have been available to the decision-maker to review.

III. ISSUES IN THE INQUIRY

[para 28] The following are the issues in the Inquiry, as set out in the 2014 Notice and reproduced in the 2017 Notice:

1. *Whether the Public Body properly relied on and applied s. 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.*

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**.]

A. FIRST APPLICANT INITIAL SUBMISSION [2014 First AIS]

[para 29] In accordance with the 2014 Notice of Inquiry, the First Applicant provided his/her Initial Submission [2014 First AIS] dated July 8, 2014 (dated 2012 sic). What follows is a detailed overview of the First Applicant's 2014 First AIS:

SUMMARY OF SUBMISSION

1. The First Applicant submits that the Inquiry arises out of the Public Body's refusal to disclose agreements and records related to the agreements and news release regarding the HCCR Litigation, which refusal was based on s. 16, s. 17, s. 21, s. 24, s. 25 and s. 27 of the *FOIP Act.*

2. Because s. 71(1) places the onus on the Public Body to prove an applicant has no right to access the requested records [Records at Issue], the First Applicant submits s/he will rely on his/her Requests for Inquiry and their attachments for his/her initial submission, which s/he attaches [attached as Schedule A #F6420 Request for Inquiry (including Tabs 1-4) and Schedule B #F6843 Request for Inquiry (including Tabs 1-4)].

FACTS

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

ARGUMENT

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

NATURE OF ORDER SOUGHT

5. The First Applicant seeks an order under s. 72(2)(a) of the *FOIP Act* requiring the Public Body to provide access to all the Records at Issue or, alternatively, access to those portions of the Records at Issue not subject to s. 16, s. 21, s. 24, s. 25 and s. 27 of the *FOIP Act.*

i. SCHEDULE A: FIRST APPLICANT REQUEST FOR INQUIRY #F6420

[para 30] Submissions were attached to the First Applicant's Request for Inquiry, as Schedule "A." As the First Applicant referentially incorporated the #F6420 Request for Inquiry into his/her 2014 First AIS, the following summarizes Schedule A of that request:

1. The First Applicant provides the history regarding the access to information request filed on June 12, 2012. The request was *"for records in the custody or under the control of the Ministry of Justice and Solicitor General"*, to which s/he received a response on July 16, 2012. The letter from the FOIP Director described the responsive records as:

   > *[F]or the time period September 2005 to present:*
   >
   > *(a) All agreements between [*name of law firm*] or any member of that consortium;*
   >
   > *…*
   >
   > *(d) all agreements between Alberta and any other province or territory concerning lawsuits against tobacco manufacturers.*

   and advised that 35 pages of responsive records were being refused on the basis of the exceptions set out in s. 21(1)(a)(i), 25(1)(c)(i), 27(1)(a) and 27(1)(b) of the Act. The First Applicant indicates that

s/he filed a Request for Review, which did not result in a resolution, thereafter filing a Request for Inquiry.

2. The First Applicant argued that the FOIP Director only described the records as *“agreements”* and provided no explanation as to how the claimed exceptions applied. The First Applicant stated *“we do not understand why [*name of FOIP Director]*’s letter is as opaque and conclusory as it is, given that, pursuant to section 71 of the Act, the Ministry will bear the burden of providing that we have no right of access to these records in any future inquiry by the Commissioner.”*

3. The First Applicant provided submissions concerning the disclosure exceptions relied on by the Public Body, indicating more information was required as to the reasons behind the decision, as follows:

A. Section 21(1)(a)(i)
After reciting the test laid out in s. 21(1)(a)(i), the First Applicant listed the following as concerns regarding the Public Body’s reliance on s. 21(1)(a)(i) as follows:

1. *The FOIP Guidelines and Practices (the “FOIP Guidelines”) indicate, at p. 161, that before invoking the exceptions set out in subsection 21(1), the FOIP Coordinator of a public body (in this case, the Ministry) should normally consult with officials in comparable positions in external government bodies. [*name of FOIP Director*]’ s letter makes no reference to this sort of consultation.*

2. *The Ministry has not provided any evidence or even argument that disclosure would harm relations between the Alberta and another government. The FOIP Guidelines indicate, at p. 162, that the Ministry must provide evidence or at least an argument in that regard.*

3. *The Ministry has not demonstrated that “the conduct of intergovernmental relations of the Government of Alberta, and not just those of the public body, would be harmed by the disclosure”, as required by the FOIP Guidelines, at p. 162.*

The First Applicant submits that the Public Body’s decision should be reviewed as to whether the Public Body had an adequate evidentiary basis for invoking s. 21(1)(a)(i) and whether it engaged in adequate consultation with external government bodies before making the decision.

B. Section 25(1)(c)(i)
After reciting the test laid out in s. 25(1)(c)(i), the First Applicant argued that in order to show this exception applies, the Public Body *“must have objective grounds for believing that harm will result from disclosure: see FOIP Guidelines, at p. 191. Financial loss means “direct monetary or equivalent loss”, not speculative loss or loss expected as a result of a “ripple effect”: FOIP Guidelines, at p. 192.”*

The First Applicant submits that the Public Body’s decision should be reviewed as to whether the Public Body had objective grounds for believing that disclosure of the Records at Issue would result in direct financial loss as opposed to indirect loss.

C. Section 27(1)(a) and s. 27(1)(b)
The First Applicant submits that these two paragraphs under s. 27(1)(a) concern information subject to solicitor-client privilege or that relates to the provision of legal services and is prepared by or for specified individuals. After making reference to the *Solicitor-Client Privilege Adjudication Protocol*, the First Applicant highlights the following three submissions:

1. *Part of the Request is for “all agreements between Alberta and any other province or territory concerning lawsuits against tobacco manufacturers”. Agreements between governments cannot be subject to solicitor-client privilege, as they do not meet two of the three pre-conditions for solicitor-client privilege: they are not communications between a*

lawyer and his or her client, and they do not entail the seeking or giving of legal advice. See Solosky v. Canada, [1980] 1 S.C.R. 821, at p. 837. It is thus wrong to refuse our request for these agreements pursuant to paragraph 27(1)(a).

2. *We also requested "all agreements between [*name of law firm*], or any member of that [*name of law firm*]". Especially given the need for transparency in the expenditure of public funds, these agreements should be withheld on the ground of solicitor-client privilege only where it is shown that 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": Imperial Tobacco Co. v. Newfoundland & Labrador (Attorney General), 2007 NLTD 172, at para. 95. See also R. v. Cunningham, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 30. The Ministry's response to our request does not make the required showing. Furthermore, as a matter of common sense, many aspects of the requested agreements (e.g., terms relating to interest or the resolution of disputes) could not possibly touch on legal advice.*

3. *In respect of all the requested records, any solicitor-client privilege that might have existed has been waived by virtue of public statements, including those contained in the news release enclosed with the Request.*

ii. SCHEDULE A: FIRST APPLICANT REQUEST FOR INQUIRY #F6843

[para 31] Submissions were attached to the First Applicant's Request for Inquiry, as Schedule "A." As the First Applicant referentially incorporated the #F6843 Request for Inquiry into his/her 2014 AIS, the following summarizes Schedule A of that request:

1. After reviewing the history, the First Applicant requests an Inquiry to have the Public Body provide additional details of the responsive Records at Issue as well as further disclosure. Referring to the Public Body's decision, the First Applicant indicates s/he was advised that there were 1,901 pages of responsive records located but only 129 produced, many of which, s/he states were redacted.

2. The First Applicant provided submissions concerning how or why the disclosure exceptions relied on by the Public Body apply, indicating more information was required as to the reasons behind the decision to be able to assess how the exception(s) apply. The First Applicant reviewed the exceptions as follows:

   A. Section 16
   After referring to the three-part test for the mandatory s. 16(1) exception: first, be of a specific type, second, be supplied in confidence, and three, meet one of the enumerated harms, the First Applicant submits that the Public Body has not identified with any precision the type of information in the Records at Issue that meet the test, particularly where the information relates to negotiations that have been completed. No evidence, the First Applicant argues, has been provided that demonstrates the information was meant to be confidential or objective grounds that disclosure would result in harm.

   B. Section 17
   The First Applicant is not seeking a review of the decision by the Public Body to redact any personal information in any of the 129 pages produced to him/her.

   C. Section 21
   The First Applicant indicates that the Public Body has relied on s. 21(1)(a) and s. 21(1)(b), which are intended to prevent disclosure of information that would harm intergovernmental relations or supply of information. The First Applicant submits s/he has the following concerns:

- The First Applicant argues that a pre-requisite to invoking this exception, according to the *FOIP Guidelines,* is consultation between the FOIP Coordinator and officials in comparable positions with bodies external to government, for which there is no evidence.

- The Public Body has not met the onerous test, to date, of showing a reasonable probability that disclosure would harm intergovernmental relations or negotiations for the Government, not just the Public Body.

D. Section 24

The Public Body has relied on s. 24(1)(a) (advice, recommendations, analyses or policy options) and s. 24(1)(b) (consultations or deliberations) but these exceptions, the First Applicant submits, do not apply to names of correspondents, subject line, dates or other information that does not reveal anything substantive falling within the exception and, therefore, these records should be provided in redacted format.

E. Section 25

The First Applicant advises that the FOIP Coordinator has applied s. 25(1)(c) to many of the withheld Records at Issue about which s/he has the following concerns in that regard:

- The Public Body has failed to prove objective grounds to demonstrate that disclosure would result in harm.

- The harm s. 25(1)(c) is aimed to protect involves, according to the *FOIP Guidelines* : financial loss, prejudice to competitive position, and interference with specific contractual negotiations not information that might affect a lawsuit.

The First Applicant submits the s. 25 exception has little application here because these harm categories do not flow from the types of information in the Records at Issue as negotiations have been concluded and the exception is not aimed at preventing release of information that may reveal liability that may lead to a lawsuit against a public body.

F. Section 27

The First Applicant submits that s. 27 concerns information that is subject to solicitor client privilege or is related to the provision of legal services prepared by or for specified individuals. As such, the *Solicitor-Client Privilege Adjudication Protocol* applies, in which the First Applicant expects to participate.

In advance of participating in the *Solicitor-Client Privilege Adjudication Protocol* process, the First Applicant highlights three points, as follows:

1. *Two of the three pre-conditions for solicitor-client privilege require that the records are communications between a lawyer and his or her client, and entail the seeking or giving of legal advice. See: Solosky v. Canada [1980] 1 S.C.R. 821, at p. 837. Given the nature of the requested records (which include internal agendas, analyses, authorizations, briefing noes,* [sic] *diaries, emails, letters, memos, presentations, travel claims and visit/travel reports) it is difficult to conceive of how these two pre-conditions to solicitor-client might be said to apply.*

2. *In addition, given the need for transparency in the expenditure of public funds, the requested records should be withheld on the ground of solicitor-client privilege only where it is shown that 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"; Imperial Tobacco Co. v. Newfoundland & Labrador (Attorney General), 2007 NLTD 172. at para. 95. See also: R. v. Cunningham, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 30. The Ministry's response to our request does not make the required*

showing. Furthermore, as a matter of common sense, many aspects of the requested records (e.g., travel claims) could not possibly touch on legal advice.

3. *In respect of all the requested records, any solicitor-client privilege that might have existed has been waived by virtue of public statements, including those contained in the news release enclosed with the Request.*

B. SECOND APPLICANT INITIAL SUBMISSION [2014 Second AIS]

[para 32] On July 10, 2014, the Second Applicant provided the following email:

> *I apologize in submitting my correspondence on July 10 instead of July 9. I was [*absent*] from the office from the 7th to the 9th.*
>
> *I will be relying on my previously submitted documents included in the Notice of Inquiry.*

[para 33] On August 22, 2014, the Second Applicant faxed a letter [2014 Second AIS] to the Public Body, the First Applicant and the OIPC, which read as follows:

> *I'm writing in regards to the initial submission on behalf of Alberta Justice and Solicitor General.*
>
> *My primary concern, and reason for requesting this inquiry, relates to the May 23, 2013 letter from [*name of OIPC employee*], in which [*s/he*] stated that "AJSG did not allow me to review any records withheld under sections 16, 21, 24, 25 and 27 of the FOIP Act." Section 56 of the FOIP act, specifically 56(2), allows the Commissioner to "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." 56(3) requires that a public body must produce to the Commissioner within 10 days any record or copy of any record required under subsection (1) or (2).*
>
> *I appreciate that many of the records requested could be exempted from release due to legal privilege among other sections. But the powers of the Commissioner are paramount in this case. The OIPC has not been allowed to exercise its full powers because of the actions of AJSG in denying access to the relevant records. 56(1) is clear that "the Commissioner has all the powers, privileges and immunities of a commissioner under the Public Inquiries Act and the powers given by subsection (2) of this section." These powers include the power to summon witnesses and to produce any documents, papers, and things that the commissioner ... consider to be required for the full investigation of the matters into which the commissioner or commissioners are appointed to inquire as per Section 4 of the Public Inquiries Act*
>
> *In closing, I request that AJSG abide* [sic] *the powers set out by the FOIP Act. I request that the OIPC be allowed to exercise its legislated powers and fully review all records requested by myself and to determine their eligibility, or lack thereof, for release.*

[para 34] On August 25, 2014, I responded to the Second Applicant and the portion of the letter that relates to the ongoing Inquiry, read as follows:

> *Re: Inquiry #F6420/#F6747/#F6843*
>
> *On Friday August 22, 2014, the Commissioner's Office received correspondence from you by fax. It is my understanding your faxed letter was received in the afternoon. It was brought to my attention shortly thereafter. While your letter states it is in regards to the initial submission of the Public Body, it does not say specifically that it is your Rebuttal.*

Parallel to your faxing your correspondence, I was in the process of sending out a letter to all the parties in this Inquiry regarding a Preliminary Evidentiary Issue. In that correspondence I had suspended the due date for the filing of the Applicants' Rebuttals, which had been set for August 27, 2014.

…

Please confirm that the correspondence received last Friday is your Rebuttal to the Initial Submission of the Public Body and that a copy has been sent to all parties. Alternatively, if you choose to do so, you may withdraw your Rebuttal received on Friday and elect to file your Rebuttal when the schedule is reset. This is completely your decision. Please advise the Commissioner's Office of your intentions in this regard, in writing. For the purpose of clarity, the parties should be copied on your response so it is clear on which Rebuttal you will be relying.

[Emphasis in original]

C. PUBLIC BODY INITIAL SUBMISSION [2014 PBIS]

[para 35] At para. 4 of its 2017 PBSS, the Public Body refers back to the 2014 PBIS that included the FOIP Director Affidavit dated July 31, 2014 (reviewed *infra*) and the FOIP Advisor Affidavit dated April 16, 2013 (reviewed *infra*). At para. 28 of its 2017 PBSS, the Public Body states it *"continues to rely on its submissions dated August 6, 2014 with respect to the other sections of FOIPP..."* At para. 27 of its 2017 PBSS, the Public Body makes it clear that, in addition to the affidavits of in-house counsel [2017 Affidavit of Records], the FOIP Director and the FOIP Advisor, it continues to rely on the report of the retired judge [Opinion Letter] notwithstanding the latter evidence has been ruled inadmissible, which ruling is under judicial review. With a view to considering all of the admissible evidence before me, to begin, the following is a detailed overview of the 2014 PBIS, dated and received August 6, 2014 (except the Opinion Letter that was the subject of the 2014 Decision/Order):

1. The Public Body lays out the three access to information requests made by the two Applicants, a summary of which follows:

    a. For #F6420, the First Applicant sought access to *"Agreements"* between the Province of Alberta and the [name of law firm] counsel in the CRA Litigation, other law firms, or any other province/territory concerning [name of law firm] and with any other province/territory concerning lawsuits against tobacco manufacturers. The Public Body identified 35 pages of responsive records, none of which were disclosed to the First Applicant.

    b. For #F6843, the First Applicant sought access to *"Related Records"*, the latter referring to all records related to the Agreements, in addition to a news release dated May 30, 2012. The Public Body identified 1,901 pages of responsive records (which the Public Body stated included the 35 pages of records in #F6420) and disclosed 129 pages to the First Applicant.

    c. For #F6747, the Second Applicant sought access to the same records as involved in #F6843 and, therefore, the Public Body provided the same response.

Index of Records

2. The Public Body advises that Tab 1 contains an Index for the 35 pages Records at Issue in #F6420 and that Tab 2 contains the Index for the 1,901 pages of the Records at Issue in #F6843 and #F6747, indicating that the Indices specify the sections of the *FOIP Act* on which it is relying to deny access.

Issue

3. The Public Body submits that the issue is the Public Body's decision [sic] not to disclose the requested Records at Issue, all of which relate to the ongoing HCCR Litigation. [**NOTE:** In this Inquiry, the Public Body made three decisions for two Applicants: the First Applicant made two access to information requests and the Second Applicant made one access to information request.]

Evidence

4. The Public Body relies on the following:

    1. Material contained in the Notice of Inquiry dated June 6, 2014
    2. The Index [sic] at Tabs 1 and 2 of the 2014 PBIS
    3. Affidavit of the FOIP Advisor sworn April 16, 2013 [2014 FOIP Advisor Affidavit]
    4. Affidavit of the Public Body's Director of FOIP and Records Management sworn July 31, 2014 [2014 FOIP Director Affidavit]
    5. Letter report [Opinion Letter] dated July 2, 2014 from retired judge. [**NOTE:** The Opinion Letter was the subject of a preliminary evidentiary issue [PEI] raised by the External Adjudicator, which was ruled inadmissible in Decision F2014-D-04/Order F2014-51 [2014 Decision].]

Structure of the Act

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

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

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

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

Section 27(1)(a)

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

9. What constitutes any type of legal privilege under s. 27(1)(a) of the *FOIP Act*, the Public Body submits, must be determined by reference to the meaning of those terms in the common law, citing *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner),* 2014 ABCA 231 *[Imperial Oil],* at para. 37, attached at Tab 6 of the 2014 PBIS, and arguing that these terms do not have a different meaning under the *FOIP Act*.

Solicitor Client Privilege

10. In similar proceedings involving related litigation in NB and BC, retainer agreements were found to be subject to solicitor client privilege, referring to a decision from the NBQB *[Hayes v. New Brunswick (Minister of Justice and Consumer Affairs),* 2008 NBQB 112 *[Hayes]* and Order F13-15 from the BC Information and Privacy Commissioner, attached at Tabs 7 and 8 of the 2014 PBIS, respectively. Both of these decisions, the Public Body points out, were decided after the *Imperial Tobacco* decision from the NLTD referred to by the First Applicant in his/her 2014 First AIS.

11. After speculating about what a court knew or did not know about the *Imperial Tobacco* decision, the Public Body returns to the *Hayes* decision, which it states *"unequivocally held that the contingency fee agreement was subject to solicitor-client privilege."* Turning next to the BC case, the Public Body cites it as saying, *"[t]he law in BC clearly provides that the terms of … a solicitor-client relationship contained in a retainer or contingency fee agreement - including information relating to financial*

arrangements - relate directly to the seeking, formulating or giving of legal advice and are privileged." The Public Body states these two decisions are consistent with a leading case *Descôteaux* from the SCC.

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

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

Litigation and Common Interest Privilege

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

15. The Public Body cites two decisions regarding litigation and common interest privilege, attached at Tab 11 and Tab 12: *"[l]itigation privilege encompasses all communications between the client and his or her solicitor on the one hand, and third parties on the other hand, which are made for the purpose of pending or contemplated litigation"* and *"[c]ommon interest privilege applies where several persons have a common interest in pending or anticipated litigation, whether or not they are all parties to the litigation (or the same litigation)."*

Legal Privilege is categorical and not weighed against other interests

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

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

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

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

Legal Privilege has not been waived

20. The Public Body argues that various statements made by the Minister of Justice and other Government representatives do not evince an intention to waive solicitor client privilege for any of the Records at Issue. At para. 35, the Public Body cites a passage from Alberta Hansard as follows:

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

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

[**NOTE:** The Alberta Hansard transcript is dated December 4, 2012, shortly after the access to information decisions were made by the Public Body. The FOIP Director, at para. 17 of the 2014 FOIP Director Affidavit, also refers to this passage from Alberta Hansard, which is attached as Exhibit D, but like the Public Body does not provide any explanation as to how the Alberta Hansard transcript is evidence for the statement it purports to support; that there has been no intention to waive legal privilege. Rather, the passage does appear to be evidence regarding a factor the Public Body considered in making its decisions to deny access.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Summary about s. 27(1)

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

Section 24: Disclosure of Advice from Officials

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

Section 25(1)(c)(i): Disclosure of information which could reasonably be expected to result in Financial Loss to the Government of Alberta

34. While 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."*

35. The Public Body, referring back to the Alberta Hansard quote at para. 35 of its 2014 PBIS, 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*]."*

36. 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."*

37. The Public Body submits that the Court of Appeal approach of *"reasonable expectation of financial harm"* should be adopted, citing the *Imperial Oil* decision. The Public Body argues that in the Alberta Court of Appeal 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.

Section 16(1): Information which could reasonably be expected to result in Financial Loss to a Third Party

38. While 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.

39. The Public Body submits that the disclosure of the Agreements would directly affect the financial interests and competitive positions of, which are summarized as follows:

    a. the party or parties to the Agreements
    b. the lawyers retained in the CRA Litigation
    c. other provinces/territories who are party to an Agreement with the Province
    d. prospective law firms who provided information

40. 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.

Section 32: Information to be released in the Public Interest

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

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

43. Relying on *IMS Health (Canada) v. Alberta (Information and Privacy Commissioner),* 2008 ABQB 213, attached at Tab 14, the Public Body argues that s. 32 must be read as a whole as dealing with emergencies involving risk of significant harm and that s. 32(1)(b) *"cannot be read as* a *disembodied, stand-alone provision."*

44. The Public Body remakes its earlier submission (see para. 35.16 *supra*) and refers to case law to support its argument that legal privilege is a class privilege and does not require case-by-case balancing of interests and that including s. 27 in the *FOIP Act "is the embodiment of the public interest."* Short of an emergency of the type referred to in s. 32(1)(a), the remaining part of s. 32 does not provide the basis for weighing public interest in disclosure against the Public Body of rigorously protecting legal privilege.

45. Section 32, the Public Body submits,*"does not mean "where the public is interested", but rather means "where it is in their best interests" in some emergent and potentially harmful situation that would justify an override of other exceptions to disclosure in the Act."* If s. 32(1)(b) had any application, it would allow a public body or the Commissioner to override both mandatory and discretionary exceptions to disclosure. Referring to the *Imperial Oil* decision in the Alberta Court of Appeal, the Public Body submits that *"the Commissioner does not have any authority to override privilege by consideration of public policy, such as any perceived "public policy of openness"."*

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). [**NOTE:** In its summary, the Public Body only refers to the s. 27(1) exception. But in the Exhibited Index to the 2017 Affidavit of Records, the Public Body has specified on which paragraphs under s. 27(1) it is relying.]

i. TAB 3 OF 2014 PBIS: FOIP ADVISOR AFFIDAVIT [2014 FOIP Advisor Affidavit]

[para 36] At Tab 3 of its 2014 PBIS, the Public Body attached the 2014 FOIP Advisor Affidavit sworn April 16, 2013. The Public Body continues to rely on this evidence in its 2017 PBSS. It is important, therefore, to review the 2014 FOIP Advisor Affidavit in detail. I do so now:

1. The affiant identifies him/herself as a FOIP Advisor in the Public Body. 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 the Government of Alberta and their clients within the Public Body and the Ministry of Health.

3. The affiant submits that based on his/her review of the records and *"consultation 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 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 affidavit is made in support of the Public Body's response to the Applicants' request for review.

[**NOTE:** It is noted that the style of cause in the 2014 FOIP Advisor Affidavit reveals names of individuals who are not a party to this Inquiry. Also, the style of cause lists Case File numbers that do not form part of this consolidated Inquiry.]

ii. TAB 4 OF 2014 PBIS: FOIP DIRECTOR AFFIDAVIT [2014 FOIP Director Affidavit]

[para 37] At Tab 4 of its 2014 PBIS, the Public Body attached the 2014 FOIP Director Affidavit sworn July 31, 2014. The Public Body continues to rely on this evidence in its 2017 PBSS. It is important, therefore, to review the 2014 FOIP Director Affidavit in detail. I do so now:

1. The affiant identifies him/herself as an employee of the Public Body as the Director of FOIP and Records Management. As part of the duties of that position, the affiant states s/he received three access to information requests: Two requests from the First Applicant (Case Files #F6420 and #F6843) and one request from the Second Applicant (Case File #F6747).

2. The affiant describes the two access requests from the First Applicant and the one access request from the Second Applicant, indicating that the responsive records for the latter were encompassed within the larger of the two requests from the First Applicant and, therefore, the Public Body's decision in response to the Second Applicant's access request was identical. [**NOTE:** Details of access requests have been provided *supra*.]

3. The affiant indicates that the information sought in the three access to information requests relate to the Alberta Government lawsuit against tobacco companies 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 action as Exhibit B.

5. As part of his/her duties, the affiant states s/he was responsible for collecting and reviewing all of the Responsive Records (totalling 35 for Case File #F6420 and 1,901 for Case Files #F6843 and

#F6747) for the three access requests. In doing so, the affiant indicates s/he was aware that due to the CRA Litigation against the tobacco manufacturers, s/he would have to be cognizant of possible legal and other privileges along with other exemptions.

6. The affiant states his/her understanding is that legal privilege described in s. 27(1)(a) includes solicitor client privilege 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 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 it was on this basis on which the Records at Issue were reviewed. On his/her review, the affiant found the large majority were privileged, based the following indicators:

    - *All the emails or other correspondence are to or from Alberta Justice lawyers, and/or lawyers retained by 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 states all of the records in #F6420 were privileged as were the vast majority in #F6843 and #F6747, for which an exception sheet is attached as Exhibit C, referring to them cumulatively as the *"Privileged Records."* [**NOTE:** There is no exception sheet for #F6420 attached to the affidavit.]

11. The affiant states that the Privileged Records all relate to the CRA Litigation, and s/he "*believes"* they were all 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 a fee 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 the Alberta Hansard transcript as Exhibit D with comments by the Minister of the Public Body, as evidence that legal privilege has not been waived. [**NOTE:** The Hansard transcript is dated December 4, 2012, shortly after the access to information decisions were made by the Public Body. The FOIP Director, in his/her Affidavit, does not provide any details as to how the Alberta Hansard transcript is evidence for his/her statement that there has been no intention to waive legal privilege. Rather, it does appear to be evidence regarding the reasoning behind the Public Body's decision to deny access to the CFA.]

13. 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.

14. 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. [**NOTE:** The affiant refers to the exception sheet as Exhibit B. Exhibit B is, in fact, the Statement of Claim. The only exception sheet attached is Exhibit C but is only for two of the three Case Files. The Public Body in this Inquiry is not Alberta Health.]

15. 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 4, 24, 27(1) and 29 of the Freedom of Information and Protection of Privacy Act."* [**NOTE:** The exceptions at issue in this Inquiry do *not* include s. 4 or s. 29 referred to by the affiant in the 2014 FOIP Director Affidavit and were not claimed by the Public Body in its access to information decisions. In addition, the affiant made no reference to the exceptions in s. 16, s. 17, s. 21, and s. 25, which are at issue in this Inquiry. In addition, the affiant made no reference to the exceptions in s. 16, s. 17, s. 21, or s. 25, which are exceptions that are at issue in this Inquiry.]

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

[para 38] After receiving a portion of the Records at Issue from the Public Body on January 19, 2017 (over which legal privilege had not been claimed), I issued the 2017 Notice. In that Notice, I laid out specific evidentiary requirements for the Public Body to meet in order to meet the standard in the Alberta Rules of Court (as approved in *ShawCor*) that are required to demonstrate the applicability of the legal privilege exception, as the records over which it had been claimed had not been provided to me. What follows is a detailed overview of the Public Body's Supplementary (Initial) Submission [2017 PBSS], referred to by the Public Body as its Supplemental Submission(s), dated and received November 15, 2017.

Introduction

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

2. The Public Body reproduces the information sought by the Applicants in their access to information requests for the three Case Files #F6420, #F6843 and #F6747 [**NOTE:** All access requests reproduced *supra* in the 2014 Notice].

3. The Public Body states it *"withheld records on the basis of sections 16, 24, 25 and 27 of the Act",* a decision the Applicants disagreed with resulting in this Inquiry. [**NOTE:** This is an incomplete list of the exceptions claimed by the Public Body in its access to information decisions or as listed in 2017 Notice.]

4. The Public Body refers to its 2014 PBIS along with the 2014 FOIP Advisor Affidavit and the 2014 FOIP Director Affidavit. The Public Body states in a footnote to this submission:

   > *Alberta Justice continues to rely on those submissions in this inquiry and provides these supplemental submissions to address recent guidance from the Supreme Court of Canada regarding the law of solicitor-client and litigation privilege, and to provide an updated Index of Records (discussed below).* [**NOTE:** With its 2017 PBSS, the Public Body provided one upgraded Index for all three Case Files in this Inquiry.]

5. The Public Body refers to the Decision 2014-D-04/Order F2014-51 in this Inquiry, wherein the Opinion Letter was ruled inadmissible and the Public Body was ordered to produce records for inspection, which the Public Body indicates is under Judicial Review.

6. The Public Body states *"[o]n September 6, 2017* [sic]*, the External Adjudicator wrote to the parties setting out her intention to continue with this Inquiry."* [**NOTE:** The 2017 Notice, sent out to the parties on September 8, 2017, notified them that the Inquiry was continuing as a direct result of the Public Body providing the External Adjudicator with a portion of the Records at Issue, in partial compliance with the 2014 Decision/Order.]

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

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

8. The Public Body provides a general overview of solicitor client privilege and litigation privilege: the former applying to communications that entail the seeking or giving of legal advice which are intended to be confidential by the parties and the latter protecting information from compulsory disclosure of communications and documents whose dominant purpose is for the conduct of litigation.

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

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

    1. The *British Columbia (Attorney General) v. Lee,* 2017 BCCA 219 *[Lee]* decision 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."*

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

11. The Public Body confirms that almost all of the information withheld has been done on the basis of s. 27(1)(a) of the *FOIP Act* as information subject to any type of legal privilege. As set out in the 2017 Affidavit of Records (discussed in detail *infra)*, which includes an updated Index of Records, 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. CRRA refers to the *Crown's Right of Recovery Act* and is another way of referring to the HCCR Litigation. In this Order, CRA Litigation is used throughout except where a party refers to it as the HCCR Litigation or the CRRA Litigation.]

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

Issues

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

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

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

[**NOTE:** The 2014 Notice and the 2017 Notice both listed the exceptions claimed by the Public Body in its access to information decisions: s. 16, s. 17, s. 21, s. 24, s. 25, and s. 27. In its 2017 PBSS, the Public Body makes no reference to the exceptions in s. 17 or s. 21 other than a general statement, at para. 28, that it relies on its 2014 PBIS in regard to other exceptions.]

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

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

15. As well as listing the basis on which the records were being withheld in the Exhibited Index attached to the 2017 Affidavit of Records, the Public Body adds that the 2014 FOIP Director Affidavit also *"described in general terms why the records were privileged."*

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

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

17. The Public Body asserts that its updated Index of Records conforms with the *OIPC Privilege Practice Note* released by the Commissioner after the SCC decision in *U of C.* [**NOTE:** The Public Body refers to an Index of Records. The Public Body is correct that there is, in fact, one Index for all of the Case Files in this consolidated Inquiry, attached as Exhibit A to the 2017 Affidavit of Records at Tab A.]

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

19. The Public Body states that at no point has it provided copies of any records over which it has claimed privilege for review by the External Adjudicator or the Commissioner as part of this Inquiry.

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

Section 27(1)(a) - Legal Privilege

20. The 2017 Affidavit of Records points to the fact that most of the records in the updated Index of Records have been withheld on the basis of s. 27(1)(a), the majority of those subject to, the Public Body submits, both solicitor client privilege and litigation privilege. [**NOTE:** The Exhibited Index shows that all of the Records at Issue where s. 27(1) is in the "Section(s) of the Act" Column both "Litigation Privilege/Solicitor/Client Privilege" populate the Privilege Column. Also, the Public Body indicates in the Exhibited Index which paragraph of s. 27(1) it had relied on.]

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

22. The Public Body submits that the 2017 Affidavit of Records is evidence that *"the records over which solicitor-client privilege have been claimed in this inquiry all involve communications where legal advice was either sought or given, in circumstances where the communication was intended to remain confidential."* [**NOTE:** The 2017 Affidavit of Records does not have any instance where solicitor client privilege alone has been claimed for a record. There are *no* records where litigation privilege alone has been claimed. All of the records that show s. 27(1) as the exception claimed, list both litigation privilege and solicitor client privilege in the Privilege Column, as discussed *supra*. In addition, of the 98 records shown as released, 60 of these have "Litigation Privilege/Solicitor/Client Privilege" claimed in the Privilege Column, discussed *infra*.]

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

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

    [**NOTE:** 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.]

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

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

26. The Public Body states that, in addition to the 2014 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 is inadmissible.]

Other Sections of FOIPP

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

Conclusion and Summary

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

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

[para 39] The 2017 Affidavit of Records, sworn November 15, 2017 by in-house counsel, was attached as Exhibit A to the 2017 PBSS and provided the following evidence:

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

2. The affiant swears that his/her affidavit is supplemental to the 2014 Affidavits of the FOIP Director and the FOIP Advisor for the Public Body submitted as part of the 2014 PBIS and that the 2014 Affidavits set out the basis upon which the Public Body has refused to provide information to certain records 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 three 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 by first and last name, profession as a lawyer, the name of the lawyer's law firm and the fact that the named firm represents one of the defendants in the HCCR litigation. [**NOTE:** The Public Body's evidence referencing the identity of 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 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 (listed by full name and by professional title) 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 references a released record that notes this decision.

7. The affiant confirms that after the Minister of Justice's decision to retain the CRA 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 CRA Litigation law firm (name of law firm provided). [**NOTE:** Providing the names of the law firms assisted in the considering the evidence in the Exhibited Index. Notably, however, the affiant did not provide the names of individual lawyers in the respective law firms 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 to whom s/he is referring.]

Privileged Records

9. The affiant indicates s/he has reviewed all of the records in the Exhibited Index for Case Files #F6843 and #F6747, marked as Exhibit A attached to his/her Affidavit. The records for Case File #F6420 are, s/he attests also found in the Exhibit A. 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"*:

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

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

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

    (d) 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 HCCR litigation."*

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

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

    (b) Records describing legal advice from Alberta Health lawyers and lawyers at Alberta Justice and Solicitor General regarding the terms of the CFA, the May 31, 2012 News Release, and the HCCR litigation generally,

    (c) Records describing communications between the Public Body [sic] *[*name of law firm*] regarding the CFA or 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 all contain 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."*

14. The affiant states it should be noted that *"one of the applicants herein also represents [*name of 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."*

Section 16 Records

15. From his/her review of the records 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."* [**NOTE:** There is no evidence from third parties attached to the 2017 Affidavit of Records.]

Section 24 Records

16. 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 Alberta Health"* and *"contain positions, plans, procedures, criteria or instructions developed for the purpose of contractual negotiations by Alberta Health, or considerations that relate to those negotiations."* [**NOTE:** The Public Body in this Inquiry is not Alberta Health.]

17. 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."*

18. 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 official delegate in the Inquiry and has not been shared with the Commissioner.]

E. FIRST APPLICANT REBUTTAL SUBMISSION [2017 First ARS]

[para 40] Complying with the Schedule set out in the 2017 Notice, on December 20, 2017, the First Applicant provided his/her Rebuttal Submission [2017 First ARS], referred to by the Applicant as a Supplemental Submission. What follows is a detailed overview of the First Applicant's 2017 First ARS.

Part 1: Summary of Submission

1. In paras. 1-7, the First Applicant provides a summary that includes the following:

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

- With respect to the other statutory exceptions, the First Applicant submits that because of its cursory arguments and evidence, the Public Body has failed to discharge its burden and has effectively abandoned its reliance on other exceptions: s. 16. s. 24 and s. 25 of the *FOIP Act.*

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

Part 2: Facts

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

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

3. In paras. 9-11 the First Applicant argues that the Public Body, in its submissions and evidence, highlighted his/her identity as a lawyer representing one of the defendants in the HCCR Litigation. S/he submits that the identity of an applicant is not a relevant consideration for any of the statutory tests for non-disclosure under the *FOIP Act.*

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

5. The same logic applies, the First Applicant submits, to the other exceptions relied on by the Public Body. That is: *"under the FOIP Act, a record is either exempt from disclosure, or it is disclosable to the public at large. There are no in-between, where a record can be disclosed to some members of the public, but not others. To say otherwise runs counter to the spirit and intent of freedom of information legislation."*

Part 3: Argument - Privilege

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

7. The First Applicant states that it appears the Public Body is claiming both solicitor client privilege and litigation privilege over all the records where privilege has been claimed. Citing record ABJ000770 [Page Count 207], as an example, which is described as *"Notice to Government of Alberta Employees revised kilometre and related transportation rates Effective July 1, 2008",* the First Applicant submits the descriptions of the records are not sufficiently detailed to allow for an analysis of how or why either of the two types of privilege apply to any given record.

8. The First Applicant adds that there are a number records listed in the Privilege Column where there is not enough information to assess if the claim of privilege is reasonable or valid, citing as examples, documents that are simply described as *"Briefing Note AR### Background"* without any further information: *"who drafted it, to whom it was sent, or, in some cases, even when it was drafted or sent."*

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

Part 3: Argument - Insufficient Evidence and Argument to Support Other Statutory Exceptions

10. The First Applicant submits that the Public Body failed to advance sufficient evidence and arguments, in its 2014 PBIS, to prove the other exceptions (s. 16, s. 24 and s. 25) it has claimed apply. Specifically, the First Applicant submits:

    - Regarding s. 16, the Public Body has failed to satisfy the statutory test by providing evidence that demonstrates a third party supplied the information in confidence and that there is a real, not speculative, threat to the third party's business interests or competitive position.

    - Regarding s. 25, the First Applicant argues that the Public Body's submission that it is obvious there is a paramount need not to do anything that would *"even remotely jeopardize the tobacco recovery litigation"* does not meet the onerous test under the s. 25 exception: the Public Body must demonstrate objective grounds for believing disclosure of a particular record will result in a specific harm and consider if the issue of harm can be addressed by severing the record. The First Applicant submits that these issues are not sufficiently canvassed in the Public Body's submissions.

11. The First Applicant submits that the approach adopted by the Public Body in this case makes it clear that the only exception to disclosure that is seriously at issue is privilege under s. 27.

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

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

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

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

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

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

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

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

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

- non-disclosure is a recurring theme through all three investigations/inquiries into the *"Tobaccogate"* scandal, using Iacobucci's investigation, as an example, who found the Alberta Government *"failed to adequately disclose information to the very individual that had been tasked with investigating the Tobaccogate scandal at taxpayers' expense."*

18. The First Applicant states s/he is unaware of any case where disclosure has been ordered based on s. 32(1)(b) and submits that in order for the section to have any meaning, there must be some circumstances where it would apply. The Applicant argues, at para. 29, that: *"[*o*]ne would be hard pressed to think of more compelling circumstances creating a public interest in disclosure of privileged information than the present: the Requested Records relate to the biggest government corruption scandal in recent memory, and publicly-funded investigations into that scandal have been vexed by the inadequate disclosure of relevant information by government.*"

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

Part 3: Nature of Order Sought

20. The First Applicant seeks an Order pursuant to s. 72(2)(a) of the *FOIP Act* requiring the Public Body to provide access to all the Records at Issue, or, alternatively, an Order requiring the Public Body to provide access to those portions of the Records at Issue not subject to the exceptions claimed (s. 16, s. 21, s. 24, s. 25 or s. 27).

F. SECOND APPLICANT REBUTTAL SUBMISSION [2017 Second ARS]

[para 41] On September 17, 2014, the Registrar of the OIPC confirmed his/her conversation with the Second Applicant regarding the fax s/he sent to the Public Body on August 22, 2014. That conversation was confirmed by email that read, in part, as follows:

> *Further to our telephone conversation this afternoon, please confirm that:*
>
> a) *You have provided a copy of your September 11, 2014 email to [*name of lawyer*] on behalf of the Public Body (Alberta Justice and Solicitor General) indicating that you intend for your August 22, 2014 fax to be your rebuttal for the inquiry.*
>
> b) *You do not intend to provide a further rebuttal when the External Adjudicator resets the rebuttal submissions schedule sometime after September 26, 2014 (i.e., after submissions are closed on the Preliminary Evidentiary Issue).*

[para 42] The Second Applicant provided confirmation on the same date. The referenced August 22, 2014 fax is reproduced under the 2014 Second AIS [para. 32 *supra*] which the Public Body acknowledged receiving.

G. PUBLIC BODY REBUTTAL SUBMISSION [2017 PBRS]

[para 43] Complying with the Schedule set out in the 2017 Amended Notice, as subsequently modified, the Public Body, on January 17, 2018, provided its Rebuttal Submission [2017 PBRS]. At para. 1 of its 2017 PBRS, the Public Body specifies that its submission is a Reply to Rebuttal Submissions of the First Applicant, which is understandable as no further submission was received from the Second Applicant. [**NOTE:** The Public Body makes no reference to the Second Applicant or the correspondence

received from him/her. For that reason, throughout the following overview, I will refer only to the First Applicant, throughout the 2017 PBRS.] What follows is a detailed overview of the 2017 PBRS:

Identity of the First Applicant

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

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

Section 32 - Public Interest Override

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

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

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

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

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

Insufficient Evidence

8. The Public Body refers to the three affidavits it has provided, in addition to the Opinion Letter from a former judge (admissibility it notes is currently in dispute), all of which it submits, *"provide ample additional information and context regarding the background for how the Refused Records were created, and why privilege has been claimed."*

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

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

    - once privilege is established it applies to all communications made within the framework of solicitor client relationship
    - severances within the continuum may be appropriate when advice is given by lawyers outside the framework, which is not protected and can be severed
    - severances should only be considered when it can be accomplished without any risk of revealing legal advice or any erosion of legal privilege.

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

Exercise of Discretion

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

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

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

[para 44] This completes the overview of all of the parties' submissions in this Inquiry. I turn now to a Discussion of Issues.

V. DISCUSSION OF ISSUES

[para 45] In the preceding portion 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 Applicants. What follows is my evaluation and assessment of that evidence and those submissions. The evidentiary standard I have employed throughout is a balance of probabilities in deciding whether either the Public Body or the Applicants have met their respective burdens of proof under the *FOIP Act [*Refer to *FH v. McDougall* 2008 SCC 38*].*

[para 46] The Public Body has relied on the following exceptions to refuse disclosure of the majority of the Records at Issue to the Applicants: two mandatory exceptions were claimed in the access to information decisions: s. 16(1) and s. 17. For the mandatory exceptions, the question is whether the Public Body has demonstrated that it properly claimed the exception and withheld the information accordingly. The Public Body has claimed the following discretionary exceptions: s. 21(1)(a), s. 24(1)(b), s. 25(1)(c), s. 27(1)(a), 27(1)(b) and s. 27(1)(c). For the discretionary exceptions, the questions are twofold. First, has the Public Body met its burden of proof to demonstrate that it *properly relied* on the exception and, second, that it *properly applied* the exception by exercising its discretion to deny disclosure?

[para 47] Section 27(1)(a): solicitor client privilege and litigation privilege have been claimed for the vast majority of the Records at Issue. Where the Public Body meets its burden of proof to demonstrate that that it has *properly relied* on and *properly applied* the legal privilege exception in s. 27(1)(a) to the Records at Issue and that it has properly exercised its discretion to refuse access, it will be unnecessary for me to go on to consider the other discretionary exceptions claimed. In its reply, the Public Body submitted that the primary issue in the Inquiry is whether it has properly exercised its discretion under s. 27(1)(a) [Refer to 2017 PBRS, at para. 14]. That is only part of the question before me with respect to legal privilege. An essential pre-requisite to examining the issue of the Public Body's exercise of discretion under s. 27(1)(a) is to determine, based on the evidence provided, whether the Public Body has met its burden of proof that it *properly relied* on s. 27(1)(a), which the Public Body has acknowledged [Refer to 2017 PBSS, at para. 13(a)]. In other words, on a balance of probabilities, has the Public Body provided *sufficiently* clear, convincing, and cogent evidence that s. 27(1)(a) has been properly claimed for each specific Record at Issue. I begin the Discussion with Issue #6 with respect to s. 27(1)(a).

A. Issue #6: Section 27(1)

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

[para 48] Under s. 71(1) of the *FOIP Act,* the Public Body has the burden to prove the Applicants have no right of access to the information that it withheld under s. 27(1). Section 71(1) reads as follows:

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

[para 49] The Public Body has relied on three exceptions under s. 27(1): 27(1)(a), 27(1)(b) and 27(1)(c) in the Exhibited Index, set out in the *"Section(s) of the Act"* Column. The Public Body has predominantly relied on the legal privileges contained in s. 27(1)(a). I begin there.

i. Section 27(1)(a)

[para 50] 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 51] The *FOIP Act* was structured in a way that anticipated that the Commissioner, or her delegate, would have the Records at Issue at her/his disposal to review. This was in order to enable the Commissioner or her delegate to review the records to make a determination as to whether a public body had properly relied on and applied the exceptions it claimed in making its decision to disclose or refuse records that were the subject of an access to information request. The timeline between the access to information requests in 2012 and the Inquiry beginning in 2014, and reactivated after the Public Body provided the first copies of any Records at Issue in January 2017, spans a period during which the requirements regarding legal privilege have evolved and been clarified by the Courts. Recognizing that reality, it is important to review the details of the decisions reached by the Public Body to withhold the complete sets of Records at Issue beginning with its decisions in response to the Applicants' access to information requests.

[para 52] In the case of s. 27(1)(a) regarding a public body's reliance on the solicitor client privilege and litigation privilege exceptions, access to information and protection of privacy commissioners across Canada have, historically, made attempts to balance the unequivocal need to respect and protect legally privileged information while at the same time fulfill their statutory oversight mandate by not always requiring the production of records over which privilege had been claimed. The Supreme Court of

Canada [SCC] in two recent decisions made it clear that the present legislation in Alberta does not empower the Commissioner or her delegate to compel a public body to produce records, over which legal privilege has been claimed, for examination. As a result, the Public Body is now required, in the absence of it exercising its discretion to produce some or all of the Records at Issue to the decision-maker on a non-waiver basis (*in camera*), to provide direct evidence to meet its burden pursuant to s. 71 of the *FOIP Act.* The onus on the Public Body is to identify the grounds for claiming privilege with respect to each record to assist the decision-maker in assessing the validity of that claim and, also, to describe the record in a way, without revealing any privileged information, that indicates how, on a balance of probabilities, the record fits within the claimed solicitor client privilege and/or litigation privilege. [Refer to *Alberta (Information and Privacy Commissioner) v. University of Calgary* 2016 SCC 63 *[U of C]* and *Lizotte v. Aviva Insurance Company of Canada,* 2016 SCC 52 *[Lizotte].*]

[para 53] At paras. 8 and 10 of its 2017 PBSS, the Public Body submits, in part, as follows:

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

[para 54] The Public Body lays out the law regarding legal privilege and, in doing so refers to the leading decisions (*Solosky, Pritchard* and *Lizotte)* from the SCC. The First Applicant states s/he does not take issue with the Public Body's presentation of the law of privilege. Nor do I. The Second Applicant was silent on this point. For the purpose of examining the evidence provided, however, I highlight the following cases with respect to legal privilege.

[para 55] In *Solosky v. The Queen,* the SCC confirmed the *basic and essential* criteria for solicitor client privilege as follows:

> *As Mr. Justice Addy notes,* ***privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege—(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.*** *To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court. Finally, the privilege is aimed at improper use or disclosure, and not at merely opening.*
> [*Solosky v. The Queen*, [1980] 1 SCR 821, at p. 838]
> [Emphasis added]

[para 56] The SCC has made it clear that while the two legal privileges: solicitor client privilege and litigation privilege, serve a common cause, they are separate genres. The *Lizotte* decision discusses the privileges, in part, as follows:

> *Litigation privilege protects against the compulsory disclosure of communications and documents whose dominant purpose is preparation for litigation. Although it differs from the professional secrecy of lawyers (solicitor-client privilege) in several respects, the two concepts do overlap to some extent. Since Canada (Privacy Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44 (CanLII), [2008] 2 S.C.R. 574, it has been settled law that any legislative provision capable of interfering with solicitor-client privilege must be read narrowly and that a legislature may not abrogate that privilege by inference, but may only do so using clear, explicit and*

unequivocal language. The issue in this appeal is whether this principle also applies to litigation privilege.

…

A. Characteristics of Litigation Privilege

Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts: J.-C. Royer and S. Lavallée, La preuve civile (4th ed. 2008), at pp. 1009-10.

…

Because of these origins, litigation privilege has sometimes been confused with solicitor‑client privilege, both at common law and in Quebec law: Royer and Lavallée, at pp. 1003‑4; N. J. Williams, "Discovery of Civil Litigation Trial Preparation in Canada" (1980), 58 Can. Bar Rev. 1, at pp. 37‑38.

However, since Blank was rendered in 2006, it has been settled law that solicitor‑client privilege and litigation privilege are distinguishable. In Blank, the Court stated that "[t]hey often co-exist and [that] one is sometimes mistakenly called by the other's name, but [that] they are not coterminous in space, time or meaning" (para. 1). It identified the following differences between them:

- *The purpose of solicitor-client privilege is to protect a relationship, while that of litigation privilege is to ensure the efficacy of the adversarial process (para. 27);*

- *Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends (paras. 34 and 36);*

- *Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services (para. 32);*

- *Litigation privilege applies to non-confidential documents (para. 28), quoting R. J. Sharpe, "Claiming Privilege in the Discovery Process", in Special Lectures in the Law Society of Upper Canada (1984), 163, at PP. 164-65);*

- *Litigation privilege is not directed at communications between solicitors and clients as such (para. 27).*

The Court also stated that litigation privilege, "unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration" (Blank, at para. 37). Moreover, the Court confirmed ***that only those documents whose "dominant purpose" is litigation (and not those for which litigation is a "substantial purpose") are covered by the privilege*** *(para. 60). It noted that the concept of "related litigation", which concerns different proceedings that are brought after the litigation that gave rise to the privilege, may extend the privilege's effect (paras. 38-41).*

*While it is true that in Blank, the Court thus identified clear differences between litigation privilege and solicitor-client privilege, it also recognized that they have some characteristics in common. For instance, it noted that the two privileges "****serve a common cause: The secure and effective administration of justice according to law" (****para. 31). More specifically, litigation privilege serves that cause by "ensur[ing] the efficacy of the adversarial process" (para. 27) and maintaining a "protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (para. 40, quoting Sharpe, at p. 165).*

[*Lizotte v. Aviva Insurance Company of Canada,* 2016 SCC 52, at paras. 1, 19, 21-24]
[Emphasis added]

[para 57] The Public Body has applied *both* solicitor client privilege and litigation privilege to the majority of the Records at Issue. This in and of itself is not necessarily a problem. It is completely conceivable that any specific record could legitimately contain information protected by both solicitor client privilege and litigation privilege. The descriptions provided in this case, however, pay limited attention to making a distinction as to what information falls under which legal privilege and, importantly, how the information in each specific record fits under either privilege.

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

[para 58] In this Inquiry, the 2017 Affidavit of Records was sworn by in-house counsel, a Justice and Solicitor General government lawyer, who attested to being tasked with providing advice to public bodies. The descriptions of the Records at Issue in the 2017 Affidavit of Records and the Exhibited Index fall short with respect to making a distinction as to the two possible roles for the affiant as in-house counsel: legal advisor or policy advisor. A careful review of the descriptions of the Records at Issue reveals a gap in the evidence of when the affiant is providing *policy advice* versus *legal* advice to the Public Body or to any public body. In the *Pritchard* decision, the SCC held as follows:

> *Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency: see R. v. Campbell, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, at para. 49. In Campbell, the appellant police officers sought access to the legal advice provided to the RCMP by the Department of Justice and on which the RCMP claimed to have placed good faith reliance. In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply.* ***However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.***
>
> ***Owing to the nature of the work of in-house counsel, often having both legal and nonlegal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered****: Campbell, supra, at para. 50.*
> [*Pritchard v. Ontario (Human Rights Commission),* [2004] 1 SCR 809, at paras. 19-20]
> [Emphasis added]

[para 59] In the *Campbell* decision to which the Court referred to in *Pritchard,* the SCC stated:

> ***It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with***

their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. *A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations. Solicitor-client communications by corporate employees with in-house counsel enjoy the privilege, although (as in government) the corporate context creates special problems: see, for example, the in-house inquiry into "questionable payments" to foreign governments at issue in Upjohn Co. v. United States, 449 U.S. 383 (1981), per Rehnquist J. (as he then was), at pp. 394-95. In private practice some lawyers are valued as much (or more) for raw business sense as for legal acumen. No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer. As Lord Hanworth, M.R., stated in Minter v. Priest, [1929] 1 K.B. 655 (C.A.), at pp. 668-69:*

> *[I]t is not sufficient for the witness to say, "I went to a solicitor's office." … Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office.*

Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered *[…].*
[*R. v. Campbell,* [1999] 1 SCR 565, at para. 50]
[Emphasis added]

[para 60] The First Applicant submits that one of the access to information requests is for all agreements concerning lawsuits against tobacco manufacturers, including the Contingency Fee Agreement, and is not about the process leading up to the agreements. As such, the First Applicant submits that the agreements cannot meet two of the three *Solosky* criteria to establish solicitor client privilege: the agreements are neither a communication between a lawyer and a client nor do they entail seeking or giving legal advice.

[para 61] Further to the terms of this Interim Decision outlined *infra*, the Public Body will have the opportunity to make a decision for those Records at Issue where, based on the evidence submitted by the Public Body, I have been unable to decide if either or both legal privileges apply, which in some cases, the record is as an agreement. Because the Applicants' access to information requests were about agreements or information related to those agreements, and because the Public Body devoted a significant portion of its evidence and submissions to the CFA, I turn now to a brief discussion of the case law related to this genre of record.

[para 62] With respect to similar proceedings involving related litigation, in its 2014 PBIS, the Public Body relied on the *Hayes v. New Brunswick (Minister of Justice and Consumer Affairs),* 2008 NBQB 112 [*Hayes*] decision and Order F13-15 from BC. The *Hayes* Court found that the agreement was protected by privilege because in that case, it found that the *Solosky* criteria had been met. In relying on *Descôteaux v. Mierzwinski* [1982] 1 SCR 860 *[Descôteaux]*, the Public Body argued that where legal advice of any kind is sought from a legal adviser in his/her capacity as such, a communication related to that purpose, made in confidence, will be protected by privilege.

[para 63] The Public Body also relied on a FOIP decision from BC that declined to follow *Imperial Tobacco Co v. Newfoundland and Labrador (Attorney General),* 2007 NLTD 172 *[Imperial Tobacco]* choosing instead to rely on what the adjudicator referred to as the *"law in BC."* The most important distinguishing feature regarding Order F13-15 becomes obvious when reviewing the adjudicator's conclusion, which states, in part, as follows:

> ***I have carefully reviewed the requested records****, and I find that the BHT Retainer, the Side Letter and the CFA are protected by legal advice privilege. They are confidential, written communications between the Province and its lawyers, and they are directly related to the seeking, formulating and giving of legal advice.*
> …

I am restricted in what I may say here regarding the Province's submissions relating to this record as they are appropriately <u>in camera</u>.
[Order F13-15, at paras. 19-20]
[Emphasis added and <u>in original</u>]

[para 64] In that case, the decision-maker had the records at issue available *in camera* in order to make a determination. Regarding the *Hayes* decision on which the Public Body also relied, the Court was less clear in its reasoning as to how the agreement met the *Solosky* criteria when it stated:

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

[para 65] By providing minimal descriptions, if any, other than to describe them as contingency fee agreements, the Public Body seems to be taking the position that the CFA is to be automatically classified as legally privileged. There are, in fact, competing authorities with respect to lawyer's bills, retainers, and contingency fee agreements. What appears to be clear is that disclosure can only be permitted where there is no reasonable possibility that the disclosure of a document will directly or indirectly reveal a communication protected by legal privilege. When it has not made the records or detailed descriptions of the records available *in camera,* the burden on the Public Body is to provide descriptions that adequately satisfy its burden of proof to establish the record as subject to legal privilege without revealing that privilege.

[para 66] Each case involving these kinds of documents appear to vary on their facts. In Order F2007-014 where the issue was regarding bills of account, the Alberta Adjudicator, *after reviewing the records*, stated:

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

[para 67] Once again, the decision-maker had the information to review in order to make a determination. *[For a different outcome regarding where a lump sum payment is considered a privileged communication: British Columbia v. British Columbia (Information and Privacy Commissioner),* [1996] BCJ No. 2534, at Tab 9 of the 2014 PBIS*]*

[para 68] With respect to similar proceedings involving related litigation, in his/her 2017 First ARS, the First Applicant relied on the *Imperial Tobacco* decision. The Court, in that case, stated:

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

[para 69] The Court went on to address the issue of when assertions of legal privilege may lack specificity, as follows:

> *Once it is established that the information sought is covered by the Act and prima facie subject to disclosure under s. 4, the onus of establishing that access to that information should be refused rests on the head of the department or agency concerned. Section 14 provides:*

> *"14. In a proceeding under this Act this burden of establishing that access to information requested under this Act may or shall be refused shall be on the head concerned."*

> *Thus, in Industrial Union of Marine and General Workers of Canada, Local 20 v. Marystown Shipyard Ltd. (1988), 1988 CanLII 5412 (NL SC), 72 Nfld. & P.E.I.R. 145; 223 A.P.R. 145 (Nfld.T.D.),* ***where vague assertions in affidavits attempting to justify refusal of access were not considered specific enough to bring the type of information within the statutory exemptions, the court, applying s. 14, held that the onus had not been discharged and therefore ordered access.***
>
> *The same approach applies to claims to refuse access on grounds of solicitor-client privilege under s. 11 (d) …*
> [*Imperial Tobacco*, at paras. 34-35]
> [Emphasis added]

[para 70] For many of the Records at Issue, including some described by the Public Body as *"Retainer and Contingency Fee Agreement",* I have not been provided with any further details in order to establish the criteria for legal privilege. The Court in the *Imperial Tobacco* decision acknowledged the fundamental nature of solicitor client privilege but went on to make the point that privilege still had to be established.

> *Generally, each communication must meet three criteria for the privilege to exist: (i) there must be a communication between a solicitor, acting in his or her professional capacity, and the client; (ii) the communication must entail the seeking or giving of legal advice; and (iii) the communication must be intended to be confidential by the parties. See Solosky, at p. 837; R. v. B.B. [2001] N.J. No. 203, at para. [26].*
>
> *If the Minister is able to demonstrate that each of those characteristics applies to the information contained in or disclosed by the documents in question in this case, they will be protected from disclosure.*
>
> *The Characterization of the Contingency Fee Agreement*
>
> ***A document is not automatically privileged just because it is entered into between a lawyer and his or her client. It must meet the criteria outlined above before it will attract the special status of privilege.***
>
> *The Minister claims that inasmuch as a contingency fee agreement is a document that involves the engagement of legal counsel for purposes of litigation, an activity that of necessity would involve the giving of legal advice, its terms, including its financial terms, are protected by the privilege.*
>
> *Imperial, on the other hand, argues that from the limited amount we know about it,* ***the agreement was essentially a commercial agreement entered into for the purchase of legal services in exercise of the government's general procurement function. As such, its disclosure would not necessarily reveal anything about the nature of the legal advice that was, or was to be in the future, provided by the government's contracted legal advisors; nor would the type of information contained in such an agreement be the type that would be needed for the lawyer to know to be able to provide the legal advice.***
> [*Imperial Tobacco*, at paras. 46-50]
> [Emphasis added]

[para 71] The Court held that the contingency fee agreement was a communication between the government as a client and a lawyer but held the government had failed to demonstrate that disclosure of the agreement could reasonably lead to the discovery of legal advice passing between a lawyer and client thus eroding the fundamental purpose of solicitor client privilege. As is the case in this Inquiry, the

decision-maker did not review the documents over which privilege had been claimed in reaching its conclusions.

[para 72] At para. 20 of its 2014 PBIS, the Public Body stated that *"it would strain credulity to think that the New Brunswick Court would not have been acutely aware of Imperial Tobacco"* because, it submitted, the same lawyer acted for the applicants in both cases, using that for the basis of its submission to dismiss the fact that the *Imperial Tobacco* decision had not been referred to in the *Hayes* decision. For our purposes in this Inquiry, I prefer an approach that relies on the precedents rather than speculation, that, on their facts, most fall in line with this Inquiry with respect to the circumstances of the case or as the SCC stated, *"[u]nder the established rules on solicitor-client privilege, and based on the facts and interests at stake before us."* [Refer to *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23, at para. 75]

[para 73] The evidentiary requirements for an Affidavit of Records as laid out in the *ShawCor* decision (reflecting the Alberta Rules of Court and adopted in the *OIPC Privilege Practice Note*), referred to by the Public Body in its 2017 PBSS, are as follows:

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

[para 74] The result of the evidentiary requirements being met are significant because once a public body has established, on a balance of probabilities, that any particular record is subject to solicitor client privilege, *"it will only yield in certain clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis."* [*R. v. Lavallee* [2002] 3 SCR 209, at para. 36]

[para 75] In the 2017 Notice, I impressed upon the Public Body the importance of providing affidavit evidence from lawyers who had knowledge about the information over which it was claiming legal privilege. If one or more of the affiants was in-house counsel, I urged the Public Body to provide robust evidence regarding the potential for his/her duplicate roles. This would enable me to measure if the communications met the criteria for the solicitor client framework, as set out by the SCC in the *Solosky, Pritchard* and *Campbell* decisions. That is, whether or not solicitor client privilege can be applied is dependent on the Public Body providing evidence as to the nature of the relationship, the subject matter of the advice (legal or policy) and the circumstances in which it is sought or rendered without revealing any privileged information.

[para 76] The primary question in this Inquiry is whether the Public Body has provided *sufficiently* clear, convincing, and cogent evidence to discharge its burden under the *FOIP Act* to support its claims of either or both legal privileges. In January 2017, the Public Body provided me with 12 pages (from Case Files #F6747/#F6843; no pages from #F6420) of the Records at Issue where legal privilege had not been claimed. Given that the Records at Issue where legal privilege has been claimed were neither available for me to review nor were they described as to how legal privilege applied by way of *in camera* evidence, it was incumbent on me to thoroughly scrutinize the evidence that was submitted by the Public Body in order to determine if I was able to decide if the Public Body has met its burden of proof by providing what is required by the *ShawCor* decision (reflecting the Alberta Rules of Court and adopted in the *OIPC Privilege Practice Note*). I do so now.

Access to Information Decisions

[para 77] I begin with the information provided by the Public Body at the time of making its decisions in response to the access to information requests. Section 12(1)(c)(i) directs that *"the applicant must be told the reasons for the refusal and the provision of this Act on which the refusal is based."* What reasons were given to the Applicants by the Public Body for its access to information decisions?

[para 78] In its three 2012 access to information decisions to the Applicants, the Public Body withheld all of the Records at Issue except for 129 pages. The Public Body withheld the Records at Issue where it claimed that s. 16, s. 17, s. 21, s. 24, s. 25 and s. 27 applied. The Public Body's access to information decisions, which were released on July 12, 2012, December 17, 2012 and December 31, 2012, cited the exceptions upon which it was relying, which decisions read as follows:

> (Decision for Case File #F6420)
> *35 pages of records were located in response to your request. Agreements were located in response to items (a) and (d). No records were located in response to items (b) and (c). Unfortunately, access to all the information that you requested is refused under sections 21, 25, and 27 of the Freedom of Information and Protection of Privacy Act.*
>
> *Below is a list of the specific sections of the FOIP Act that were applied to the records responsive to your request.*
>
> > *Pages 1 to 14 - exempted in entirety under sections 25(1)(c)(i), 27(1)(a) and 27(1)(b).*
> > *Pages 15 to 35 - exempted in entirety under sections 21(1)(a)(i), 25(1)(c)(i), 27(1)(a) and 27(1)(b).*
>
> (Decision for Case File #F6747 and Case File #F6843)
> *Some of the records requested contain information that is excepted from disclosure under Sections 16, 17, 21, 24, 25 and 27 of the Alberta Freedom of Information and Protection of Privacy (FOIP) 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.*

[para 79] In his/her #F6420 Request for Inquiry (attached to his/her 2014 AIS), the First Applicant, who had two access requests, stated the following with respect to the Public Body's decisions:

> *Unfortunately, [*name of FOIP Director*]'s letter does not describe the records in question as anything other than "agreements", and does not explain how or why they might be subject to the disclosure exceptions [*s/he*] cites. This makes it very difficult for us to assess whether and to what extent the Ministry is justified in withholding the records. We do not understand why [*name of FOIP Director*]'s letter is as opaque and conclusory as it is, given that, pursuant to section 71 of the Act, the Ministry will bear the burden of proving that we have no right of access to these records in any future inquiry by the Commissioner.*

[para 80] The FOIP access to information decisions were referred to in the 2014 Affidavits, to which I now turn.

2014 FOIP Director and 2014 FOIP Advisor Affidavits

[para 81] At para. 14 of its 2017 PBSS, the Public Body stated:

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

[para 82] When the Inquiry began in 2014, the Public Body included Affidavits from the FOIP Director and the FOIP Advisor in its 2014 PBIS, which, in part, provided attestations in *"general terms."* It is only fair to mention that these 2014 Affidavits were prepared in advance of the 2016 SCC decisions, which provided clarity around evidentiary requirements regarding legal privilege, and before the *ShawCor* decision (reflecting the Alberta Rules of Court and adopted in the *OIPC Privilege Practice Note*).

[para 83] Equally important to note, however, is the fact that the 2014 Affidavits were not provided in the Record Form format recommended in the Commissioner's *Solicitor-Client Privilege Adjudication Protocol* [*Protocol*]. The *Protocol,* the predecessor to the Commissioner's *OIPC Privilege Practice Note,* was developed by the Commissioner after the *Canada (Privacy Commissioner) v. Blood Tribe Department of Health,* 2008 SCC 44 *[Blood Tribe]* decision. It was designed to assist public bodies in meeting their burden to demonstrate that legal privilege had been properly claimed without necessarily providing the privileged records to the Commissioner or her delegate.

[para 84] In the 2014 FOIP Director Affidavit itself, the FOIP Director attached an Exception Sheet that indicates which documents are subject to s. 27(1)(a), s. 27(1)(b) and/or s. 27(1)(c). The Exception Sheets list the Records at Issue by pages number along with the exceptions claimed but did not attach any substantive indices or schedules in the Record Form format recommended by the *Protocol*. With respect to what s/he describes as *"Privileged Records",* the FOIP Director, a non-lawyer, stated at paras. 14-16 of his/her affidavit:

> *The Privileged Records all relate to the tobacco litigation and from my review were meant to be confidential.*
>
> *I believe that the agreements being sought by the applicants would be privileged.*
>
> *It would be a record of a communication between a solicitor and a client, it relates to the seeking of legal advice, and it is intended to be confidential.*
>
> *A fee agreement, such as an agreement between Alberta and its legal counsel, is 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.*

[para 85] The second affidavit provided with the 2014 PBIS was the 2014 FOIP Advisor Affidavit. With respect to the claim of legal privilege, the affiant, a non-lawyer, stated at paras. 3-6 of his/her affidavit:

> *The Privileged Records include email, memoranda and other communication between various legal counsel for the Government of Alberta and their clients within the Public Body and Ministry of Health.*
>
> *Based on my review of the Privileged Records and consultation 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.*
>
> *Based on my review of the Privileged Records and consultation with some of the individuals named in the records, I do verily believe that the Privileged Records were intended to be confidential and that distribution of the Privileged Records was limited to only those who needed to have the information.*
>
> *I am advised by [*name of in-house counsel*], legal counsel for the Public Body, and do verily believe that these records are subject to solicitor-client privilege and/or litigation privilege.*

[para 86] The evidence provided in both of the 2014 Affidavits is based on information and belief from non-lawyers and, as such, is not direct evidence of either of the legal privileges claimed.

[para 87] On January 19, 2017 the Public Body sent 12 pages of Records at Issue [8 Records] to me, prompting the continuation of the Inquiry. For the records provided there was no claim of legal privilege. The Public Body had withheld these 12 pages of Records at Issue based on the claim that the record was Non-Responsive [NR] or that the s. 17(1), s. 24(1), or s. 25(1)(c)(i) exceptions of the *FOIP Act* applied.

[para 88] With respect to the Records at Issue provided to the External Adjudicator (not the Applicants), the Public Body, in its January 19, 2017 cover letter, indicated that, on reflection, it was withdrawing its reliance on legal privilege and s. 25 for Record 1143 (at Doc Count 329 - ABJ001143) and changed the descriptor to NR. The Public Body also submitted that if the s. 17 exception was found not to apply where it had been claimed, s. 16 would apply to withhold names of lawyers and law firms who submitted an expression of interest. The changes to the exceptions relied on came after the 2014 Affidavits were sworn.

[para 89] I turn now to the third and final affidavit submitted by the Public Body.

<u>2017 Affidavit of Records</u>

[para 90] At paras. 15-18 of its 2017 PBSS, the Public Body submitted:

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

[para 91] The updated Exhibited Index of Records attached to the 2017 Affidavit of Records lists the records for Case Files #F6747 and #F6843, which the Public Body states includes the records for Case File #F6420.

[para 92] At para. 24 of its 2017 PBSS, the Public Body submitted:

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

- *The section of the Act applied to withhold the information; and*
- *The type of privilege claimed.*

[para 93] On careful inspection of the Exhibited Index, it in fact, contains the following Columns of information:

Count
Document ID
End Document ID
Section(s) of the Act
[HC] Doc Date
Document Type
Title
People/Organizations From
People/Organizations To
People/Organizations CC
People/Organizations Between
Privilege
Page Count
[**NOTE:** The Public Body has advised that HC indicates 'hard copy.']

[para 94] In the 2017 Affidavit of Records, the affiant attests to having reviewed all of the Records at Issue listed in the Exhibited Index, and that the Public Body objects to produce the records listed as solicitor client privilege or litigation privilege or both. For example, at paras. 14-18, the affiant states:

> ***Generally**, solicitor client privilege is claimed by the Public Body as client over records that are:*
>
> *(a) Records, email or other correspondence to and from Alberta Health lawyers and lawyers at Alberta Justice and Solicitor General;*
> *(b) Records that are attached to correspondence to or from a lawyer;*
> *(c) Records of communications between employees of the Public Body quoting referencing* [sic] *legal advice given by a lawyer; and*
> *(d) Records documenting legal advice provided by a lawyer.*
>
> *Separate from solicitor client privilege claimed over the records, the Public Body also claims litigation privilege. All of the records identified as litigation privilege were created for the dominant purpose of facilitating, furthering and/or dealing with the contemplated or ongoing HCCR litigation.*
>
> *Records found in **Exhibit "A" generally** concern the negotiations of the contingency fee agreement with the [*name of law firm*] and the drafting of the May 31, 2012 News Release. The records marked as privileged in this set are **generally**:*
>
> *(a) Records describing legal advice between lawyers from [*name of law firm*] and the Public Body regarding the terms of the CFA,*
> *(b) Records describing legal advice from Alberta Health lawyers and lawyers at Alberta Justice and Solicitor General regarding the terms of the CFA, the May 31, 2012 News Release, and the HCCR litigation **generally**,*
> *(c) Records describing communications between the Public Body* [sic] *[*name of law firm*] regarding the CFA or the HCCR litigation.*
>
> *The records marked as privileged in this set of records all involved legal counsel, were all meant to be confidential, and all were for the purpose of giving or receiving legal advice. All of the records identified as litigation privilege were also created for the dominant purpose of facilitating, furthering and/or dealing with the contemplated or ongoing HCCR litigation.*

*It should be noted that one of the applicants herein also represents [*name of 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.*
[Emphasis added and in original]

[para 95] While this affidavit evidence describes the records as legal advice between lawyers and public bodies, the information in the Exhibited Index for many of the records where the Public Body has applied s. 27(1)(a) cannot be described in this way. The generalities attested to *supra* are distinguishable from other instances where some of the descriptions provided are substantive. For example, the reference to seeking legal advice from outside counsel (name of firm provided) regarding the agreement being negotiated with [name of law firm] is the subject of specific evidence from the affiant in the 2017 Affidavit of Records, where s/he states:

*Following the Minister of Justice's December 14, 2010 decision, the firm [*name of law firm] *was retained to assist in the negotiations and drafting of a contingency fee agreement. [*Name of law firm*] was retained as Justice and Solicitor General rarely utilizes contingency fee agreements, and as such required legal advice on the agreement it was negotiating with [*name of law firm*].*

*All of the communications between lawyers from [*name of law firm*] and employees of Justice and Solicitor General were privileged and confidential communications and all contained legal advice.*
[2017 Affidavit of Records, at paras. 11-12]

[para 96] Accordingly, I have found the Public Body has properly claimed solicitor client privilege and/or litigation privilege under s. 27(1)(a) for many Records at Issue in this Inquiry under Findings *infra* because the evidence provided by the Public Body is substantial enough to meet its burden of proof. This approach of specificity for the descriptors, however, was not adopted by the Public Body throughout.

[para 97] As I stated earlier, sufficient evidence is essential to meet the *Solosky* criteria, which points to a need for specificity in the evidence provided by the Public Body to establish legal privilege. While *ShawCor* indicates the description need only be brief, the Public Body must provide *sufficiently* clear, convincing, and cogent evidence as to how each record fits within the legal privilege(s) claimed to meet its burden of proof. Before providing my findings on what evidence is lacking, a few general observations about the 2017 Affidavit of Records and its Exhibited Index is warranted.

[para 98] On September 8, 2017 I issued the 2017 Notice regarding the continuation of the Inquiry in which I gave the Public Body notice of some of my concerns regarding the Exhibited Index to the 2017 Affidavit of Records to which I did not receive a full response. As stated earlier, 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 in the Index attached to its Affidavit of Records.

[para 99] In that regard, I begin by noting that the Exhibited Index is not accurate. The first example is that for the vast majority of records (60 of 99 records) shown as "RELEASED" in the Section(s) of the Act Column are also records for which Litigation Privilege/Solicitor/Client Privilege populates the Privilege Column. These records are described at para. 7.E *infra.* The inaccuracies are in the Exhibited Index, attached to the 2017 Affidavit of Records, which the Public Body has submitted is the foundational Index to be considered in deciding whether it has met its burden of proof. Are these records that were at one time considered legally privileged but have now been released to the Applicants? The importance of accuracy on the part of the Public Body cannot be overstated where, as in this case, the record is sizeable (made up of 1,901 pages), of which only 12 pages have been available to the decision-maker.

[para 100] Another example of inaccuracy in the Exhibited Index is where there is a gap in the description for the particular record (for examples refer to Doc Counts 276, 574, 575) where there are no statutory exceptions listed and the Privilege Column is not populated. Two of these records are described in a similar, if not identical, manner to other records claimed as legally privileged and released. For example, one can compare Doc Count 101 (released) and Doc Count 276 (blank page) where the

descriptors that are provided are nearly identical. These two records, where no exception was claimed, were *not* provided to me. This is different from a third record (Doc Count 574) where no exceptions were claimed, alleged to be a blank page, a copy of which was provided to me, which was not blank.

[para 101] Second, the evidence in some instances is vague. For example, the affiant of the 2017 Affidavit of Records employs the word *"generally"* frequently when referring to the Records at Issue. This would not necessarily prove to be problematic if the attached Exhibited Index itself was populated with *sufficiently* clear, convincing, and cogent evidence to describe each record specifically. In other words, descriptions that indicated how the record fits within the claimed legal privilege(s): solicitor client privilege, litigation privilege or both.

[para 102] There are a number of examples where the information is incomplete, for example, where the name of a person is included in the descriptor with no indication as to their professional title or role (For examples refer to Doc Counts 5, 200, 267, 273, 298, 305, 308, 334, 343, 380, 400, 457, 459, 576 and 582). Clarity as to role or title for a person is an important part of establishing the record meets the test as a legally privileged communication involving legal advice and/or pending or ongoing litigation. [Refer to *Descôteaux,* at p. 873]

[para 103] For some Records at Issue, there is no one identified as acting as a lawyer or solicitor for the information in the particular record. The evidence did not establish that all senior government officials who are identified as being lawyers were acting in that capacity for *each* record to which they are a party. The Public Body has sometimes provided a description or title that meets the evidentiary test (Refer to Doc Count 476: *"Email Meeting with [*name of law firm*]"*) while other times the description is insufficient (Refer to Doc Count 479: *"Email Tobacco"*).

[para 104] Part of the difficulty is that there are instances where records with the same Document Type, same Title and same Doc Date have been released but other times withheld as legally privileged. (for an example refer to Doc Count 360 compared with Doc Counts 363, 366, 369, 410 and 412). Also, some of the records described as *"affidavit of execution"* have been released to the Applicants but the Privilege Column is populated with both legal privileges.

[para 105] Finally, and importantly, not all of the Columns for each Record or sequence of records are populated with descriptions. The difficulty in making a determination with respect to the sufficiency of the evidence in the 2017 Affidavit of Records *vis a vis* either legal privilege has been compounded by the Public Body's decision to populate some of the column spaces in the Exhibited Index with the word "REDACTED". At para. 18 of its 2017 PBSS, the Public Body submits:

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

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

[para 107] The Public Body's use of REDACTED in the Exhibited Index to the 2017 Affidavit of Records is not 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 full explanation as to why some of the descriptions for some of the Records at Issue in the Exhibited Index have been REDACTED (other than to state it is to shield legally privileged information) and how the redactions were intended to serve in relation to the Public Body meeting its statutory burden. There are 41 Records at Issue where REDACTED is in one or more columns, most often the Title Column, and for some of these, the remaining columns are REDACTED, for example, the identity of the sender or recipient or the date on the

record. A prime example is the record at Doc Count 272: the only information provided in the Exhibited Index is REDACTED for an (undated) "Document." The specific Records at Issue where the Public Body has REDACTED information in the Exhibited Index will be detailed under Findings *infra.*

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

[para 109] 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 is insufficient to meet the burden. The specific Records at Issue where the Public Body has REDACTED information in the Exhibited Index will be detailed under Findings *infra.*

[para 110] By way of comparison, in the 2017 Affidavit of Records, the affiant refers to some Records at Issue that involve obtaining legal advice from outside counsel [name of law firm] retained to advise on and assist in negotiating the CFA with the [name of law firm provided], the affiant explaining that this was necessary because the Public Body rarely utilizes contingency fee agreements. The Records at Issue are clearly described in the Exhibited Index as relating to involvement of the outside law firm providing legal advice about the CFA. The specific Records at Issue describing legal advice with outside counsel that meets the burden will be detailed under Findings *infra.*

[para 111] The Public Body could have considered using this kind of REDACTED evidence in a different way. The Public Body could have made an *in camera* application to enable it to provide me with an unredacted version of the REDACTED Exhibited Index attached to its 2017 Affidavit of Records. The Public Body chose not to do so even though, this would have been more consistent with the approach in Order F2017-28, a case relied on by the Public Body. The Public Body argued the case is an example of where privilege can be decided in the absence of the documents to review. That submission is not wholly accurate.

[para 112] At para. 25 of its 2017 PBSS, the Public Body, relying on Order F2017-28, submits as follows:

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

[para 113] In Order F2017-28, the Adjudicator details, in her decision, the evidence the Public Body provided to her in that case, which reads, in part, as follows:

> *With its initial submission, the Public Body provided an* ***in camera affidavit and a copy of some of the responsive records that left more information unsevered so that I could review more of the information to which the Public Body has applied section 27*** *in conjunction with the CYEA (Child, Youth and Family Enhancement Act).*
>
> *…*
>
> > *While the Public Body's submission has addressed some of the above points, the test above must be met on a record-by-record basis. For example, it would be instructive to know the job duties of the author and recipient(s) of information over which privilege is claimed, in each case. Further, it would be helpful if the Public Body can tell me the context of the legal advice without revealing the advice itself. The Public Body's submissions have already provided me with some general context for the advice; however, I must be satisfied that the Solosky test has been met on a record-by-record basis.*
>
> *The Public Body responded with an* ***in camera affidavit sworn*** *by an employee of the Public Body's FOIP office, as well as a response exchanged with the Applicant. In the exchanged submissions, the Public Body says that the emails are between solicitor and client, or Public Body employees discussing those emails.*
>
> *As noted above, the Public Body also provided a chart, in camera, listing:*
>
> - *each page of records containing information over which solicitor-client privilege had been claimed,*
> - *the type of record contained on each page,*
> - *the relevant dates for each page, and*
> - *the correspondents involved, including to whom the information was forwarded or copied.*
>
> ***The chart was accompanied by a list of the individuals named in the chart, along with their position titles. The chart also notes the difference between instances where legal advice was given or sought, and where the legal advice given was later discussed.***
>
> ***In most cases, the Public Body has redacted only small portions of a page under section 27(1)(a), citing solicitor-client privilege. The remaining information in the records afforded context for the Public Body's claim of privilege. That context, along with the additional evidence provided by the Public Body, satisfies me that the Public Body has met the test for solicitor-client privilege. Having the relevant dates for the correspondence and the position titles of the correspondents was helpful, especially in making a determination about emails between Public Body employees who are not counsel (i.e. determining the likelihood that those Public Body employees were discussing legal advice that was provided by counsel).***
>
> *…*
>
> *For the reasons given, the evidence provided by the Public Body in this case was sufficient for me to make a determination on a balance of probabilities that section 27(1)(a) applies to the information.*
>
> [Order F2017-28, at paras. 118, 131-135, 137]
>
> [Emphasis added]

[para 114] The Public Body in this Inquiry appears to have elected *not* to submit *in camera* evidence as a means to either provide a copy of the unredacted version of the Exhibited 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), which would have afforded me with the opportunity to

see 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 releasing information in a record, after redacting the privileged information, to aid in providing context to the privileged information that has been withheld.

[para 115] The Public Body, in this case, 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) in his/her affidavit: notably s/he makes no reference to any Record at Issue where the descriptors have been REDACTED. In fact, as will be discussed *infra*, the redacted format has proven to compromise the Public Body's ability to meet its burden under the *FOIP Act* and to meet the evidentiary standard set by *ShawCor* for some of the Records at Issue over which it has claimed legal privilege. The approach taken by the public body in Order F2017-28, cited *supra,* would have been (and will be under the Interim Decision) one worth emulating.

[para 116] I turn now to consider whether the Public Body has met its burden to provide *sufficiently* clear, convincing, and cogent evidence to support its claim of legal privilege. I begin with the relevant *Alberta Rules of* Court, which provide as follows:

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

[para 117] I turn next to the *OIPC Privilege Practice Note,* which reads, in part, as follows:

> *In Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53 (CanLII), the Supreme Court of Canada (SCC) suggested that the rules applicable to claims of solicitor-client privilege in the context of civil litigation apply to privilege claims in the context of access requests. The SCC also cited Canadian Natural Resources Ltd. v. ShawCor Ltd., 2014 ABCA 289 (CanLII), 580 A.R. 265 as the relevant authority in Alberta. In this case, the Alberta Court of Appeal discussed the application of Rules 5.7 and 5.8 of the Rules of Court (producible records, and records for which there is an objection to produce). The Court stated (at paras. 42-43):*
>
>> *…Therefore, in explaining the grounds for claiming privilege over a specific record, a party will necessarily need to provide sufficient information about that record that, short of disclosing privileged information, shows why the claimed privilege is applicable to it. Depending on the circumstances, this may require more or less than the "brief description" contemplated under Rule 5.7(1)(b) although we expect that oftentimes the brief description will suffice.*

Accordingly, under either interpretation of the relevant Rules, a party must provide a sufficient description of a record claimed to be privileged to assist other parties in assessing the validity of that claim. From this, it follows that all relevant and material records must be numbered and, at a minimum, briefly described, including those records for which privilege is claimed. As noted, though, this is subject to the proviso that the description need not reveal any information that is privileged.

This is the basis for the practice note for the provision of evidence by Respondents claiming solicitor client privilege over records. The practice note also applies to litigation privilege on the basis of the significance attributed to that privilege by the SCC in Lizotte v. Aviva Insurance Company of Canada, 2016 SCC 52.

[para 118] The *OIPC Privilege Practice Note* also lays out what is required for the Schedule, Index or Exhibit attached to the Affidavit of Records, which reads, in part, as follows:

(*PAGE NUMBER COLUMN)*
A group of records may be numbered and treated as a single record if the records are all of the same nature and the bundle is described in sufficient detail to enable the Commissioner to understand what it contains.

(DESCRIPTION COLUMN)
The description of the record or bundle of records must provide sufficient information about the records that, short of disclosing privileged information, shows why the claimed privilege applies to them.

For claims of solicitor-client privilege, the Respondent should provide:

- *Information about the relationship between the Respondent and the lawyer in the context of the relevant communication*
- *Information about the circumstances to establish that the record was created in the course of requesting or providing legal advice or is a record revealing such a request or advice*
- *Information about the confidentiality of the communication*

For claims of litigation privilege, the Respondent should provide:

- *Information establishing that the record was created for the dominant purpose of litigation*
- *Information establishing that the litigation has not ended*

[para 119] At para. 13 of his/her 2017 First ARS, the First Applicant submitted that the Public Body had failed to provide sufficient information in order for the External Adjudicator to make a determination as to whether the Records at Issue are, in fact, privileged. The First Applicant notes an example [Doc Count 207] described as *“Notice to Government of Alberta Employees revised kilometre and related transportation rates Effective July 1, 2008”* and submits that the descriptions of the records are not sufficiently detailed to allow for an analysis of how or why either of the two types of privilege claimed by the Public Body apply to any given record.

[para 120] In the amended 2017 Notice on September 15, 2017, I alerted the Public Body’s new lawyer of the need for him/her to address the evidentiary requirements, as follows:

*In that regard, I am heartened at the news that you, [*name of lawyer*], will be reviewing the Records at Issue and propose to provide evidence respecting any legal privilege exception, which the Public Body intends to continue to claim. I can assure you that I have no interest in injuring or compromising valid claims to legal privilege.* ***To date, however, the submissions from the***

Public Body have been deplete leaving me, as the ShawCor Court of Appeal of Alberta put it "blindfolded": inadequate description of each page or bundle of records, unclear link between the particular grounds of legal privilege being claimed for each page or bundle of records, and insufficient information/evidence to assist me (without the Records at Issue over which legal privilege has been claimed being available to me) in assessing the validity of the claimed privilege. *I encourage you, [*name of *lawyer], to put your attention to all these aspects during your review of the records and preparation of the relevant affidavit evidence.* [Emphasis added]

[para 121] In its 2017 PBSS and its Affidavit of Records and Exhibited Index, the Public Body provided some evidence that demonstrated that solicitor client privilege and litigation privilege apply to some of the Records at Issue, for examples:

1. Communication between in-house counsel and outside specific law firms with respect to the CFA.
2. Documentation, including emails and notes, involving meetings with lawyers and a specific law firm.
3. Correspondence by email between lawyers identified as such.

[para 122] At the same time, however, the Public Body has failed to provide *sufficiently* clear, convincing, and cogent evidence for many of the Records at Issue with respect to s. 27(1)(a). Some Records at Issue have not been described accurately, adequately or consistently and thus the need for the Interim Decision *infra*, which will provide the Public Body with the opportunity to gather evidence in order to provide an appropriate and specific description with respect to the application of legal privilege for each Record at Issue where it has failed to meet its burden of doing so.

[para 123] Under Findings *infra*, I have listed those Records at Issue where I have been able to decide if a Record at Issue is protected by legal privilege based on the descriptions provided by the Public Body. For the remainder, due to the gaps or shortcomings of the evidence provided with respect to application of s. 27(1)(a), I am unable to decide if the records are protected by either or both legal privileges as claimed.

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

[para 124] For those Records at Issue where I have been able to decide that the Public Body has properly relied on s. 27(1)(a), I turn now to the issue of whether the Public Body has properly applied the legal privilege exception. In doing so, I will address the issue of how the Public Body exercised its discretion.

[para 125] In a recent Order, while addressing the issue of the exercise of discretion, under another discretionary exception s. 24(1), an Alberta Adjudicator, referring to the *Criminal Lawyers' Association* decision from the SCC, stated the following:

> *Section 24(1) is a discretionary exception. In Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.*
>
> *The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:*
>
> - *the decision was made in bad faith*
> - *the decision was made for an improper purpose*
> - ***the decision took into account irrelevant considerations***

• the decision failed to take into account relevant considerations

In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded:

> *In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information* ***not*** *subject to solicitor-client privilege in Ontario (Public Safety and Security). (At para. 104)*

[Order F2017-28, at paras. 101-103]
[Emphasis added]

[para 126] Other than with respect to an access request for personal information, it is well established that the identity of an applicant is an irrelevant consideration, one a public body should not consider in making an access to information decision, which is reflected in the following Order from Ontario.

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

[para 127] At paras. 4 and 18 of the 2017 Affidavit of Records, the affiant states:

> *…One of the requesters [*name*] is a lawyer with [*name of law firm*], a legal firm that that* [sic] *also represents [*name of company*], one of the defendants in the HCCR litigation.*
> *…*
> *It should be noted that one of the applicants herein also represents [*name of 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.*

[para 128] In the 2014 FOIP Director Affidavit, the affiant states that the *"Public Body continues to assert privilege over the fee agreement, and has not waived this right"* and in that regard, attaches, as Exhibit D, comments from the Minister of Justice in Alberta Hansard, that read as follows:

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

[para 129] At paras. 9-10 of his/her 2017 ARS, the First Applicant responded to the Public Body's submissions as follows:

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

[para 130] In its 2017 PBRS submitted on January 17, 2018, the Public Body devoted three paragraphs in its rebuttal responding to the First Applicant's submission that factoring in *who* was seeking the information was an irrelevant consideration in exercising its discretion to withhold records. At paras. 2-4, the Public Body, attempts to distance itself from the evidence previously submitted that it had considered who one of the Applicants was when making its decision(s), by stating the following:

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

[para 131] I do not find the Public Body's rebuttal submission persuasive: its after-the-fact, late in the Inquiry objection to its own initial evidence and submissions. The Public Body did not provide any direct evidence by way of rebuttal from either the in-house counsel or the FOIP Director with its 2017 PBRS. I find, on a balance of probabilities, as a fact, that the Public Body took the identity of one of the Applicants into consideration in making its access to information decision.

[para 132] The exercise of discretion with respect to s. 27(1)(a), however, is treated as distinct from other discretionary exceptions. At para. 14 of its PBRS, the Public Body submits as follows:

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

[para 133] The Public Body goes on to cite Order F2010-007, which reads, in part, as follows:

> *Section 27(1)(a) states that the head of a public body may refuse to disclose any information that is subject to any legal privilege, including solicitor-client privilege. As a result, section 27(1)(a) is discretionary, given that the head is not required by the FOIP Act to withhold information subject to legal privilege.*

In Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23, the Supreme Court of Canada commented on the authority of the Ontario Information and Privacy Commissioner to review the way in which the head of a public body exercises discretion to withhold information in response to an access request.

> *We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in McClure, stressed the categorical nature of the privilege:*
>
> > *... solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis in original]*
> >
> > *Accordingly, we would uphold the Commissioner's decision on the s. 19 claim.*

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

[para 134] The *FOIP Act* grants the Applicants a right of access to information. Section 27(1)(a) provides the Public Body with the right to protect legally privileged information by refusing to disclose that information. Section 27(1)(a) provides the Public Body with the discretion to refuse access to any information to which an applicant may otherwise be entitled where it is able to establish on a balance of probabilities that the content of the records are protected by solicitor client and/or litigation privilege. As the SCC stated in *Descôteaux*:

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

[para 135] Notwithstanding the evidence that the Public Body considered the identity of one of the Applicants, an irrelevant factor in exercising discretion, discussed *infra,* this does not change the appropriate analysis of the exercise of discretion under s. 27(1)(a). No case-by-case analysis or balancing of interests or rights is necessary or appropriate with respect to s. 27(1)(a) where proper reliance has been demonstrated. For those Records at Issue where, based on the evidence provided, I am able to decide on a balance of probabilities, that the Public Body has properly relied on solicitor client privilege and/or litigation privilege, detailed under Findings *infra*, I find the Public Body has properly applied the s. 27(1)(a) exception by exercising its discretion to refuse access to legally privileged information to the Applicants. This will apply equally under the Interim Decision for those Records at Issue where the Public Body is able to meet its burden of proof to demonstrate that s. 27(1)(a) applies.

iii. Section 27(1)(b)

[para 136] Section 27(1)(b) and/or s. 27(1)(c) have been specifically claimed for almost all of the Records at Issue where the Public Body has also relied on s. 27(1)(a), thus these Records at Issue were not available to the External Adjudicator. At the outset, it is important to note that the kind of record that would properly fall under s. 27(1)(a) as containing legally privileged information will be quite different and distinct from information in a record to which a public body would properly apply s. 27(1)(b) or s. 27(1)(c). This is clear from a plain language reading of the three exceptions. The way in which all three of these exceptions under s. 27(1) have been claimed give the appearance that the Public Body has adopted a blanket approach to applying s. 27(1), which approach is inconsistent with s. 2 of the *FOIP Act*. Under s. 71(1) of the *FOIP Act*, the Public Body has the burden to prove the Applicants have no right of access to the information that it withheld under s. 27(1)(b). I begin with the exception in s. 27(1)(b) of the *FOIP* Act, which reads as follows;

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

[para 137] I begin by addressing the following issue: whether the Public Body has properly *relied* on s. 27(1)(b). In other words, asking the question: do the Records at Issue over which this exception has been applied, contain information prepared by or for a lawyer or agent of the Minister of Justice and Solicitor General in relation to a matter involving the provision of legal services?

[para 138] In order to determine if s. 27(1)(b) applies to the information over which it has been applied, it is necessary to examine the statutory language employed in the exception. First, what is meant by *"information prepared … in relation to a matter"*?

> *In the context of "information in relation to a matter involving the provision of legal services", I read "matter involving the provision of the legal services" such that the "matter" is constituted by, or consists of, the provision of legal services. The other potential interpretation of this part of the provision – that the phrase is met for any matter to which legal services have been provided at some time – is implausible. It would have the provision take into account a factor (that the matter happens to have involved the provision of legal services) that may be coincidental and have no relevance to the information that is being prepared and which requires the protection of the provision. I interpret the phrase "information prepared in relation to" as referring to information compiled or created for the purpose of providing the services, in contrast to merely touching or commenting upon the provision of the services. The use of the term "prepared" – which the Canadian Oxford Dictionary defines as "to make ready for use" - carries the suggestion that the information is necessary for the outcome that legal services be provided.*
>
> ***It follows, then, that the person contemplated by the provision who is preparing the information, is doing so for the purpose of providing legal services, and therefore must be either the person providing the legal service or a person who is preparing the information on behalf of, or, at a minimum, for the use of, the provider of legal services.*** *It also follows that section 27(1)(b) does not cover the situation where a person, even a person who is one of the persons listed in subclauses i – iii, creates information that is connected in some way with the provision of legal services but is not created for that purpose.* ***For example, section 27(1)(b) does not apply to information that merely refers to or describes legal services without revealing their substance.***
> [Order F2008-021, at paras. 110-112]

[Emphasis added]

[para 139] With respect to the statutory language, what is meant by *"information prepared by or for"*?' The key is that the information in the record is for a lawyer or someone preparing the information under the direction of a lawyer.

> *In Order F2008-021, I interpreted section 27(1)(b) in the following way:*
>
> > *In the context of "information in relation to a matter involving the provision of legal services", I read "matter involving the provision of the legal services" such that the "matter" is constituted by, or consists of, the provision of legal services. The other potential interpretation of this part of the provision – that the phrase is met for any matter to which legal services have been provided at some time – is implausible. It would have the provision take into account a factor (that the matter happens to have involved the provision of legal services) that may be coincidental and have no relevance to the information that is being prepared and which requires the protection of the provision. I interpret the phrase "information prepared in relation to" as referring to information compiled or created for the purpose of providing the services, in contrast to merely touching or commenting upon the provision of the services. The use of the term "prepared" – which the Canadian Oxford Dictionary defines as "to make ready for use" - carries the suggestion that the information is necessary for the outcome that legal services be provided.*
> >
> > *It follows, then, that the person contemplated by the provision who is preparing the information, is doing so for the purpose of providing legal services, and therefore must be either the person providing the legal service or a person who is preparing the information on behalf of, or, at a minimum, for the use of, the provider of legal services.*
>
> ***For section 27(1)(b) to apply to information, the information in question must be prepared by the lawyer or someone acting under the direction of the lawyer for the purpose that a lawyer will use the information in order to provide legal services to a public body.***
>
> *In Order F2008-028, the Adjudicator held that the term "prepared" in section 27(1)(b) precludes information that is not substantive, such as dates, letterhead, and names and business contact information. He said at paragraphs 156 – 158 of that order:*
>
> > *I find that the substantive information on pages 305-311 was prepared for a lawyer of a public body in relation to a matter involving the provision of legal services, and therefore falls within section 27(1)(b)(iii). However, this is not because the information was sent to a solicitor, as the fact that information was destined to go to someone does not necessarily mean that it was prepared by or for that person. Under other sections of the Act, it has been concluded that, for a record or information to be created "by or for" a person, the record or information must be created "by or on behalf of" that person [Order 97-007 at para. 15, discussing what is now section 4(1)(q) of the Act; Order 2000-003 at para. 66, discussing what is now section 4(1)(j); Order 2008-008 at para. 41, discussing section 24(1)(a)]. Here, I find that the substantive content of pages 305-311 was prepared "for" the lawyer who received the information because the covering letter indicates that the sender of the information was specifically asked to provide input.*
> >
> > *However, to fall under section 27(1)(b), there must be "information prepared" as those words are commonly understood (Order 99-027 at para. 110). I therefore do not extend the application of section 27(1)(b) to the dates, letterhead, and names and business contact information of the sender and recipient of the information on pages 305-311. These are not items of information that were "prepared". In keeping with principles articulated in respect of sections 22 and 24 of the Act, section 27(1)(b) does not extend to non-substantive information, such as dates and identifying information about senders and recipients, unless this reveals the substantive content elsewhere. However, in the context of section 27(1)(b) -*

which applies more broadly to information that was prepared rather that the substance of deliberations or advice under sections 22 and 24 - I find that the heading on page 309 reveals the information that was prepared in the rest of the document.

Pages 351-352, 353 (lower two thirds), 355 (upper half) and 373 consist of e-mail exchanges. I find that the content of these e-mails may not be withheld under section 27(1)(b). With the exception of the last five lines of page 352 and the top half of page 351, ***I do not consider the information to be "prepared". In my view, the word "prepared" implies that there must be a greater degree of substantive content, rather than simply a communication of an administrative nature (e.g., distributing documents, arranging meetings) or a communication referring to or briefly discussing information that has been prepared elsewhere.*** *There is presumably substantive content in the attachments to some of the e-mails, but that content is not actually revealed in the e-mails. I also find that the last five lines of page 352 and the top half of page 351 do not fall under section 27(1)(b) because, although the information is substantive, it is not in relation to legal services. The content expressly refers to "policy" objectives.*

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

[para 140] Third, the reference in the statute is to *"the provision of legal services"* has been interpreted as follows:

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

[para 141] Section 27(1)(b) clearly is meant to apply where *"information is prepared by or for an agent or lawyer … in relation to a matter involving the provision of legal services."*

Applying the reasoning in Orders 99-022, F2008-021, and F2008-028, information "prepared for an agent or lawyer of a public body" is substantive information prepared on behalf of an agent or lawyer so that the agent or lawyer may provide legal services. Information sent to an agent or lawyer of the public body in circumstances where the sender is seeking to obtain legal services, is not captured by section 27(1)(b), as the information is not prepared on behalf of the agent or lawyer. It also follows that section 27(1)(b) does not cover the situation where a person, even a person who is one of the persons listed in subclauses i – iii, creates information that is connected in some way with the provision of legal services but is not created for that purpose. For example, section 27(1)(b) does not apply to information that merely refers to or describes legal services without revealing their substance. The term "agent" does not refer to any employee of a public body, but to an individual who is acting as an agent of a public body under particular legislation or in the course of a specific matter or proceeding.
[Order F2014-38, at para. 87; See also Order F2009-024, at paras. 74-75]

[para 142] Adjudicators have consistently found that the information being *"prepared"* must have a substantive content with respect to the provision of legal services rather than communication that is simply administrative in nature. This would be consistent with where the s. 27(1)(b) exception is found in the statute as part of s. 27, the *"Privileged information"* exceptions.

However, to fall under section 27(1)(b), there must be "information prepared" as those words are commonly understood (Order 99-027 at para. 110). I therefore do not extend the application of section 27(1)(b) to the dates, letterhead, and names and business contact information of the sender and recipient of the information on pages 305-311. These are not items of information that were "prepared". In keeping with principles articulated in respect of sections 22 and 24 of the Act,

section 27(1)(b) does not extend to non-substantive information, such as dates and identifying information about senders and recipients, unless this reveals the substantive content elsewhere. However, in the context of section 27(1)(b) - which applies more broadly to information that was prepared rather than substance of deliberations or advice under section 22 and 24 - I find that the heading on page 309 reveals the information that was prepared in the rest of the document.

Pages 351-352, 353 (lower two thirds), 355 (upper half) and 373 consist of e-mail exchanges. I find that the content of these e-mails may not be withheld under section 27(1)(b). With the exception of the last five lines of page 352 and the top half of page 351, I do not consider the information to be "prepared". ***In my view, the word "prepared" implies that there must be a greater degree of substantive content, rather than simply a communication of an administrative nature (e.g., distributing documents, arranging meetings) or a communication referring to or briefly discussing information that has been prepared elsewhere.***
[Order F2008-028, at paras. 157-158]
[Emphasis added]

[para 143] The 2017 PBSS did not provide any submissions with respect to s. 27(1)(b) but, at para. 28, it referentially incorporated its reliance on the 2014 PBIS regarding other sections of the *FOIP Act*.

[para 144] At paras. 43-47 of its 2014 PBIS, the Public Body submitted the following with respect to s. 27(1)(b):

Alberta Justice provides legal services to all departments of the Government of Alberta, including Alberta Justice, and is involved in retaining outside legal counsel as required.

From the material in this Inquiry, it is patently evident that section 27(1)(b) squarely and literally describes the information in the Agreements and Related Records which the applicant seeks to access—namely, information about the provision of legal services.

It is important to note that section 27(1)(b) does not refer to "legal privilege". It is irrelevant and immaterial whether the information relating to the provision of legal services would otherwise be subject to any type of legal privilege. *This also means that the doctrine of waiver (which relates to the existence or extinguishment of legal privilege) has no role to play in section 27(l)(b).*

Similarly, it is important to note that section 27(l)(b) does not refer to the <u>substance</u> of the legal services provided. *To the extent that previous decisions of the Commissioner might have interpreted section 27(1)(b) as being restricted to information about the <u>substance</u> of the legal services provided, those decisions are incorrect in law.* ***Further, if section 27(l)(b) were only to apply to information about the <u>substance</u> of the legal services provided, it would be unnecessary because information about the <u>substance</u> of the legal services provided would come under section 27(l)(a)—legal privilege.*** *The fact that section 27(1)(b) is a separate provision in the Act indicates that the Legislature intended it to have a different meaning from section 27(1)(a).*

Accordingly, Alberta Justice submits that section 27(1)(b) is sufficient to justify its refusal to disclose the Agreements and Related Records.
[Emphasis in <u>original</u> and added]

[para 145] In addition, while the 2017 PBSS did not address s. 27(1)(b) directly, the 2017 Affidavit of Records provided evidence that relates to the exception. At paras. 5-10, the affiant stated:

Justice and Solicitor General retained counsel for the HCCR litigation by way of expressions of interest. Law firms submitted detailed and lengthy proposals setting out their legal strategy for

pursuing the tobacco companies. These proposals were reviewed by the following three person panel:
…
[Lists by name and title the Executive Director of Legal Services, Assistant Deputy Minister of Alberta Health and the Assistant Deputy Minister of Legal Services Division of the Public Body, all of whom are identified as QC and a Barrister and Solicitor]
…
The proposals were all made in the context of privileged and confidential communications, and all contained proposed litigation strategy and legal advice.

At all times, the three person panel, as well as other Public Body lawyers involved were acting as legal counsel to the Public Body.

Following the submission of written proposals, three firms were asked to present in person their strategy for pursuing the tobacco companies. The same three person panel evaluated these presentations. The records detailing these presentations were again privileged and confidential communications and contained proposal litigation strategy and legal advice.

The three person panel then internally discussed these proposals, evaluated the relative strengths and weakness of each proposed strategy, consulted other lawyers in both Justice and Solicitor General and the Ministry of Health, and ultimately provided a legal recommendation to the Minster [sic] *of Justice. The records detailing these evaluations were again privileged and confidential communications and contained proposed litigation strategy and legal advice.*

On December 14, 2010 the Minister of Justice choose [sic] *[*name of law firm*] as counsel to represent the province in the CRRA Litigation, as is noted in the released record ABJ000033. [*law firm make-up referred to by name*].*

[para 146] I agree with the Public Body that the information protected from disclosure under s. 27(1)(b) will be distinct from information protected by legal privilege as that privileged information would fall under s. 27(1)(a). The information that may fall under s. 27(1)(b) must contain substantive content with respect to the provision of legal services that goes beyond non substantive administrative information such as dates, names and references related to the administrative process of selection of outside counsel.

[para 147] Reading s. 27(1)(b) as a whole, the provision states: *"The head of a public body may refuse to disclose to an applicant information prepared by or for … an agent or lawyer of the Minister of Justice and Solicitor General, … in relation to a matter involving the provision of legal services, …"* Based on the interpretations given to each of the language components in s. 27(1)(b), as discussed *supra*, the submissions at paras. 43-47 of the 2014 PBIS, and the evidence provided in the 2017 Affidavit of Records *supra,* I conclude that the information in some of the records where the s. 27(1)(b) has been claimed fits within that exception. The affected Records at Issue will be detailed under Findings *infra.*

iv. Section 27(1)(c)

[para 148] Section 27(1)(c) has been specifically claimed for almost all of the Records at Issue where the Public Body has also relied on s. 27(1)(a). It bears repeating that the kind of record that would properly fall under s. 27(1)(a) as containing legally privileged information will be quite different and distinct from information in a record to which a public body would properly apply s. 27(1)(b) or s. 27(1)(c). This is clear from a plain language reading of the three exceptions. The way in which all three of these exceptions under s. 27(1) have been claimed give the appearance that the Public Body has adopted a blanket approach to applying s. 27(1), which approach is inconsistent with s. 2 of the *FOIP Act*. I turn now to the exception in s. 27(1)(c) of the *FOIP Act,* which reads as follows:

27(1) The head of a public body may refuse to disclose to an applicant
…

(c) information in correspondence between

(i) the Minister of Justice and Solicitor General,
(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or
(iii) an agent or lawyer of a public body,

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

[para 149] Section 27(1)(c) is a discretionary exception which may be relied on by a public body for information *"in correspondence between"* the same individuals listed in s. 27(1)(b) and *"any other person in relation to a matter involved the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer."* This statutory language makes the distinction as to what information falls under each s. 27(1)(b) versus s. 27(1)(c).

[para 150] There are examples of correspondence in the Exhibited Index between the affiant of the 2017 Affidavit of Records who is a lawyer communicating as in-house counsel to the Public Body and other persons. On reading the affidavit, it seems the affiant has claimed legal privilege over this correspondence and I am unable to determine which information in the Records at Issue where the Public Body has relied primarily on s. 27(1)(c), as this is not laid out in the 2017 Affidavit of Records. Also, the statute refers to *"agent or lawyer of the Minister of Justice and Solicitor General."* The information in the correspondence is, in some cases, between senior employees who are lawyers [QC] and referred to as such in the 2017 Affidavit of Records. It remains unclear when these individuals were acting in a position as a *"lawyer of the Minister of Justice and Solicitor General."* An employee of the Public Body does not fall within the meaning of "agent" within the terms of s. 27(1)(c):

> *Even if the sender or recipient of correspondence is not a lawyer, section 27(1)(c) permits the withholding of information sent to or from an "agent". In my view, the reference to "agent" is not intended to include* <u>*everyone*</u> *employed by or otherwise acting on behalf of the Minister of Justice and Attorney General or another public body. If that were the case, section 27(1)(c) would shield a great many records of a public body from disclosure under the Act, given that a great many records consist of correspondence from employees in relation to the advice or other services that they provide. The Legislature may have cast a wide net in section 27(1)(c), but it could not have intended to cast such a wide net. If it had so intended, it would have used the word "employee" – as done elsewhere in the Act – rather than the word "agent".*
>
> *A basic rule of interpretation is that it is presumed that Parliament or a Legislature uses language carefully and consistently, and that within a statute, the same words are taken to have the same meaning and different words have different meanings [Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R 625 at para. 133, citing Ruth Sullivan, Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) at pp. 163 to 65]. Given this rule of interpretation, the fact that the word "agent" is used in section 27(1)(c) – as well as 27(1)(b) – shows that the Legislature intended for the term "agent" to mean something different than the broader term "employee". ("Employee" is already defined in section 1(e) of the Act to include a person who performs a service for the public body under a contract or agency relationship, so use of the term "employee" would not have excluded outside legal and non-legal agents).*
> [Order F2008-028, at paras. 161-162]
> [Emphasis in <u>original</u>]

[para 151] I am adopting a plain language and broad interpretation to the language of these exceptions. Notwithstanding the use of the word "agent" and not the use of the word "employee" defined in the statute, I consider "any other person" an intentional and inclusive phrase to capture just that - any other person - so long as the Public Body has made it sufficiently clear as to what was the nature of that person's role in the correspondence between the lawyer/agent and that person and that it was in relation to a matter involving the provision of advice or other legal service, in line with what s. 27(1)(c) requires, which in this case the Public Body has failed to do.

[para 152] Section 27(1)(c) has been given considerable breadth. McMahon, J., sitting as an External Adjudicator, had the following to say with respect to s. 27(1)(c):

> *Even more sweeping is subsection 27(1)(c). It permits non-disclosure of information in any correspondence between a lawyer of a public body (which would include all Alberta Justice lawyers), or an agent of a public body (which would extend to the non-legal staff of Alberta Justice) on the one hand, and anyone else. The information need merely relate to a matter involving the provision of any kind of advice or any kind of service by the agent or lawyer.*
>
> ***It would be difficult to draft a more general or exclusionary clause.*** *Despite the fact that it was public money facilitating Mr. Day's legal defence, only selective documents have been released to the public under the "public interest override" contained in s. 32 of the Act. These documents deal with, primarily, settlement costs. Thousands of records still remain hidden from public view.* ***Vesting in the head of the public body, in this case the Minister of Justice, the discretion to disclose or not to disclose in the context of these broad provisions permits government to manipulate public knowledge by the selective release of documents, as occurred here. That process has however legislative sanction.***
> [OIPC External Adjudicator Order #4 (October 3, 2003), at paras. 12-13]
> [Emphasis added]

[para 153] Notwithstanding the breadth of s. 27(1)(c) of the *FOIP Act* referred to by Adjudicator McMahon, a more recent decision examined the language in s. 27(1)(c) to reveal what is required for a Public Body to deny access to records based on this exception. In that case, Adjudicator Cunningham said:

> *As stated above, section 27(1)(c)(iii) contemplates information in correspondence between a public body's lawyer and any other person; the correspondence must be in relation to a matter in which involves the provision of advice or services by the lawyer.*
>
> *Here, the correspondence in question was between the Third Party and the Public Body's lawyer. The correspondence was in relation to a matter, and the matter, from the perspective of the Public Body, involved the provision of legal services to the Public Body.*
>
> *However, the correspondence was itself not in relation to the provision of advice or other services by the lawyer; the correspondence was in relation to the legal status of certain organizations and what the correspondent thought the significance of that status might be. Nothing in the content of the emails suggests that the correspondence was prepared for the purpose of directing how the lawyer might use the information to provide advice to the public body, or that this was even contemplated. If there were a prior exchange of information which could lead me to conclude that the correspondence was prepared for this purpose, then this was not stated or explained to me.*
>
> *To put this another way, I believe that the understanding of both parties to the correspondence must be that there is a matter involving the provision of advice or other services by the lawyer, and the correspondence is intended, if not to advance the matter, then to relate to that matter. For example, if a party were to send an offer of settlement to the lawyer of a public body, then such correspondence would be "in relation to a matter involving the provision of advice or other services" by the public body's lawyer. However, if a third party sends correspondence to a public body's lawyer and the third party does not contemplate that there is a matter involving the provision of a lawyer's advice or services, then the correspondence cannot be said to be in relation to such a matter.*
>
> *That is not to say that a lawyer cannot obtain information on a confidential basis from a third party that the lawyer requires in order to provide advice or services. (Such information is typically covered by litigation privilege when it is obtained for the dominant purpose of preparing for litigation.) Rather, I mean that section 27(1)(c) is intended to allow parties to correspond freely in*

relation to matters about which they need to speak in order to allow the lawyer's advice or services to be provided.

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

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

[para 154] In its 2017 PBSS, the Public Body did not provide any submissions with respect to s. 27(1)(c) but, at para. 28, it referentially incorporated its reliance on the 2014 PBIS regarding its reliance on other exceptions under the *FOIP Act.* At paras. 48-52 of its 2014 PBIS, the Public Body submits the following with respect to s. 27(1)(c):

In addition, section 27(1)(c) excepts disclosure of any information in any correspondence between Alberta Justice lawyers and any other person in relation to a matter ***involving the provision of legal services.***

"Any other person" includes clients and other persons in any department of the Alberta Government, other Alberta Justice lawyers, prospective outside legal counsel, retained outside legal counsel, opposing counsel, other government body—in short: "any other person".

As noted above with respect to section 27(1)(b), the exception in section 27(1)(c) does not require the information in that correspondence to be subject to legal privilege. This also means that the doctrine of waiver (which relates to the existence or extinguishment of legal privilege) has no role to play in section 27(1)(c). Nor does section 27(l)(c) apply only to the substance of the legal advice provided. The only requirements are that the correspondence be between an Alberta Justice lawyer (or agent) and another person, and that it relate to the provision of legal advice or other services by the Alberta Justice lawyer (or agent).

Similarly, section 27(1)(c) does not refer to the substance of the legal services provided. To the extent that previous decisions of the Commissioner might have interpreted section 27(1)(c) as being restricted to information in correspondence about the substance of the legal services provided, those decisions are incorrect in law. Further, if section 27(1)(c) were only to apply to information about the substance of the legal services provided, it would be unnecessary because information about the substance of the legal services provided would come under section 27(1)(a)—legal privilege. The fact that section 27(1)(c) is a separate provision in the Act indicates that the Legislature intended it to have a different meaning from section 27(1)(a).

Accordingly, Alberta Justice submits that section 27(1)(c) is sufficient to justify its decision not to disclose any information in any correspondence relating to any matter involving the provision of advice or other services by Alberta Justice lawyers or their agents.
[Emphasis in original and added]

[para 155] In addition, while the 2017 PBSS did not address s. 27(1)(c) directly, the 2017 Affidavit of Records provided *general* evidence that relates to the exception. I have reproduced paras. 5-10 of that affidavit *supra.*

[para 156] The question is whether I am able, based on the 2014 PBIS, the 2017 PBSS and the 2017 Affidavit of Records, to decide if the Public Body has met its evidentiary burden to provide *sufficient* clear, convincing, and cogent evidence to demonstrate that the information in a record falls within the terms of s. 27(1)(b) and/or s. 27(1)(c) where they have been applied. The heading of s. 27 of the *FOIP Act* is *"Privileged information"* and has been found to assist in interpreting the exception:

> *I also note that the heading of section 27, of which section 27(1)(c) is a provision, is "Privileged Information". Section 12(2)(c) of the Interpretation Act states that headings do not form part of the provision;* ***however, jurisprudence establishes that headings can be evidence of legislative intent when a provision is ambiguous, despite provincial interpretation acts.***
>
> *Pierre-André Côté notes the following on page 63 of his work, The Interpretation of Legislation in Canada:*
>
>> *It is accepted today that headings and subheadings are part of a statute and thus relevant to its construction. Headings may help to situate a provision within the general structure of the statute: they indicate its framework, its anatomy. Headings may also be considered as preambles to the provisions they introduce. The heading is a key to the interpretation of the sections ranged under it.*
>>
>> *How much weight should headings be accorded? Some authorities maintain that headings may be looked at only where there is ambiguity in the enacting words. If these cases are meant to suggest that headings may be ignored, such a method of statutory interpretation is no longer followed. Because they are part of the statute, they must be taken into consideration as part of the context, even where the enactment itself is clear.*
>
> *If one considers the context created by the heading of section 27, and also considers that sections 27(1)(a), 27(2), and 27(3) all address privileged information, it seems reasonably likely that sections 27(1)(b) and 27(1)(c) address similar kinds of information that are not necessarily caught by section 27(1)(a).*
> [Order F2015-22, at paras. 122-124]
> [Emphasis added]

[para 157] The Records at Issue to which the Public Body has applied s. 27(1)(b) and s. 27(1)(c) have, in all instances, been relied on in conjunction with s. 27(1)(a), which means it is a challenge to distill when each of the non legal privilege exceptions under s. 27(1) may apply. The Public Body's claim that all three subsections of s. 27(1) apply to justify refusal of all the records is insufficiently discerning because the three exceptions under s. 27(1) are notably distinct. By taking this approach, the Public Body leaves the impression that it applied all of the exceptions in a blanket fashion.

[para 158] In this regard, the submissions from the Public Body are instructive. In its 2014 PBIS, the Public Body states, at para. 41:

> *In summary, Alberta Justice submits that the records at issue are excepted from disclosure because they are subject to legal privilege pursuant to section 27(1)(a).*

[para 159] Also, in its 2014 PBIS, the Public Body states, at para. 47:

> *Accordingly, Alberta Justice submits that section 27(1)(b) is sufficient to justify its refusal to disclose the Agreements and Related Records.*

[para 160] And again at para. 52 of the 2014 PBIS, the Public Body states:

> *Accordingly, Alberta Justice submits that section 27(1)(c) is sufficient to justify its decision not to disclose any information in any correspondence relating to any matter involving the provision of advice or other services by Alberta Justice lawyers or their agents.*

[para 161] There are Records at Issue that have been described as involving communication between outside legal counsel preparing to provide or providing legal services and in-house counsel and other employees of the Ministry of Justice and Solicitor General.

[para 162] The Public Body did not, in all cases, provide particulars of when and how individuals identified as senior government employees were acting as legal advisors versus policy advisors for the Minister of Justice and Solicitor General or any public body within the terms of s. 27(1)(c)(ii). As discussed *supra*, in the *Pritchard* and *Campbell* cases, the SCC recognized that not every communication by a government lawyer will attract legal privilege when what is communicated may be policy advice:

> *Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency: see R. v. Campbell, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, at para. 49. In Campbell, the appellant police officers sought access to the legal advice provided to the RCMP by the Department of Justice and on which the RCMP claimed to have placed good faith reliance. In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply.* ***However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.***
>
> ***Owing to the nature of the work of in-house counsel, often having both legal and nonlegal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered****: Campbell, supra, at para. 50.*
> [*Pritchard*, at paras. 19-20]
> [Emphasis added]

[para 163] The 2014 PBIS is not discerning with respect to where and how these distinct exceptions found under s 27(1) apply to the Records at Issue. This lack of specificity could have been but has not been completely corrected by the 2017 PBSS or the 2017 Affidavit of Records at Issue. What the latter affidavit does, however, is provide evidence that demonstrates some Records at Issue where s. 27(1)(b) and/or s. 27(1)(c) applies, as follows:

1. Information has been prepared by or for a lawyer of the Minister of Justice and Solicitor General, that is in-house counsel, the affiant of the 2017 Affidavit of Records to/from outside counsel.

2. Information prepared in relation to a matter involving the provision of legal services, that is the CRA (or HCCR or CRRA) Litigation involving senior government officials.

3. Some of the information in correspondence was between a lawyer of the Minister of Justice and Solicitor General, that is in-house counsel, the affiant of the 2017 Affidavit of Records, and another person in relation to a matter involving the provision of advice or other services, that is outside counsel or senior government officials (not demonstrated to be acting as lawyers) but are *"any other person."*

[para 164] My finding that the Public Body took an irrelevant consideration (the identity of one of the Applicants) into account in exercising its discretion, as discussed *supra,* does factor into deciding the issue of whether the Public Body has properly applied s. 27(1)(b) and s. 27(1)(c), which as discussed *supra,* is not relevant in the case of s. 27(1)(a). For reasons discussed *infra* regarding s. 32, it is unnecessary to make an Order in this regard.

B. Issues #3, #4, #5 and #6: Exercise of Discretion

> ISSUE #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.
>
> ISSUE #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.
>
> ISSUE #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.
>
> ISSUE #6: Whether the Public Body properly relied on and applied s. 27 of the FOIP Act [privileged information] to the information in the records.
>
> [**NOTE:** In this part, the discussion only involves the exercise of discretion under s. 27(1)(b) and s. 27(1)(c).]

[para 165] Because for the vast majority of the Records at Issue where other discretionary exceptions (s. 21, s. 24, s. 25, s. 27(1)(b) and s. 27(1)(c)), legal privilege pursuant to s. 27(1)(a) has also been claimed, none of these records have been available for review. The Public Body provided limited submissions regarding these other exceptions as listed in the Exhibited Index.

[para 166] Because of my findings with respect to the application of s. 32(1)(b) of the *FOIP Act* discussed *infra,* I find that it is unnecessary for me to make a finding. It is important to note with respect to all the other discretionary exceptions, the Public Body has provided insufficient evidence of the relevant factors it considered and took an irrelevant factor into consideration in exercising its discretion. Before turning to the issue of the public interest override, I turn to the Public Body's reliance on the s. 16(1) mandatory exception.

C. Mandatory Exceptions: Sections 16 and 17

i. Section 16

[para 167] The exception in s. 16(1) of the *FOIP Act* 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 168] 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 statutory test. In order to demonstrate that this mandatory exception does, in fact, apply to the Records at Issue, the Public Body must provide evidence that demonstrates *all* three conditions are met:

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

[Order F2014-49, at para. 32]
[Emphasis in <u>original</u> and added]

[para 169] For every Record where the Public Body has claimed s. 16(1) it has also applied s. 27(1)(a) and, therefore, these records were not 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 170] At paras. 65-68 of its 2014 PBIS, the Public Body submitted that:

The Agreements directly affect the financial interests of the other party or parties to them.

With respect to agreements with lawyers retained by the Province in the tobacco litigation, their financial interests and competitive position would be directly affected by disclosure of the information in those agreements.

The disclosure of information in any agreements between Alberta and any other province or territory would affect their financial interests.

With respect to the Related Records, 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 171] The Public Body concludes its 2014 PBIS by stating that all outside lawyers should be given notice of the Inquiry with respect to s. 16(1), by submitting 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. 69]
[Emphasis added]

[para 172] At para. 28 of its 2017 PBSS, the Public Body makes a general reference to its previous submission in 2014 but is otherwise silent with respect to s. 16(1) specifically. There is a reference to s. 16(1) at para. 19 of the 2017 Affidavit of Records, where the affiant states:

> *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 positions of the third parties.*

[para 173] The descriptions in the Exhibited Index where s. 16(1) is identified do not address the specific requirements to meet the three-part statutory test for this mandatory exception discussed *supra*. In addition, the Public Body did not provide any evidence from third parties. A general claim attesting to the three-part test in the absence of evidence in support of that claim results in my not being able to make a finding as to whether the Public Body has properly claimed s. 16(1) applies.

[para 174] The Interim Decision in this Inquiry provides the Public Body with the opportunity to make a decision for some of the Records at Issue. Where the Public Body decides s. 27(1)(a) does not apply before releasing any Records at Issue pursuant to s. 32, it is incumbent on the Public Body to satisfy itself whether or not the mandatory exception in s. 16(1) applies. In other words, where the evidence meets the three-part test, which evidence will be required in its decision, the Public Body will be required to refuse access pursuant to s. 16(1). For the Records at Issue that are not protected by legal privilege, if the evidence is insufficient to meet the three-part test and s. 16 does not apply, the Public Body will be required to provide the Applicants with access to these records.

[para 175] Details of the Records at Issue where s. 16(1) has been applied are described under Findings *infra.* The Doc Count for these records has been broken into two sections. The first lists those Records at Issue where the Public Body has properly relied on and applied s. 27(1)(a) to refuse disclosure, in which case, it will be unnecessary to consider s. 16(1). The second section lists those records where the Public Body has not met its burden to demonstrate that legal privilege applies. For the latter records, these will be the subject of the Interim Decision. Where the Public Body is able to demonstrate s. 27(1)(a) does apply, it will be unnecessary to consider s. 16(1) under the Interim Decision. Where the Public Body decides s. 27(1)(a) *and* s. 16(1) do not apply, the Public Body will be required to provide the Applicants with access to these records pursuant to s. 32.

ii. Section 17

[para 176] The exception in s. 17 of the *FOIP Act* reads as follows:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*

[para 177] Section 17 has been applied by the Public Body to 2 Records at Issue, both of which were provided to me. In setting up the Inquiry, I stated: *"The applicability of s. 16 and s. 17 requires greater attention by the Public Body for the complete set of the Records at Issue where it has relied on these mandatory exceptions."* Despite this direction, the s. 17 exception, which is listed in the original access to information decisions, is not referred to in the 2014 PBIS, the 2017 PBSS, the 2014 FOIP Director Affidavit, the 2014 FOIP Advisor Affidavit or the 2017 Affidavit of Records. Section 17 has been claimed for two Records at Issue (Doc Count 304 and 594) in the Exhibited Index. The Public Body submits Doc Count 304 has been partially released to the Applicants. The Public Body applied s. 17(1) and s. 24(1)(b) for Doc Count 594. The disposition of these records will be discussed under Findings *infra.* Because the Public Body's submissions are lacking for s. 16(1), it will not, as suggested by the Public Body, be considered as an alternate exception to s. 17.

D. Issue #8: Public Interest Override

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

[para 178] 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 179] 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 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 180] Relying on the s. 32(1)(b) test summarized in Order 97-018, the First Applicant acknowledged s/he has the burden of proof to meet the pre-condition that disclosure of information is *"clearly a matter of public interest."*

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

[para 181] The First Applicant acknowledged in his/her submission that in order to meet his/her burden of proof to show that disclosure is a matter of *"compelling public interest"*, s/he must prove that it is more than mere interest or curiosity in the information and that the benefits of disclosure will override any of the other public and private interests the *FOIP Act* exceptions are intended to preserve and protect. If the First Applicant successfully meets that burden, the onus then shifts to the Public Body to prove that its refusal to disclose the information is rationally defensible.

[para 182] To meet his/her burden with respect to public interest, the First Applicant's evidence stressed the fact that the issues surrounding this information have already been the subject of three publicly funded investigations/inquiries. In support of that submission, the First Applicant provided an Affidavit to which the following reports were attached:

(a) *a 2013 inquiry before former Alberta Ethics Commissioner Neil Wilkinson, on the allegations of wrongdoing against former Premier [*name*], which cleared [*him/her*] of wrongdoing*[12]*;*

(b) *a 2015 inquiry before the Honourable Frank Iacobucci on the question of whether Commissioner Wilkinson did* <u>not</u> *have available to him all information relevant to his investigation* [13]*; and*

(c) *a 2016 re-investigation by Acting Alberta Ethics Commissioner Paul Fraser, Q.C., in which he determined, based on information that was previously not available to Commissioner Wilkinson, that former Premier [*name*] was not in a conflict of interest situation in the procurement process for [*name of law firm*] counsel*[14]*.*

[Emphasis in <u>original</u>]

[para 183] These reports have been examined in detail for the sole purpose of making a determination if the First Applicant has met his/her burden pursuant to s. 32 of the *FOIP Act.* All three investigations/inquiries, whose reports were attached to an Affidavit submitted by the First Applicant, concerned an inquiry or investigation, or issues arising in the course of those reviews, of an ethical question with respect to a potential conflict of interest in the decision-making process of selecting counsel for the CRA Litigation made by a former Minister of Justice. The First Applicant submits that the issue of

the selection process was not the subject of his/her access requests, is not relevant to this Inquiry and is not what his/her claim under s. 32 entails. Rather, the First Applicant argues that non-disclosure by the Government is a recurring theme in all three investigations/inquiries and it is, therefore, reasonable to argue this is the issue of public interest to which the s. 32 override should be applied. The focus of the First Applicant's submission to meet the test of *"compelling public interest"* is with respect to how the affidavit evidence submitted establishes that information has been withheld or mis-managed by the Public Body throughout and that, as a result, the information should be disclosed pursuant to the public interest override.

[para 184] After listing the investigations/inquiries in his/her 2017 ARS, the First Applicant stressed how the public investigations/inquiries related to access to information issues, a summary of which follows:

- the original inquiry before the Ethics Commissioner was initiated as a result of information made public under access to information processes
- media reports on the *"Tobaccogate"* scandal and in the Acting Ethics Commissioner's report reference *"leaked"* documents
- non-disclosure is a recurring theme through all three investigations/inquiries and, using Iacobucci as an example, who found the Government had failed to adequately disclose information to the Ethics Commissioner, the Officer of the Legislature tasked to investigate the alleged scandal at taxpayers' expense.

[para 185] For the purpose of considering whether the First Applicant has met his/her burden pursuant to s. 32, the test is whether the evidence s/he submitted is *sufficiently* clear, convincing, and cogent to demonstrate that these circumstances meet the test of *"compelling public interest."* In deciding whether the s. 32 public interest override applies, it would be wholly inappropriate and well outside the scope of my delegation, for me to review or even consider any allegation of ethical impropriety in the process of selecting counsel for the CRA Litigation.

[para 186] The First Applicant argues that what should be considered is whether the evidence s/he submits demonstrates how the Public Body shared, released or withheld information in circumstances in which there was *"compelling public interest."* Ethics Commissioner Wilkinson reveals in his conclusions that his report was based on *"evidence gathered in this investigation* [that] *is clear, consistent, cogent and uncontradicted."* [Refer to para. 111, Report to the Speaker of the Legislative Assembly of Alberta by Neil Wilkinson, Ethics Commissioner]. It was subsequently revealed in the Iacobucci Review Report that, unbeknownst to him, the Ethics Commissioner did not have all information relevant to his investigation at his disposal [Refer to para. 78, Iacobucci Review Report].

[para 187] Media reports by CBC in 2015 based on leaked documents revealed that the Public Body had *not* provided the Ethics Commissioner with all the relevant documents. Upon learning that Ethics Commissioner Wilkinson did not have all the relevant information available to him for his investigation, the Minister of Justice asked former SCC Justice, the Honourable Frank Iacobucci, to review the matter. The focus of Iacobucci's investigation was the extent to which the Public Body had provided relevant documents to the Ethics Commissioner, not the conduct of the former Premier. The Minister of Justice instructed that Iacobucci be provided with all relevant documentation for his review including privileged information.

[para 188] Information given to Iacobucci in the course of preparing his report to the Government included materials over which solicitor client privilege had been claimed along with unredacted FOIPP information. In his Report on the Independent Review Conducted by The Honourable Frank Iacobucci, C.C., Q.C. of Information Relating to an Investigation by the Former Ethics Commissioner of Alberta into Allegations involving the Honourable (former Minister of Justice), Iacobucci cited from the information that had been provided to him by the Government in the course of his review.

[para 189] The central issue in the Iacobucci Review Report is what information did the Government fail to provide to the Ethics Commissioner, an Officer of the Legislature. Iacobucci found in his review that the Government failed to disclose or provide relevant information to the Ethics Commissioner. This included, but was not restricted to, documents over which it claimed legal privilege. In the case of the privileged documents, the Public Body and the Ethics Commissioner's office devised a process proposed by counsel to the Public Body (original counsel for the Public Body in this Inquiry). The process entailed the documents over which privilege had been asserted being provided to a former judge who the Public Body retained to provide his/her legal opinion. As was subsequently determined by Iacobucci in his Review Report, the former judge who prepared a legal opinion for the Ethics Commissioner was also not provided with all of the relevant documentation by the Government in order to prepare his/her legal opinion. This former judge, referred to by Iacobucci in his Review Report, was also the author of the Opinion Letter (not a legal opinion) that has been ruled inadmissible in this Inquiry. This evidence is only relevant to the s. 32 issue *vis a vis* the fact that Iacobucci found the former judge had also not been provided with all documents relevant to prepare his/her legal opinion.

[para 190] At para. 74 of his Review Report, Iacobucci stated that it appeared the Ethics Commissioner did not have all of the information relevant to his investigation made available to him. He went on to say that it was abundantly clear some of the key records had not formed part of the Ethics Commissioner investigation and listed them in detail, at para. 75, of his Review Report.

[para 191] At paras. 76 and 78, Iacobucci concluded as follows:

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

[para 192] The whole of the evidence points to the fact that the Government failed to provide all relevant information or withheld relevant information to some of those tasked with oversight or with providing a legal opinion. In deciding to recommend a remedial option to correct this situation, Iacobucci, at paras. 81 and 85 of his Review Report, he stated that:

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

[para 193] At para. 86 of his Review Report, Iacobucci indicated that he was of the view that the public interest was served by the Government taking further action and then proceeded to recommend options. The Government accepted Iacobucci's recommendation to have the Ethics Commissioner consider re-investigating the matter. The newly appointed Ethics Commissioner declared herself in a conflict and referred the matter to BC's Conflict of Interest Commissioner Paul Fraser to seek his opinion

regarding re-investigation. Acting Ethics Commissioner Fraser recommended a re-investigation, conducted it and issued a public report.

[para 194] Based on the First Applicant's affidavit evidence, how information was provided to the Ethics Commissioners is relevant to the question of public interest. To my knowledge there was no legislative amendment to the *Conflicts of Interest Act* during the period of time between the two ethics investigations making provision to protect privileged information being provided to the respective Ethics Commissioners. The reports indicate that the Government had refused Ethics Commissioner Wilkinson access to privileged information. Despite that fact, after making a determination that a re-investigation was warranted, Acting Ethics Commissioner Fraser stated he *"received and reviewed unredacted and privileged documents from the Government that dealt with the process leading to the Decision and the aftermath"* despite the fact that Ethics Commissioner Wilkinson had not been provided with that same privileged information. This privileged information was shared with the Acting Ethics Commissioner confidentially, relying for authority on the *Conflicts of Interest Act.*

[para 195] The report of Ethics Commissioner Wilkinson is attached as Exhibit A to the 2017 First ARS detailing how he was not provided with privileged information and was, in lieu thereof, provided with a former judge's legal opinion who, Iacobucci found, also did not receive all relevant documents. The report of Acting Ethics Commissioner Fraser is attached as Exhibit C to the 2017 First ARS. At para. 44 of his report, Acting Ethics Commissioner Fraser refers to s. 26 of the *Conflicts of Interest Act,* which reads as follows:

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

[para 196] In relying on this provision and after citing the *U of C* decision in the SCC, Acting Ethics Commissioner Fraser stated at para. 44:

> *It is important to recognize that the Government* ***did not waive privilege and only provided me access to the privileged documents and information on the basis of the assurance of confidentiality, which is set out in section 26 of the Conflicts of Interest Act. Without the documents and information provided to me by the Government, under this statutory assurance of confidentiality, I would not have been able to effectively undertake this investigation. My role as an officer of the Legislature in serving to preserve the integrity of the Legislature and its members would have been undermined.*** *In short, this process of re-investigation should not be seen by anyone as a tool for obtaining access to privileged information of the Government. If it is, it will impair the ability of the Ethics Commissioner to fulfill her important duty to the Assembly to investigate and make recommendations relating to the discipline of members when there is a breach of the Conflicts of Interest Act.*
> [Emphasis added]

[para 197] Like Iacobucci in his Review Report, Acting Ethics Commissioner Fraser, in his public report, quoted some information verbatim from documents that had been provided to him. I am making the assumption, which I believe to be a reasonable one, that the Acting Ethics Commissioner, as in the case of Iacobucci, did not cite any information that was subject to legal privilege. In finding no breach of the *Conflicts of Interest Act*, Acting Ethics Commissioner Fraser stated:

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

[para 198] After putting the three public investigation/inquiry reports into evidence, the First Applicant submitted that s/he is unaware of any case where disclosure has been ordered based on s. 32(1)(b) of the *FOIP Act* and argued that in order for the section to have any meaning, there must be some circumstances where it would apply. The First Applicant argued that:

> *If subsection 32(1)(b) is to have any meaning, there must be some circumstances in which it can apply, and that are not already covered by subsection 32(1)(a) (harm to public safety, public health, or the environment). One would be hard pressed to think of more compelling circumstances creating a public interest in disclosure of privileged information than the present: the Requested Records relate to the biggest government corruption scandal in recent memory,* ***and publicly-funded investigations into that scandal have been vexed by the inadequate disclosure of relevant information by government.***
> [2017 First ARS, at para. 29]
> [Emphasis added]

[para 199] One of the central themes at the heart of why the investigations/inquiries put into evidence by the First Applicant took place was the failure on the part of the Public Body to disclose or

provide all relevant information to Ethics Commissioner Wilkinson, an Officer of the Legislature. The information withheld from the Officer of the Legislature was essential to enable that Officer to fulfill his/her statutory mandate and is one example of the inadequate disclosure to which the First Applicant refers. This was withholding of information in circumstances surrounding the recovery of tobacco related health care costs litigation that the Government had represented was being pursued for the benefit of the public, in which clearly the public had shown significant interest. The First Applicant argues *"for s. 32 to have any meaning at all, this set of compelling circumstances must fall within the statutory meaning of "clearly in the public interest"."*

[para 200] The First Applicant relied on Order F2007-014 for the proposition that s. 32(1) overrides all exceptions, including s. 27, under the *FOIP Act.* The First Applicant is correct that the adjudicator in that Order did consider s. 32 but found the applicant had not met the burden under s. 32. At para. 67, citing the *Blood Tribe* decision, the adjudicator stated:

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

[para 201] In the case of those Records at Issue where I have found the Public Body has met its burden under s. 27(1)(a), I agree. Notwithstanding the statutory language in s. 32(2), I find the public interest override should not apply to records protected by legal privilege and that the public interest is served by preserving legal privilege. In addition to considering *Blood Tribe,* following the reasoning of the SCC in the *U of C* decision, I find that had the Legislature intended s. 32(2) public interest override to set aside legal privilege, it would have used clear, explicit and unequivocal language to do so.

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

[para 202] The First Applicant has met his/her burden to establish that these unique circumstances meet the *"compelling public interest"* test and that s. 32(1)(b) applies. The unique circumstances are the Public Body's pattern of inadequate or inconsistent disclosure in some cases and sharing information, including privileged information, in other cases, without a rational explanation. This has resulted in lingering concerns amounting to a compelling public interest that calls for the full disclosure of all remaining information (other than information protected by legal privilege). While the public reports went some distance to address the conflict of interest issue and how information was provided, or not, to the Ethics Commissioner, there remain residual questions of how, when, why, what and to whom information was shared or distributed by the Government. The compelling public interest is in the disclosure of as much information to the public as is available about the CRA Litigation, being pursued on its behalf.

> *Section 1 sets forth the purpose of the FIPPA. Reflecting the public interest in access to information, it establishes a presumption in favour of granting access. Chief Justice McLachlin and Justice Abella explain in Ontario v. CLA:*
>
> > ***Access to information in the hands of public institutions can increase transparency in government, contribute to an <u>informed public</u>, and <u>enhance an open and democratic society</u>.***

...Open government requires that the citizenry be granted access to government records ***when it is <u>necessary to meaningful public debate</u> on the conduct of government institutions.*** *[Emphasis added; paras. 1 and 37.]*

However, s. 1 also recognizes that ***the presumption must be rebuttable in a limited number of specific circumstances*** *according to the mandatory or optional exemptions provided for in the Act.*

The scheme of the Act reflects its purpose. The head of the institution that controls or has custody of the requested records, and who has knowledge of their content and the impact of their release, has the primary responsibility for determining whether one of the exemptions applies to the requested records. ***In the case of a discretionary exemption, he also has the responsibility of determining whether that exemption should be invoked.*** *However, the Act gives the ultimate power over releasing the information to the IPC, subject to judicial review.*
[*John Doe v. Ontario (Finance),* 2014 SCC 36, at paras. 41-42]
[Emphasis underlining in <u>original</u> and added]

[para 203] Because the First Applicant met his/her burden under s. 32(1)(b), the burden shifts to the Public Body to demonstrate that s. 32(1)(b) has no application in these circumstances; that its decision not to disclose the (non-privileged) information is rationally defensible.

[para 204] At para. 75 of its 2014 PBIS, the Public Body submitted the following:

The inclusion of section 27 in the Act is the embodiment of the public interest. Apart from the very rare case of an emergency of the type referred to in section 32(1)(a), section 32(1)(b) cannot justify breaching legal privilege, and does not provide the basis for weighing or balancing someone's view of the general "public interest" against the public policy of rigorously protecting legal privilege. "Public interest" in section 32 does not mean "where the public is interested", but 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.

[para 205] The Public Body did not address the issue of the s. 32 public interest override in its 2017 PBSS or in the 2017 Affidavit of Records. But at paras. 6 and 8 of its 2017 PBRS, the Public Body provided the following by way of rebuttal to the First Applicant's submission regarding the issue:

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

[para 206] As stated *supra,* I agree with the Public Body that s. 32 does not override solicitor client privilege where the Public Body has met its burden to demonstrate s. 27(1)(a) applies. However, I reject the Public Body's submission that s. 32 is only triggered when there is potential for severe harm, as a plain language reading of s. 32(1)(b) specifically, and s. 32 as a whole, does not support that argument.

[para 207] Further, in its submission, the Public Body refers to *"even if these issues were still newsworthy"* and the *"lingering public interest in the outcome of the Ethics Commissioner probes"* and argues that while there may have been significant interest in the issues surrounding the CRA Litigation and the awarding of the contract to [name of law firm], that this is no longer the case. In my opinion, public interest cannot be measured solely at the time of the Inquiry. It would be unconscionable to allow a public body to argue that s. 32 no longer applies since the public interest has faded with the passage of time. This would provide public bodies with an incentive to intentionally delay or extend the entire process of decision-making, review and inquiry well beyond the time of an access to information request. This would allow public bodies to protract proceedings in an attempt to let the public's interest fade and the compelling nature of the issue to wane, thereafter use this to their advantage in rebutting an applicant's attempt to argue that the public interest override should apply. Refusing to disclose the information in which the First Applicant has demonstrated there is a compelling public interest on this basis is not rationally defensible.

[para 208] In fact, the Public Body's own evidence attests to the public interest. Evidence submitted by the Public Body with its 2014 PBIS points to the public interest in this matter, which evidence was attached to its 2014 Affidavit: at Tab A, the Government press release regarding the Province's launch of a lawsuit to recover $10 Billion in health care costs associated with smoking-related illnesses and, at Tab D, the Alberta Hansard transcript attesting to the fact that the issue was raised on the floor of the provincial Legislative Assembly. At all material times since these access to information requests, the Public Body appears to have been cognizant that information about the CRA Litigation was a matter of public interest.

[para 209] A similar case that considered the public interest override was an inquiry regarding information about the financing of the West Edmonton Mall, where the adjudicator found:

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

[para 210] The adjudicator went on to find that the Government's instruction to the Auditor General to prepare and release a report on this *same issue* would satisfy the need for *information* and that no greater purpose was served by releasing *records* under the access to information request than would be accomplished by the Auditor General's Report. In this case, however, no information in the reports of the three publicly funded investigations/inquiries satisfies the requirement for disclosure of the Records at Issue requested by the First Applicant regarding the financial arrangements the Government made with [name of law firm] with respect to the CRA Litigation. This case involves disclosure of information in records about the financial arrangement made by the Public Body on behalf of Albertans in order to recover the financial costs of smoking related health care costs.

[para 211] The Public Body submits that the outcome of the three reports, on which the First Applicant relies, is that there was no evidence of wronging or impropriety regarding the selection of the CRA Litigation counsel by the former Minister of Justice. To the extent there may be lingering public interest in the outcome of the probes, it would be insufficient to meet the test under s. 32 as, based on the evidence submitted by the First Applicant, the Public Body argued there is no *"Tobaccogate."* But the public interest made out by the First Applicant is not about the scandal regarding the selection process of counsel. It is about the Public Body's pattern of inadequate disclosure; withholding or being selective as to which information it released or provided and to whom. In fact, the Public Body's pattern of non-disclosure is apparent, in this case, in which the Public Body has refused to provide the Applicants with access to the majority of the Records at Issue.

[para 212] I find, therefore, that the First Applicant has met his/her burden with *sufficiently* clear, convincing, and cogent evidence to demonstrate that the s. 32(1)(b) public interest override applies and that the Public Body has failed to provide evidence or submissions to successfully prove its decision to withhold the information in the Records at Issue is rationally defensible. Section 32(1)(b) will apply to all those Records at Issue where, pursuant to the Interim Decision, the Public Body is still unable to meet the evidentiary test of *sufficiently* clear, convincing, and cogent evidence to demonstrate s. 27(1)(a) applies, or it is necessary that the Public Body does not need to apply s. 16(1), to withhold any specific record. Thereafter, based on s. 32(1)(b), the Public Body will be required to release all the Records at Issue regardless of any other discretionary exceptions on which it has relied.

VI. FINDINGS:

[para 213] I make the following findings in this Inquiry for Case Files #F6420, #F6747, and #F6843:

1. I find that the Public Body has provided *sufficiently* clear, convincing, and cogent evidence to discharge its burden of proof with respect to its reliance on the exception under s. 27(1)(a) for the Records at Issue described at para. 7.A *infra*. For those Records at Issue where the Public Body has properly relied on solicitor client and/or litigation privilege *supra*, 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.

2. I find the Public Body has failed to provide *sufficiently* clear, convincing, and cogent evidence to discharge its burden of proof with respect to its reliance on the mandatory exception under s. 16(1). For those Records at Issue where the Public Body has discharged its burden of proof with respect to s. 27(1)(a) and it has also claimed s. 16(1), the application of s. 16(1) need not be reconsidered pursuant to the Interim Decision, which Records at Issue are described at para. 7.F.i *infra*. The Public Body will be required to consider the application of the mandatory s. 16(1) exception for those Records at Issue described at para. 7.F.ii.

3. I find the Public Body has failed to provide *sufficiently* clear, convincing, and cogent evidence to discharge its burden of proof with respect to its reliance on the exception under s. 27(1)(a) for the Records at Issue described at para. 7.B *infra,* which Records at Issue will be the subject of the Interim Decision.

4. I find the First Applicant has met his/her burden with *sufficiently* clear, convincing, and cogent evidence to demonstrate that there is a *compelling public interest* and, therefore, the s. 32(1)(b) public interest override applies. Further, I find the Public Body has failed to provide rebuttal evidence or submissions to successfully demonstrate its decision to deny access to the information is rationally defensible. For the Records at Issue where the Public Body has met its burden under s. 27(1)(a), however, I find that the public interest is served by preserving legal privilege over these Records at Issue and that the s. 32(1)(b) public interest override does *not* apply to the legally protected Records at Issue described at para. 7.A *infra.* Similarly, for the Records at Issue subject to the Interim Decision, I find that s. 32(1)(b) will not apply where the Public Body meets its evidentiary burden of proof under s. 27(1)(a) for the Records at Issue described at para.7.B *infra.* Where the Public Body does not satisfy its burden of proof for s. 27(1)(a) for the Records at Issue described at para. 7.B, the s. 32(1)(b) public interest override will apply to the Records at Issue described at paras. 7.C, 7.D, 7.H, 7.L, 7.M, and 7.N (discretionary exceptions only) *infra*.

5. With respect to the mandatory exceptions, I find that where the Public Body has met its burden to establish that one or both legal privileges apply under s. 27(1)(a), it is unnecessary to consider s. 16(1) for the Records at Issue described at para. 7.F.i *infra*. Where the Public Body has failed to meet its burden under s. 27(1)(a), the Public Body will, under the Interim Decision, make a decision for those Records at Issue where I have been unable to decide if s. 27(1)(a) has been properly claimed and, thereafter, for those that are not legally privileged the Public Body is under a statutory duty to decide whether the mandatory exception in s. 16(1) properly applies for the Records at Issue

described at para. 7.F.ii *infra*. The findings with respect to s. 17(1) for two Records at Issue are described at paras. 7.G and 7.N *infra*.

6. Notwithstanding my finding with respect to the application of s. 32(1)(b) of the *FOIP Act,* I find that the Public Body took an irrelevant consideration (the identity of one of the Applicants) into account in the exercise of its discretion in applying all the other discretionary exceptions claimed (s. 21, s. 24, s. 25, s. 27(1)(b) and s. 27(1)(c)). Because I have found the Applicants are entitled to disclosure of all of the Records at Issue pursuant to s. 32(1)(b) (other than Records at Issue where the Public Body has met its burden of proof, described at para. 7.A *infra,* or meets its burden of proof in compliance with the Interim Decision to demonstrate the records that are subject to legal privilege), I find that it is unnecessary to make an Order to quash the Public Body's decisions and to issue an Order to reconsider with respect to the non-legal discretionary exceptions claimed. Further other important problems with the Exhibited Index are described at paras. 7.I, 7.J and 7.K *infra*.

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

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 *sufficiently* clear, convincing, and cogent evidence 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. This evidence is made up of the 2017 Affidavit of Records and the Exhibited Index. For these records, it is unnecessary to consider the application of any other 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:

4, 6, 10-13, 18, 23-25, 32-34, 38-39, 52, 54-62, 64-72, 78-84, 88-90, 97, 99, 103-105, 107, 110, 113-114, 119, 121, 133-135, 137, 140, 146-149, 155, 157, 163, 169-175, 181, 184, 191-193, 199, 208-209, 213-222, 225-226, 229, 237, 240-242, 245, 251-254, 257-258, 262, 278, 284, 286, 288, 290, 295, 306-307, 309, 315-316, 331-332, 335-337, 341, 344-345, 348, 350, 352, 355, 357-358, 361, 376-377, 381-382, 385, 390, 392-393, 404, 415-416, 418, 431, 435-455, 458, 460-473, 477-478, 481-495, 499-505, 507-521, 523-534, 536-542, 546-547, 551-553, 557-559, 563-566, 577-580, 582, 587-588, 593, 595, 603

B. Section 27(1)(a) (Insufficient Evidence of either Legal 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 form part of the Interim Decision.]

[**NOTE:** On a review of the Records at Issue disclosed to the Applicants, it is apparent that the senior government officials involved in the process of the selection of a law firm to pursue the CRA Litigation, who have been identified as lawyers, were frequently 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 did not refer to any records specifically in making that claim. The Exhibited Index and the other records that were available to me do not support that claim and no direct evidence from the three senior government officials formed any of part the Public Body's submissions. In making determinations regarding the records under para. 7.B, I have taken this into account.]

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

   2-3, 5, 7, 14, 17, 19-22, 26, 28, 30-31, 35, 37, 40, 42-43, 46, 48-49, 53, 63, 73, 75-76, 85-87, 91, 94, 96, 98, 100, 102, 106, 108, 111, 115-116, 118, 120, 122, 127-132, 136, 138, 141, 143-144, 150, 152-153, 156, 158, 160-161, 164, 166-167, 176, 178, 180, 182, 185-186, 188, 190, 194, 196, 198, 200-207, 210-211, 223, 227, 230-236, 238-239, 243-244, 246-250, 255-256, 259-261, 263-277, 279-280, 285, 287, 289, 291, 297-298, 302, 305, 308, 311, 314, 317, 319, 322-324, 326-328, 334, 338, 340, 342-343, 346-347, 349, 351, 353, 356, 359-360, 362, 364-365, 367-368, 370, 372-373, 375, 379-380, 383, 386-389, 391, 394, 396, 399-401, 403, 406-409, 411, 413-414, 417, 420, 422-424, 426, 428-430, 434, 457, 459, 474-476, 479-480, 496-498, 506, 522, 543-545, 548, 550, 554-556, 560, 562, 567-572, 576, 581, 591, 597-598, 605

ii. Of the Records at Issue at para. 7.B.i, the following 41 records have information REDACTED in one or more Columns in the Exhibited Index:

   3, 21, 26, 46, 63, 156, 210, 230-231, 233-236, 238-239, 243-244, 246-250, 255-256, 259-261, 263-266, 268-269, 272, 302, 356, 372, 391, 407, 434, 522

C. Section 27(1)(b) (Insufficient Evidence of either Legal Privilege but s. 27(1)(b) *information prepared by or for a lawyer/agent in relation to a matter involving provision of legal services* may apply to some of the records)

[**NOTE:** Records at Issue over which solicitor client privilege and litigation privilege have been claimed where the Public Body has failed to meet its burden of proof with *sufficiently* clear, convincing, and cogent evidence that either legal privilege applies; to meet the *ShawCor* evidentiary test to demonstrate the *Solosky* test for solicitor client privilege and/or part of a continuum of communications that fall within solicitor client and/or litigation privileges. Some of the Records at Issue in this category include those showing REDACTED in one or more Columns. For many of these records because the space for document type or title is REDACTED, it is impossible to make a determination with respect to s. 27(1)(b). Some information, however, has been provided in the evidence to demonstrate that s. 27(1)(b) may apply as information prepared by or for the Minister of Justice and Solicitor General or a lawyer/agent of that Minister or public bodies in relation to a matter involving the provision of legal services. Where the Public Body fails to prove any of these Records

at Issue are not protected by legal privilege, public interest will prevail over the s. 27(1)(b) discretionary exception.]

[**NOTE:** On a review of the Records at Issue disclosed to the Applicants, it is apparent that the senior government officials involved in the process of the selection of a law firm to pursue the CRA Litigation, who have been identified as lawyers, were frequently 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 did not refer to any records specifically in making that claim. The Exhibited Index and the other records that were available to me do not support that claim and no direct evidence from the three senior government officials formed any part of the Public Body's submissions. In making determinations regarding the records under para. 7.C, I have taken this into account.]

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

2-3, 5, 7, 14, 17, 19-22, 26, 28, 30-31, 35, 37, 40, 42-43, 46, 48-49, 53, 63, 73, 75-76, 85-87, 91, 94, 96, 98, 100, 102, 106, 108, 111, 115-116, 118, 120, 122, 127-132, 138, 141, 143-144, 150, 152-153, 156, 158, 160-161, 164, 166-167, 176, 178, 180, 182, 185-186, 188, 190, 194, 196, 198, 200-207, 210-211, 223, 227, 230-236, 238-239, 243-244, 246-250, 255-256, 259-261, 263-273, 275, 277, 279-280, 285, 287, 289, 291, 297-298, 302, 305, 308, 311, 314, 317, 319, 322-324, 326-328, 334, 338, 340, 342-343, 346-347, 349, 351, 353, 356, 359-360, 362, 364-365, 367-368, 370, 372-373, 375, 379-380, 383, 386-389, 394, 396, 399-401, 403, 406, 408-409, 411, 413-414, 417, 420, 422-424, 426, 428-430, 457, 459, 474-476, 479-480, 496-498, 506, 522, 543-545, 548, 550, 554-556, 560, 562, 567-572, 576, 581, 591, 597-598, 605

D. Section 27(1)(c) (Insufficient Evidence of either Legal Privilege but s. 27(1)(c) *information in correspondence between lawyer/agent of a public body and any other person in relation to the provision of advice or other services* may apply to some of the records)

[**NOTE:** Records at Issue over which solicitor client privilege and litigation privilege have been claimed where the Public Body has failed to meet its burden of proof with *sufficiently* clear, convincing, and cogent evidence that either legal privilege applies; to meet the *ShawCor* evidentiary test to demonstrate the *Solosky* test for solicitor client privilege and/or part of a continuum of communications that fall within solicitor client and/or litigation privileges. Some of the Records at Issue in this category include those showing REDACTED in one or more Columns. For many of these records because the space for document type or title is REDACTED, it is impossible to make a determination with respect to s. 27(1)(c). Some information, however, has been provided in the evidence to demonstrate that s. 27(1)(c) may apply as information in correspondence between the Minister of Justice and Solicitor General or a lawyer/agent of that Minister or public bodies and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent/lawyer. Where the Public Body fails to prove any of these Records at Issue are not protected by legal privilege, public interest will prevail over the s. 27(1)(c) discretionary exception.]

[**NOTE:** On a review of the Records at Issue disclosed to the Applicants, it is apparent that the senior government officials involved in the process of the selection of a law firm to pursue the CRA Litigation, who have been identified as lawyers, were frequently 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 did not refer to any records specifically in making that claim. The Exhibited Index and the other records that were available to me do not support that claim and no direct evidence from the three senior government officials formed part of the Public Body submission. In making determinations regarding the records under para. 7.D I have taken this into account.]

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:

5, 17, 19-22, 26, 28, 31, 35, 37, 40, 42-43, 46, 48-49, 53, 63, 73, 75-76, 85-87, 91, 94, 96, 98, 102, 106, 108, 111, 115-116, 118, 120, 122, 127-132, 136, 138, 141, 143-144, 150, 152-153, 156, 158, 160-161, 164, 166-167, 176, 178, 180, 182, 185-186, 188, 190, 194, 196, 198, 200-207, 210-211, 223, 227, 230, 235, 239, 243, 249, 255, 260-261, 264, 266-273, 275, 277, 279-280, 285, 287, 289, 291, 297-298, 302, 305, 308, 311, 314, 317, 319, 322-324, 326-328, 334, 338, 340, 342-343, 346-347, 349, 351, 353, 356, 359-360, 362, 364-365, 367-368, 370, 372-373, 375, 379-380, 383, 386-389, 394, 396, 399-401, 403, 406, 408-409, 411, 413-414, 417, 420, 422-424, 426, 428-430, 457, 459, 474-476, 479-480, 496-498, 506, 522, 543-545, 548, 550, 554-556, 560, 562, 567-572, 576, 581, 591, 597-598, 605

E. Records where Section(s) of the Act Column show record as RELEASED but the Privilege Column claims Litigation Privilege/Solicitor Client Privilege (60 records where Privilege Column populated of 98 records shown as released)

9, 16, 27, 29, 36, 41, 45, 47, 51, 74, 77, 93, 95, 101, 109, 112, 117, 124, 139, 142, 145, 151, 154, 159, 162, 165, 168, 177, 179, 183, 187, 189, 195, 197, 212, 224, 228, 296, 312, 318, 320, 325, 333, 339, 354, 363, 366, 369, 371, 374, 384, 395, 397, 410, 412, 421, 425, 427, 535, 561

F. Section 16 (Disclosure harmful to Third Party Business Interest)
Section 16 (Disclosure harmful to Third Party Business interest has been claimed but has not been proven to apply)

i. Records for which s. 16 has been claimed but need *not* be re-considered as the Public Body has established that s. 27(1)(a) has been properly applied.

   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:

   32, 33-34, 56, 58-59, 61-62, 64-68, 70, 79, 88-89, 97, 99, 107, 110, 113, 121, 135, 137, 226, 237, 257, 306-307, 309, 332, 335-336, 341, 344-345, 348, 355, 357-358, 376, 381-382, 385, 435-437, 439-445, 470-471, 494-495, 499, 509-520, 523-526, 528-530, 534, 537-539, 541, 546-547, 566, 577, 582, 587-588, 593, 595

ii. Records for which s. 16 has been claimed and will need to be re-considered (as it is a mandatory exception) where, under the Interim Decision, the Public Body decides that s. 27(1)(a) does not apply.

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

   2, 7, 14, 20, 26, 28, 31, 35, 40, 43, 46, 49, 53, 63, 73, 76, 91, 94, 98, 108, 111, 115-116, 122, 138, 141, 144, 150, 153, 158, 161, 164, 167, 176, 178, 180, 182, 186, 188, 194, 196, 211, 223, 227, 231, 233-236, 238, 244, 246, 248, 250, 256, 259, 263, 265, 272, 317, 319, 324, 338, 342, 347, 353, 359-360, 362, 365, 368, 373, 383, 394, 396, 409, 411, 424, 426, 498

G. Records for which Section 17(1) Disclosure Harmful to Personal Privacy has been claimed (Refer to Table at 7.N *infra)*

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

304, 594

H. Section 24(1)(a) (Advice from officials) and s. 24(1)(b) (Consultations or deliberations) have been claimed but have not been proven to apply

For the majority of the Records at Issue where the Public Body has claimed s. 24(1)(a), it has also claimed s. 27(1)(a), in which case, the Records at Issue were *not* provided to me. Refer to the Table found at para. 7.N (listed herein) for findings for the following Records at Issue, where only s. 24(1) has been claimed.

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

299, 301, 594

I. Records at Issue where the person named whose professional role or title is not specified in the description in the Exhibited Index or in the 2017 Affidavit of Records

[**NOTE:** For these Records at Issue, the Public Body has claimed s. 27(1) 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 (Refer to Doc Counts 316, 582) where a professional title or role for one person is absent, there is sufficient other evidence to establish legal privilege. For those Records at Issue listed here that is not possible. Section 27(1)(a) has been claimed for all of these Records at Issue.]

5, 200, 267, 273, 298, 305, 308, 334, 343, 380, 400, 457, 459, 576

J. Records at Issue where the Public Body has failed to claim *any* Exception(s) for the Record at Issue (For Doc Count 574 refer to Table at 7.N *infra)*

[**NOTE:** The Records at Issue that have ***not*** been provided to the External Adjudicator are marked with an asterisk. In all cases, there is no claim to legal privilege in either the Section(s) of the Act Column or in the Privilege Column in the Exhibited Index for any of these records or, in fact, any exception claimed. The Public Body is to provide access to the Applicants for these Records at Issue.]

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

276*, 574, 575*

K. Records at Issue identified by the Public Body as Non-Responsive [NR]

[**NOTE:** The Records at Issue that have ***not*** been provided to the External Adjudicator are marked with an asterisk. The Public Body indicated in correspondence that ***all*** NR Records at Issue were given to the External Adjudicator. The Public Body did not provide an explanation for not providing some of the records listed as NR and not others. In one instance (Doc Count 329), the Public Body originally claimed multiple exceptions including s. 27(1)(a) but in January 19, 2017 changed its claim for the Record to NR but has continued to claim litigation and solicitor client privilege in the Privilege Column. By providing this Record to the External Adjudicator, privilege has ***not*** been waived. I find the Record for Doc Count 329 is not subject to legal privilege. All of the Records at Issue marked NR in the Exhibited Index are to be released in full to the Applicants.]

[**NOTE:** It is important to make note that NR is not a proper designation for any record. For a comprehensive review on the use of non-responsive within Canada refer to *Department of Business (Re*), 2016 NSOIPC 10, at paras. 15-74.]

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

281*, 282*, 283, 329, 432*, 433*

L. Section 21(1)(a) or (b) Disclosure Harmful to Intergovernmental Relations

[**NOTE:** The following are the Records at Issue where the Public Body has failed to meet its burden with respect to legal privilege under s. 27(1)(a) where s. 21(1)(a) or s. 21(1)(b) have also been claimed. The 2017 Affidavit of Records is silent on s. 21(1). The 2017 PBSS is silent on s. 21(1). The 2014 PBIS is silent on s. 21(1). The Public Body has failed to meet its burden to establish the application of s. 21(1)(a) or s. 21(1)(b). For those Records at Issue where the Public Body meets its burden of proof under s. 27(1)(a) pursuant to the Interim Decision, it is unnecessary to consider the application of s. 21(1). Where it fails to establish that s. 27(1)(a) applies, the Public Body is to provide the Applicants with access to these Records at Issue pursuant to s. 32(1)(b).]

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:

3, 128-131, 136, 232, 233-236, 238-239, 243-244, 246-250, 255-256, 259-261, 263-268, 323, 326-328, 351, 401, 406, 420, 422, 522.

M. Section 25(1) Disclosure Harmful to Economic Interests of the Province

[**NOTE:** The following are the Records at Issue where the Public Body has failed to meet its burden with respect to legal privilege under s. 27(1)(a) where s. 25(1) has also been claimed. The 2017 Affidavit of Records is silent on s. 25(1). The 2017 PBSS is silent on s. 25(1). The 2014 PBIS is silent on s. 25(1). The Public Body has also failed to meet its burden to establish the application of the s. 25(1). For those Records at Issue where the Public Body meets its burden of proof under s. 27(1)(a) pursuant to the Interim Decision, it is unnecessary to consider the application of s. 25(1). Where it fails to establish that s. 27(1)(a) applies, the Public Body is to provide access to the Applicants to these Records at Issue pursuant to s. 32(1)(b).]

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

2, 7, 14, 17, 19-22, 26, 28, 30-31, 35, 37, 40, 42-43, 46, 48-49, 53, 63, 73, 75-76, 85-87, 91, 94, 96, 98, 100, 102, 106, 108, 111, 115-116, 118, 120, 122, 127-132, 136, 138, 141, 143-144, 150, 152-153, 156, 158, 160-161, 164, 166-167, 176, 178, 180, 182, 185-186, 188, 190, 194, 196, 198, 200-207, 210-211, 223, 227, 231-236, 238-239, 243-244, 246-250, 255-256, 259-261, 263-273, 275, 277, 279-280, 287, 289, 291, 297-298, 302, 305, 308, 311, 314, 317, 319, 322-324, 326-328, 334, 338, 340, 342-343, 346-347, 349, 351, 353, 356, 359-360, 362, 364-365, 367-368, 372, 375, 379, 383, 386-389, 391, 394, 396, 399, 401, 403, 406, 408-409, 411, 413-414, 417, 420, 422-424, 426, 428-430, 457, 459, 479-480, 496-498, 522, 543-545, 548, 550, 554-556, 560, 562, 567-573, 576, 581, 591, 597-598, 605

N. Records at Issue provided to the External Adjudicator

With respect to those Records at Issue that were provided to me by the Public Body, my findings can be found in the Table below:

[**NOTE:** This section deals solely with the findings related to those Records at Issue provided to me by the Public Body. How the Public Body designated each Record at Issue with a page number or document ID changed from the time the Records were provided in January 2017 to the final updated Exhibited Index. The Table below is to reflect the history of the changes. Of the 8 Records at Issue (12 pages) provided to me from a total of 605 Records at Issue (total 1,901 pages) listed in the Exhibited Index, the Public Body claimed the following: s. 24(1) for 4 Records, s. 25(1) for 1 Record,

s. 17(1) for 2 records and no exception for 1 Record. The Public Body also put the designation of NR (not an exception) on 2 Records. Other than the 8 Records provided to me, there are no other Records at Issue where one or more of the non legal discretionary exceptions have been claimed as stand alone exceptions without s. 27(1)(a). There are some Records where s. 27(1)(a) has not been claimed but were not provided to me and, therefore, not included in the Table below: 2 Records at Issue where no exception has been claimed and 4 Records listed as Non-Responsive (refer to paras. 7.J and 7.K *supra*).]

Records at Issue provided to External Adjudicator (Jan 2017)			2017 Affidavit of Records Exhibited Index of Records (Nov 2017)				
Page Count	Page # (Note 1)	Page # (Note 2)	Doc Count	Doc ID (Note 3)	Section(s) of the Act	Observations	ORDER
1	1034	ABJ001703	**283**	ABJ001034	Non-Responsive	Document Type in Exhibited Index: “Handwritten Notes”	Record is Responsive; **Complete Record to be released to Applicants**
2-3	1055-1056	ABJ001724-ABJ001725	**299**	ABJ001055-ABJ001056	Partially released - Section 24(1)(a) **NOTE:** Public Body has not claimed s. 27(1)(a) but Privilege Column in Exhibited Index populated with both legal privileges	The Public Body did not provide me with a copy of the Record at Issue as it was provided to the Applicants. A portion of what was redacted in the Applicants’ copy has not been shown as redacted on what was provided to me	Exception properly relied on but Public Body has not met its burden of proof under s. 24(1)(a); **Complete Record to be released to Applicants**
4	1058	ABJ001727	**301**	ABJ001058	Partially released - Section 24(1)(a)	Partially redacted Record provided to the Applicants	Exception properly relied on but Public Body has not met its burden of proof under s. 24(1)(a); **Complete Record to be released to Applicants**

Records at Issue provided to External Adjudicator (Jan 2017)			2017 Affidavit of Records Exhibited Index of Records (Nov 2017)				
Page Count	Page # (Note 1)	Page # (Note 2)	Doc Count	Doc ID (Note 3)	Section(s) of the Act	Observations	ORDER
5-7	1063-1065	ABJ001732-ABJ001734	**304**	ABJ001063-ABJ001065	Partially released - Section 17(1)	First 2 pages of the complete unredacted pages of Record already released to Applicants; Public Body was advised of this fact by the External Adjudicator on October 23, 2017	Third page of Record 17(1) exception properly relied on and properly redacted under s. 17; **Properly redacted copy of Record already released to Applicants; Confirm Public Body's decision to release redacted Record to Applicants**
8	1143	ABJ001812	**329**	ABJ001143	Non-Responsive; No exception claimed on the Record itself	Originally Public Body claimed s. 25(1), s. 27(1)(a), s. 27(1)(b) and s. 27(1)(c) and then changed to NR; claimed legal privilege in Exhibited Index of Records	Record is responsive; **Complete Record to be released to Applicants**
9	1144	ABJ001813	**330**	ABJ001144	Partially Released 25(1)(c)	Exception properly relied on and applied to redact information in the Record expected to harm interests of the Public Body	**Properly redacted copy of Record already released to Applicants; Confirm Public Body's decision to release redacted Record to Applicants**

Records at Issue provided to External Adjudicator (Jan 2017)			2017 Affidavit of Records Exhibited Index of Records (Nov 2017)				
Page Count	Page # (Note 1)	Page # (Note 2)	Doc Count	Doc ID (Note 3)	Section(s) of the Act	Observations	ORDER
10	1852	ABJ002521	**574**	ABJ001852	No exception in Exhibited Index or on the Record	No exception claimed on the Record; In the Exhibited Index Document Type Column it states: "*Blank Page*" and all other Columns are empty. The Record itself does contain information	**Complete Record to be released to Applicants**
11-12	1881-1882	ABJ002550-ABJ002551	**594**	ABJ001881-ABJ001882	Partially Released 17(1), 24(1)(b)	Content involves an exchange of information that does not qualify as an exception to disclosure under s. 17(1).	Section 17(1) does not apply; Section 24(1)(b) exception properly relied on but Public Body has not met its burden of proof under s. 24(1)(b); **Complete Record to be released to Applicants**

Note 1: Where the Record was partially or completely released, this page number is also on the copy of the Record released to the Applicants (i.e., pages 1055-1056, 1058, 1063-1065, 1144, 1881-1882). Pages 1034, 1143 and 1852 were not released to the Applicants in response to their access to information requests.

Note 2: The Public Body advised that the ABJ page numbers on the Records which it provided to the External Adjudicator were not to be used for this Inquiry. These ABJ page numbers are not on the copy of the Records released to the Applicants, nor are they referenced on the 2017 Index of Records that accompanied the Records provided to the External Adjudicator. They are different from the ABJ page numbers listed on the Exhibited Index to the 2017 Affidavit of Records.

Note 3: The ABJ prefix appears to have been added to the original page numbers on the Records and subsequently listed in the Document ID and End Document ID columns in the Exhibited Index to the 2017 Affidavit of Records, reversing its advice that the revised Index provided with the Records on January 19, 2017 would not be relying on the ABJ numbers at the bottom of the page.

[para 214] 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 bulk of the Records at Issue, I have executed my delegated authority as the External Adjudicator by taking a reasonable, fair and diligent approach. While it is open to the Public Body to seek judicial review, I am

certain any review Court will be cognizant of the challenges faced in adjudicating decisions made by the Public Body about the Records at Issue, the majority of which have not been available to the decision-maker. On judicial review, a Court may consider reviewing the Records at Issue (despite these not being available and thus not forming part of the Certified Record of Proceedings) as the Court in *Calgary (Police Service) v Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114 elected to do. There, the Alberta Court of Appeal determined that on judicial review, where the issue relates to a public body's application of legal privilege under the *FOIP Act*, the Court may rely on its supervisory role to review the records over which the Public Body is asserting legal privilege. Alternatively, as the jurisprudence reflects, it is open to the Court, on judicial review, to show deference to a decision-maker with respect to fact-finding (reasonableness) and legal approach (correctness). In this Inquiry, given s. 73 of the *FOIP Act,* which reads: *An order made by the Commissioner under this Act is final,* a Court, on judicial review, may elect to defer to the statutory decision-maker and confirm the Interim Decision/Order.

VII. INTERIM DECISION

[para 215] 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 216] 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. 7.B *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 and Exhibited Index, 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. 7.B *supra* and, thereafter, to make a decision in a manner that complies with the evidentiary requirements as set out in *ShawCor*, the Alberta Rules of Court and the *OIPC Privilege Practice Note*. Specifically, but not limited to, the Public Body should consider providing the following kinds of evidence: direct evidence from in-house counsel that is not *general* in nature but that addresses legal privilege for each specific Record at Issue, direct evidence from senior government officials attesting to those specific Records at Issue where they were providing legal advice versus policy advice, direct evidence from senior government officials attesting to those specific Records at Issue where they were acting in the role as a representative of a *client public body* versus when acting in the capacity as a *solicitor* in a 'solicitor client' relationship, where a Record at Issue involves conversations by non-solicitor representatives of a public body that may be part of a continuum discussing legal advice, an unredacted copy of the Exhibited Index of Records of Records *in camera* (details of the Records at Issue that have been REDACTED described at para. 7.B.ii) and complete descriptors for the professional title or role for individuals named in the Records at Issue described at para. 7.I *supra* where the Public Body elects to continue to claim s. 27(1)(a).

[para 217] In complying with this Interim Decision, *after* it has made a decision regarding its reliance on s. 27(1)(a) for both legal privileges, thereafter, the Public Body is under a statutory duty to decide whether the mandatory exception in s. 16(1) properly applies to the Records at Issue described at para. 7.F.ii *supra*. Once it has made a decisions with respect to s. 27(1)(a), the Public Body will be required to

gather evidence and authority, specifically evidence sufficient to meet the three-part test that the mandatory exception s. 16(1) requires. Thereafter, if it is unable to meet its burden of proof that both s. 27(1)(a) *and* s. 16(1) do apply, the Public Body is to provide the Applicants with access to the Records at Issue in accordance with the Findings *supra.*

[para 218] The Public Body will have 60 days from the date it receives this Interim Decision to gather evidence and authority to support its application of s. 27(1)(a) and s. 16(1). If the Public Body determines that neither solicitor client privilege nor litigation privilege applies to the Records at Issue to which it has applied s. 27(1)(a) and s. 16(1) also does not apply, then it must disclose the records to the Applicants after the 60 days have expired. On or before that date, the Public Body will provide a decision to the Applicants, copied to me, explaining whether it is withholding the Records at Issue on the basis of solicitor client privilege and/or litigation privilege and/or information harmful to the business interests of a third party or whether it has decided to provide the Applicants access to any of the Records at Issue that are the subject of the Interim Decision.

[para 219] 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 described at paras. 7.B and 7.F.ii *supra.* If the subject records are disclosed to the Applicants because the Public Body decides that s. 27(1)(a) and s. 16(1) *do not apply*, that will end the matter. For those Records at Issue where the Public Body submits that either or both legal privileges under s. 27(1)(a) and/or s. 16(1) apply, the Inquiry will resume to determine if the Public Body has met its burden of proof in its decision made under the Interim Decision.

[para 220] The final disposition of those issues I am able to decide is set out in the Order that follows in Part VIII.

VIII. ORDER

[para 221] 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 222] 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. 7.A *supra.* Because these include the Records at Issue described at para. 7.F.i, I confirm it is unnecessary for the Public Body to consider s. 16(1). Pursuant to s. 72(2)(b), for these Records at Issue, referred to herein, I confirm the Public Body's decision to refuse access to these Records at Issue to the Applicants. In addition, where s. 17(1) has been applied (Doc Count 304), I confirm the decision of the Public Body to provide access to a redacted copy of the Record to the Applicants.

[para 223] I have found that the First Applicant has successfully met his/her burden to prove that the s. 32(1)(b) public interest override should be applied to all Records at Issue, excluding any Record subject to legal privilege. With respect to any Records at Issue to which the Public Body denied access under the discretionary exceptions claimed under s. 21, s. 24, s. 25, s. 27(1)(b) and s. 27(1)(c), I order the Public Body to give the Applicants access to the Records at Issue described at paras. 7.H, 7.J, and 7.K and in accordance with the Table at para. 7.N *supra*.

[para 224] Notably some of these Records at Issue have been disclosed in whole or in part to the Applicants, as described *supra,* but where the Public Body has failed to reflect this in the Exhibited Index of Records (such as those Records at Issue described at para. 7.E), for certainty, I order the Public Body to release these Records at Issue to the Applicants again, as previously provided.

[para 225] 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