

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2018-75

December 13, 2018

### WORKERS' COMPENSATION BOARD

Case File Numbers F8328 & F8329

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** An individual made an access request to the Workers' Compensation Board (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for copies of records relating to a claim he made in 2012. The Public Body responded to the Applicant's request with a fee estimate; the Applicant requested a review of the fees by this Office. An inquiry was conducted, resulting in Order F2013-54 in which the adjudicator ordered the Public Body to recalculate its fees. The Public Body complied with that Order.

The Applicant made a subsequent access request in 2014, which was essentially an update to his 2012 request. The Applicant requested a review of the Public Body's application of exceptions to access with respect to both access requests. He also requested a review of the actual fees charged by the Public Body.

The Adjudicator determined that the Public Body could not charge for colour copies of records where colour was used to indicate which exception was applied to withheld information or to denote 'spacer' pages used to indicate that pages were withheld in their entirety. The Adjudicator ordered the Public Body to refund the difference between colour copies and black and white.

The Adjudicator found that information identified as non-responsive by the Public Body was not responsive. However, the Adjudicator also noted that the Public Body was inconsistent in such determinations. The Adjudicator noted instances in which the Public Body withheld some information as responsive in records where similar information was not characterized as non-responsive in other records. The Adjudicator also noted instances in which the Public Body

withheld discrete items of information as non-responsive in records that appeared to be non-responsive in their entirety. As the Public Body is being ordered to review the records and reapply several exceptions, the Adjudicator asked the Public Body to be diligent in determining whether records contain responsive information so that the Applicant is not charged for pages of information he did not request and so that the Public Body does not spend time severing pages that do not contain responsive information.

The Adjudicator found that section 4(1)(a) and (d) applied to much of the information over which those provisions were applied. The Public Body had withdrawn its application of these provisions over records that were altered by the Public Body by way of highlighting and other notations. These alterations did not appear on the filed court document or the record created by or for an officer of the Legislature; therefore the altered information was no longer captured by sections 4(1)(a) or (d).

The Adjudicator upheld the Public Body's application of section 12(2) to any records relating to ongoing investigations (if any exist). Since the Public Body stated that it informs all claimants of completed investigations, she ordered the Public Body to respond, without relying on section 12(2), with respect to any records relating to an investigation completed since the Applicant's access requests.

The Adjudicator found that the Public Body properly applied section 24(1) to some information in the records. She ordered the Public Body to review the records at issue and sever only the information that reveals the substance of advice and deliberations. She also found that the Public Body did not consider the appropriate factors in exercising its discretion and ordered the Public Body to exercise its discretion anew as it reviewed the records.

The Adjudicator accepted the Public Body's claim of solicitor-client privilege to records not provided for review. She noted that the records that were provided for review gave context to those records not provided, and that the affidavit provided by the Public Body gave sufficient information to determine that the privilege was properly claimed. The Adjudicator also accepted the Public Body's claim of work product privilege (as a branch of solicitor-client privilege) to some notes of counsel.

The Adjudicator did not accept the Public Body's claim of statutory privilege. Regarding the Public Body's claim of litigation privilege and common interest privilege, the Adjudicator determined that they did not apply to records relating to proceedings that have ended. She ordered the Public Body to determine which records related to completed proceedings.

The Adjudicator found that the Public Body properly applied sections 27(1)(b) and/or (c) to some information. She ordered the Public Body to review the records at issue and sever only the information that reveals substantive information relating to the matter involving the provision of the relevant legal service. She also found that the Public Body did not consider the appropriate factors in exercising its discretion and ordered the Public Body to exercise its discretion anew as it reviewed the records.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 6, 12, 20, 21, 24, 27, 58, 71, 72, 93, *Ombudsman Act*, R.S.A. 2000, c. O-8, s. 25, *Workers' Compensation Act*, R.S.A. 2000, c. W-15, s. 151.1, 152.

**Authorities Cited: AB:** Decision F2017-D-01, Orders 96-006, 96-012, 96-017, 96-19, 97-007, 97-008, 97-020, 2001-009, F2003-012, F2004-026, F2004-030, F2006-12, F2007-007, F2007-014, F2008-008, F2008-028, F2009-008, F2009-025, F2010-007, F2010-017, F2010-036, F2012-08, F2012-10, F2012-12, F2013-13, F2013-20, F2013-54, F2014-R-01, F2014-37, F2014-38, F2016-57.

**Cases Cited:** *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (CanLII), 2003 ABQB 252, *Alberta v. Suncor Energy Inc.*, 2017 ABCA 221, *Alberta (Information and Privacy Commissioner) v. Alberta Federation of Labour*, 2005 ABQB 927 (CanLII), *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 52 (CanLII), *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39, *Canada v. Solosky* [1980] 1 S.C.R. 821, *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), 580 A.R. 265, *Griffiths McBurney & Partners v. Ernst & Young YBM Inc.*, 2000 ABCA 284, *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), *R. v. Card*, 2002 ABQB 537.

## I. BACKGROUND

[para 1] An individual made an access request to the Workers' Compensation Board (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for copies of records relating to a claim he made in 2012. His request stated:

In the facts stated above, please disclose the following file evidences:

1. Copy of Case Managers and WCB staff NOTES from 2009 to present, and
2. Copy of the Office of the Appeals Advisors, and
3. Copy of Senior Management and Alberta Ombudsmen exchange correspondents which creating the Government Relations File copy

[para 2] The Public Body states that “[i]n discussions with [the Applicant], the search was expanded to all of his personal information, other than what was on his claim file.” (Public Body initial submission, at page 4)

[para 3] The Public Body responded to the Applicant's request with a fee estimate; the Applicant requested a review of the fees by this Office. An inquiry was conducted, resulting in Order F2013-54 in which the adjudicator ordered the Public Body to recalculate its fees based on its actual costs of \$0.034 per page (for black and white copies) and \$0.20 per page (for colour copies). The Public Body complied with that Order, the Applicant paid the new amount, and the Public Body provided responsive records, with information withheld under sections 4(1)(a) and (d), 20(1)(d) and 27(1)(a), (b) and (c). Information was also withheld as non-responsive to the request. The Public Body refused to confirm or deny the existence of other records, per section 12(2). The Applicant now seeks a new review of the Public Body's recalculation of the fees,

based on Order F2013-54, as well as the Public Body's application of various provisions of the Act to withhold information.

[para 4] By letter dated March 8, 2014 the Applicant made the following request for information from the Public Body:

- I would like to ask to disclose also the different file records copies between 3820 pages and as estimated 4764 pages of records as stated of the WCB FOIP Request 2013-P-0050 dated September 5, 2013, and
- I would like to ask to disclose any other copies of the records which are not listed on the WCB FOIP Request 2012-P-0008 of February 29, 2012, and the WCB FOIP Request 2013-P-0050 dated September 5, 2013.

Please note: I do not need duplicate file records - I need one copy of the entire file records storage and hold in custody at the WCB FOIP Department.

[para 5] The Public Body states that it understood the Applicant to be asking for:

- An update of records from the Access to Information area, the Government Relations Department, Legal Services Department and FOIP Office for the time period February 1, 2012 to March 8, 2014.
- An update of records from all other areas of the WCB for the time period February 1, 2012 to March 8, 2014. (Public Body initial submission, at page 13)

[para 6] The Public Body sent a letter to the Applicant dated April 1, 2014, communicating this understanding and requesting further clarification from the Applicant. In a letter dated April 23, 2014, to the Applicant, the Public Body stated:

Unfortunately I have been unable to speak to you regarding the clarification I requested in my April 1, 2014 letter. You confirmed in your April 12, 2014 letter that you "will pay the fee of \$186.67 to process the partial access to the WCB file records.." We are interpreting "partial access" to mean that you do not require copies of documents created by you, or submissions you have already received. Some examples of these types of documents will include submissions prepared by you and WCB that have been submitted to the Office of the Information and Privacy Commissioner's Office for the purpose of your Inquiry, or to the Court for the purpose of your various Judicial Reviews.

We will provide copies of the versions of payment screens as you have paid the fees for them.

If this interpretation of the scope of your request is not correct please contact me immediately to ensure we are processing the records you require. If I have not heard from you by May 1, 2014, I will assume this is an accurate interpretation and continue processing the records based on this understanding. (Public Body initial submission, at Tab 22)

[para 7] It does not appear that the Applicant disagreed with this clarification.

[para 8] The Public Body provided responsive records to the Applicant with a letter dated May 28, 2014 (Public Body initial submission, at Tab 23). This letter stated that some information was withheld as non-responsive to the request, and other information was withheld under

sections 4(1)(a) and (d), 24(1)(a) and (b), and 27(1)(a), (b) and (c). The Public Body also stated in that letter that it could not confirm or deny the existence of active investigation records held by the Public Body, under section 12(2) of the FOIP Act.

[para 9] The Applicant requested a review of the above-cited provisions applied by the Public Body, as well as the Public Body's fees.

[para 10] The Commissioner authorized an investigation to settle the matter; this was not successful and the Applicant requested an inquiry.

## **II. RECORDS AT ISSUE**

[para 11] The records at issue consist of the records (or portions of records) withheld by the Public Body under various sections of the Act.

## **III. ISSUES**

[para 12] The issues as set out in the Notice of Inquiry, dated March 8, 2016, are as follows:

1. Did the Public Body properly estimate the amount of fees in accordance with sections 93(1) and 93(6) of the Act, and the Regulation?
2. Did the Public Body properly withhold information as non-responsive to the Applicant's request?
3. Are the records excluded from the application of the Act by section 4(1)(a) (court records)?
4. Are the records excluded from the application of the Act by section 4(1)(d) (records related to an officer of the Legislature)?
5. Did the Public Body properly refuse to confirm or deny the existence of a record as authorized by section 12(2) of the Act (contents of response)?
6. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?
7. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?
8. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

## **IV. DISCUSSION OF ISSUES**

### **Preliminary comment – scope of inquiry and Applicant’s submissions**

[para 13] The Applicant stated that he acknowledges this inquiry is not a review of the Public Body’s decisions regarding his WCB claims. However, much of the 4806 pages of submissions are copies of WCB and WC Appeals Commission decisions, correspondence from those bodies, correspondence and documentation provided to those bodies, including requests for reconsiderations and appeals from the Applicant and medical documentation.

[para 14] The majority of the thousands of pages provided to me by the Applicant in this inquiry appear to be documentation related to the Applicant’s ongoing claims with the WCB and reconsiderations/appeals related to those claims. I have neither jurisdiction nor the requisite expertise to review the actions of the WCB and Appeals Commission to determine correctness, reasonableness, or fairness of those actions.

[para 15] I am reviewing only the Public Body’s response to the Applicant’s access requests, including the fees associated with the requests. I have reviewed the voluminous documentation provided in support of the Applicant’s submissions, albeit briefly, and find the information to be largely irrelevant to determine the issues listed in the Notice of Inquiry.

[para 16] Regarding the Applicant’s written arguments, they are difficult to understand, and largely relate to matters that fall outside my jurisdiction under the FOIP Act (for example, allegations of unfair treatment of the Applicant by the WCB and Appeals Commission, and discrepancies between what he has been paid for his claims and what he believes he is owed). The Applicant has also posed numerous questions that are not relevant to the issues set out in the Notice of Inquiry. To the extent the arguments or questions raised in the Applicant’s submissions are relevant to the issues in this inquiry I will address them; I will not be addressing the irrelevant portions.

### **Preliminary comment – Public Body submissions**

[para 17] There are several thousand pages of records at issue in this inquiry, relating to files #F8328 and #F8329. For each file I received an initial set of records with an index, and several updated sets of records, with ‘amended’ indices.

[para 18] The Public Body provided an initial submission in May 2016, a copy of a letter to the Applicant with three pages of records in June 2016, a rebuttal submission in July 2016, and answered questions I had posed in additional submissions. Those additional submissions were made in August 2016 (additional records were also provided for both files, with amended indices for each file); March 2017 (additional records were provided for file #F8239, with an amended index for that file); March 2018 and April 2018. While the amended indices were helpful, they did not replace previous indices provided so that in every case I had to cross-reference multiple indices to discern what exception was applied to what page.

[para 19] Outside of the numerous ‘amended’ indices and records, the Public Body’s submissions (and indices) have been inconsistent in several instances, and at times puzzling. I spent an inordinate amount of time attempting to reconcile the records, indices and arguments.

[para 20] For example, while the Public Body applied section 27(1)(a) to many of the records at issue from the outset, the Public Body’s initial submission and initial indices show that this provision was not applied to every record. It is also not noted on many of the records at issue provided to me. It was not applied to any record provided to me in the initial records for file #F8328; it was applied to only nine pages of the records provided to me for file #F8329.

[para 21] In its initial submission and August 2016 submission, the Public Body stated that

Solicitor-client privilege was applied to the records found to be responsive to this request, in their entirety. Much of the information in the records is not responsive; however, section 6(2) does not apply to allow severing of documents for which a legal privilege in section 27(1)(a) is claimed. If a legal privilege is claimed for a record, the privilege normally must be applied to the entire record and none of the information in that document may be disclosed. Because of this, section 27(1)(a) was applied to the records in their entirety. (Initial submission at page 25, August 2016 submission at page 5).

[para 22] I had understood this statement to mean that *where* section 27(1)(a) was applied, it was applied to the entire page or record.

[para 23] However, the Public Body’s March 2017 submission had slightly different language on this issue. It states (at page 4, emphasis in original):

Section 27(1)(a) was applied to all the records found to be responsive to this request, in their entirety. Some of the information in the records is not responsive; however, section 6(2) does not apply to allow severing of documents for which a legal privilege in section 27(1)(a) is claimed.

[para 24] If section 27(1)(a) was applied to all records in their entirety, it would follow that the Applicant was not given full or partial access to any record. However, in its submissions regarding the fees charged to the Applicant, it is clear that the Applicant was provided with some responsive records. This is because the Applicant was charged for photocopying. Further, the Public Body’s submissions indicate that the Applicant was provided with partial access to some pages, based on the fact that the Applicant was charged for colour copies of records where colour was used to identify what exception was applied to withhold information on those pages (see paragraph 37 of this Order). Lastly, in June 2016, the Public Body gave the Applicant (and me) a new copy of pages 547-549 (file #F8329) that has only some information withheld from one page. Therefore, the scope of the Public Body’s application of section 27(1)(a) remains unclear.

[para 25] Regarding the particular claims of privilege, the Public Body’s August 2016 and March 2017 submissions state that it had withdrawn its claims of solicitor-client privilege and litigation privilege over the records being provided to me with those submissions. However, in its March 2018 submission, the Public Body seems to again claim solicitor-client privilege over some of the records that were provided to me.

[para 26] Given the number of revised records at issue and indices, it is possible that I am confused, the Public Body is confused, or we are both confused at various points as to what exception or privilege is currently being cited for what information. For example, in its March 15, 2018 submission, the Public Body states (in response to a question I had asked) that no information on page 214 (file #F8329) was withheld as non-responsive. Yet on the copy of page 214, provided to me in August 2016, there is information clearly outlined in black ink. The legend provided with that copy of the records shows that black ink was used to identify non-responsive information (although a different colour was used to identify non-responsive information in other copies of records; in the March 2017 records it was identified by purple marker). While the records themselves indicate that I have correctly understood the Public Body's legend for severing decisions, the March 2018 response raises some doubt.

[para 27] Given my uncertainty regarding the Public Body's precise application of exceptions – especially its application of section 27(1) – I will not order the Public Body to disclose particular pages of records. Rather, in this Order, I explain what arguments of the Public Body I have accepted or rejected and why, provided the applicable principles for applying each exception, and provided examples of instances in which each was applied appropriately or incorrectly. To be clear, if I have not specified that a particular exception *does* apply to a page, the parties are not to infer that the exception does not apply (and vice versa). I have made findings on particular pages because they are good examples for the Public Body of the principles I am explaining.

[para 28] I will order the Public Body to review the records at issue again, and apply the exceptions keeping in mind the principles and guidance provided in this Order.

[para 29] As the Public Body will be reviewing all of the records again, I will also ask it to again exercise its discretion to withhold information under discretionary provisions.

[para 30] In order to provide the Applicant with some idea what to expect at the end of the Public Body's review, I note that a significant amount of the exceptions applied by the Public Body were done correctly, although a line-by-line review and proper application of section 6(2) is necessary.

[para 31] There is also a significant amount of information in the records that is not responsive to the Applicant's request. I have noted inconsistencies in the Public Body's determination of what information is non-responsive; for example, the Public Body has often identified a portion of a record as non-responsive where the record in its entirety appears non-responsive, based on the Public Body's own explanation of how it determined what information is responsive. In other cases, the Public Body has correctly identified where only portions of a page are non-responsive. Following the guidance provided in the relevant section of this Order (see paragraphs 48-65), I will ask the Public Body to be diligent in determining whether records contain responsive information so that the Applicant is not charged for pages of information he did not request and so that the Public Body does not spend time severing pages that do not contain responsive information.

**1. Did the Public Body properly estimate the amount of fees in accordance with sections 93(1) and 93(6) of the Act, and the Regulation?**

[para 32] Section 93 of the Act states in part:

*93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.*

*(2) Subsection (1) does not apply to a request for the applicant's own personal information, except for the cost of producing the copy.*

...

*(6) The fees referred to in subsection (1) must not exceed the actual costs of the services.*

[para 33] Order F2013-54 dealt with the fee estimate provided by the Public Body to the Applicant in response to one of his access requests. The Applicant has requested a review of the Public Body's calculation of the actual fees charged based on that Order.

[para 34] The Applicant has argued that the Public Body is "overriding the WCA (Act) by charging fees..." (attachment to request for inquiry, at para. 32). This issue was dealt with in Order F2013-54, in which I accepted the Public Body's explanation that WCB claim files are provided to claimants free of charge, but that the Applicant's access request was for information that was not part of his claim file. Therefore, the Public Body is permitted to charge fees under the FOIP Act. I am not revisiting that issue in this inquiry.

[para 35] The Public Body's initial submission states (at page 15):

Based on Alberta OIPC [Order F2013-54], fees were then recalculated to be \$337.94. It was understood that this fee amount was in compliance with this OIPC Order and therefore, the WCB reasonably assumed that the fees were properly estimated in accordance with sections 93(1) and 93(6) of the *FOIP Act*, and the Regulation.

Then, based on Request for Review #F8328, it was recommended that the WCB again recalculate the fees based on black and white costs only. The WCB again complied in regards to recalculating the fees associated with the Customer Service Payment screens only and the costs decreased to \$177.38. This final fee amount was in compliance with all OIPC directions, and therefore, the WCB submits that the fees were properly estimated in accordance with sections 93(1) and 93(6) of the *FOIP Act*, the Regulation, and all OIPC directions.

[para 36] The Public Body charged for colour copies for 214 pages of records. It subsequently refunded the different in cost between colour and black & white for 104 pages. By letter dated February 16, 2018, I asked the Public Body why it refunded the difference in cost between colour copies and black & white copies for 104 pages of records, but not for the remaining 110 pages of records for which the fees for colour copies was charged.

[para 37] The Public Body responded (submission dated March 15, 2018, at page 13):

In the processing of a FOIP request, when a page is partially severed, the portions removed are stamped in red with the section number. When a page(s) is removed in its entirety, a spacer page is inserted with the sections that have been applied noted in red. The pages where severing has been noted in red are printed in color in order to clearly identify where information has been severed and what section of the Act has been applied to the information that has been removed. This is done in order to communicate these decisions regarding the Act as openly and transparently as possible.

...

All pages where partial severing was applied and a section number or "non-responsive" was noted on the page, or where pages that [were] inserted (spacer pages) to note pages have been severed in their entirety pursuant to a section(s), were printed in color. The Applicant was charged \$0.20 for these pages.

[para 38] In Order F2013-54 (addressing the fee estimate for the Applicant's 2012 request), I said "[i]t seems reasonable that at \$0.17 difference between colour and black and white photocopies, only those records that must be in colour would be copied in colour, especially for large requests" (at para. 58).

[para 39] While the Public Body states that making these copies in colour communicates its severing decisions "as openly and transparently as possible" these pages do not need to be copied in colour. This is especially true of the "spacer pages" as described by the Public Body, which denote only that pages were severed in their entirety. I understand the Public Body's argument that it was attempting to assist the Applicant's understanding of its severing decision. While colour copies may make reviewing the records easier, it is not a necessity. In June 2016, the Public Body provided the Applicant and me with a new copy of page 547 (File #F8329) that had some information severed. The entire page is in black and white, including the severing decisions. Despite this, the severing decisions are perfectly legible. This undermines the Public Body's argument that pages showing severing decisions must be copied in colour.

[para 40] Pages that *must* be in colour would include those for which the content would be unreadable or rendered meaningless in black and white. Having reviewed the records I did not notice any that meet this standard and the Public Body has not provided any reason to expect that this is the case for any of the responsive records. The Public Body cannot charge for colour copies for the reason that its severing (the boxes and/or provisions noted) are in colour unless an applicant requests a colour copy.

[para 41] I will order the Public Body to refund the difference between the cost for colour copies and the cost for black and white for the remaining 110 pages for which colour was charged.

## **2. Did the Public Body properly withhold information as non-responsive to the Applicant's request?**

[para 42] The Public Body states that "[i]n discussions with [the Applicant], [his 2012 access request] was expanded to all of his personal information, other than what was on his claim file." (Public Body initial submission, at page 4)

[para 43] The Applicant's 2012 access request was processed as a request for the Applicant's personal information. Order F2013-54, which dealt with the fees for that request, referred to it as a request for personal information. The Applicant's 2014 access request is basically an update of the 2012 request, and was also processed as a request for personal information. There is nothing in the requests or any of the Applicant's submissions to indicate that these requests were for general information rather than his personal information. Therefore, records that do not contain the Applicant's personal information are not responsive to his request.

[para 44] The Public Body cites past Orders of this Office as support for withholding information and records as non-responsive. It states (initial submission, page 17):

In Order 97-020 (para 33) and 2001-037 (para 13) it is noted that information or records are responsive to an applicant's access request if the information or records are reasonably related to the request. Order 99-020 (para 16) further confirmed [that] a public body may treat portions of a request as non-responsive if they are clearly separate and distinct and entirely unrelated to the access request.

[para 45] It states that employer account numbers, medical billing numbers, third party personal information, and information relating to the Public Body's administrative processes are not the Applicant's personal information, and therefore are not responsive.

[para 46] In its March 15, 2018 submission, the Public Body further argued (at page 2):

As noted in **Order 97-020** (paras 45, 48 49, 57, 59 - 61) and **Order P-913**, records may be created to serve multiple purposes. This is the case in relation to pages 522 to 524. The Legislative Relations records were created to respond to an inquiry from a Government official on behalf of their constituent, which is responsive to the Applicant's request, however, they are also created as a means for tracking the administration of that inquiry. The administrative portions of those records are not related to a request for personal information; they are separate and distinct from the Applicant's request for his personal information or claim file information.

Entire pages were removed from the Legal Services Department records as non-responsive as they are related only to administrative processes and do not contain information about the Applicant.

[para 47] The Public Body also cited Order F2016-57, which related to an access request for records in the applicant's student file. The adjudicator noted that one email contained a sentence that was about another individual and was not related to the applicant's request, although the remainder of the email was responsive. She noted that section 17 applied to that sentence, but that it was also non-responsive to the request (at para. 17).

[para 48] I agree with past Orders that non-responsive records or portions of a record must be clearly separate and distinct from the responsive portions, in order to be withheld as 'non-responsive'.

[para 49] This is consistent with Order F2009-025, in which the adjudicator said (at para. 13):

The “non-responsiveness” of information in records is not an exception to the right of access created by section 6 of the FOIP Act. Rather, I understand the Commissioner to mean that there is no duty for a Public Body to grant access to information under section 6 if an applicant has not first made a request for access to that information. A Public Body is not required to provide a response in relation to all information in its custody or under its control to an Applicant; only information that reasonably relates to the access request. Essentially, a Public Body’s duties to an applicant in relation to responding to an access request are not engaged until an applicant asks for the information.

[para 50] Records that do not contain the Applicant’s personal information are not responsive to his request. The Public Body has withheld entire records as non-responsive, such as emails dealing with the administration of files relating to the Applicant. The Public Body argues that its own administrative processes are not the Applicant’s personal information.

[para 51] I agree that emails about which Public Body employee needs a copy of a file, or will be handling or responding to the file, is not the Applicant’s personal information, even where the file relates to him. The records withheld by the Public Body as non-responsive do not contain details about the Applicant’s claim or file such that it could be characterized as being about him. Pages 696, 708, 722, 730, 740 and 751 were withheld their entirety as non-responsive and I agree that these pages are not responsive.

[para 52] To clarify, the Applicant’s name is his personal information wherever it appears in the records, regardless of the remaining content of the record; names are specifically listed in the definition of “personal information” under section 1(n)(i). However, in many of the records at issue, the Applicant’s name appears as a way for the Public Body employees to identify a particular file; in that way, a record can contain the Applicant’s name without containing any other personal information about him. For example, an email might have the Applicant’s name in the subject line but the body of the email states only that a particular Public Body employee needs a copy of the file, or will be assigned to work on the file.

[para 53] Where only the Applicant’s name is responsive and the remainder of a record is non-responsive, the Applicant would receive a blank piece of paper with only his name on it. This would be meaningless. Past Orders of this Office have stated that there is no requirement to provide an applicant with a record if, after severing, the remaining information is rendered meaningless (Orders 96-019 and 97-020).

[para 54] In many other instances, the Public Body has withheld only portions of records as non-responsive.

[para 55] Separate items of information in a record cannot be viewed out of context of the record as a whole when determining if they are separate and distinct from the remaining record. For example, there may be an email written about the Applicant, but the signature line of the author, or the date of the email, or the address line, are not the applicant’s personal information if separated from the context of the email. However, it would be unreasonable to characterize those items of information as not responsive to a personal information request from the Applicant for

emails written about him. As stated in Order F2009-025, ‘non-responsive’ is not an exception from the Act to separate sentences or other items of information from the context of the record as a whole in order to withhold them.

[para 56] Information must be considered in the context of the record as a whole, in determining whether it is separate and distinct from the remainder of the record. In the case of a personal information request like the Applicant’s, in order to withhold portions of a record as non-responsive, the Public Body must consider whether that portion contains the Applicant’s personal information *or* whether that portion provides context to the remainder of the record that *is* the Applicant’s personal information.

[para 57] An example of ‘separate and distinct’ might be distinct emails in an email chain. Another example relates to police officers’ notebooks, which often contain notes on unrelated incidents on a single page. In response to an access request for police records relating to one incident, the part of the notebook page that relates to a different incident might be non-responsive. Another example is where a personal note is added to a work email, such as a note referencing a medical absence, holiday or so on. Where that personal note does not have any relation to the remainder of the email or to the access request, it might be non-responsive.

[para 58] An example of where the Public Body has properly characterized a part of a responsive record as non-responsive is on page 690 of file #F8329 (the version provided on August 22, 2016). It appears that a Public Body employee used this record to jot down a note, which is not related to the record itself. The note is not related to the Applicant’s request. The Public Body drew a box around the note and withheld it as non-responsive. In this case, the note was unrelated to the request and was unrelated to the rest of the record such that it was ‘clearly separate and distinct’ from the remainder of the record.

[para 59] Pages 517-18, 521, 523-5 of file #F8329 are administrative records that relate to queries or complaints made to or about the Public Body and the response. The Public Body has withheld portions of these records as non-responsive, stating that they are about the Public Body’s administrative processes and are not the Applicant’s personal information.

[para 60] For the most part, I agree with the Public Body, except for information withheld as non-responsive in the first and third paragraphs under “Response Action Taken”. The Public Body states that this information relates to individuals other than the Applicant. These paragraphs do reference another (unidentifiable) individual (on page 523), but in a manner that clearly relates the Applicant’s personal information in that record. In my view, the Public Body has to have taken this sentence out of the context of the record in its entirety, to find it to be non-responsive. As I have said, information must be considered in the context of the records as a whole. In my view, this information is responsive.

[para 61] I also note that on page 524, the second-last full sentence on the page is withheld as 24(1)(b) and the last full sentence is withheld as non-responsive. The last full sentence clearly relates to the preceding sentence (the second-last); it is difficult to determine why one sentence would be responsive and the other not. Following the analysis above, neither sentence appears to be responsive.

[para 62] The Public Body withheld some portions of emails on pages 741-743 as non-responsive, stating that they relate only to administrative processes. I agree; the information is not about the Applicant.

[para 63] The Public Body withheld employer account numbers and medical billing numbers from customer service payment screens. I have reviewed that information on pages 1-104 of file #F8329 and agree that it is non-responsive.

[para 64] The Public Body has withheld portions of pages 105-114 as containing personal information of other individuals. I confirm that these portions do not relate to the Applicant.

[para 65] I have not made a finding in every instance where the Public Body claimed a record, or portion of a record, is non-responsive. The pages I have referred to above are examples to be used by the Public Body in reviewing the remainder of the records at issue to determine what information was properly withheld as non-responsive. In most cases that I reviewed, the Public Body has properly characterized information as non-responsive, with the exception of the information described at paragraph 60. If the Public Body finds other instances in which it was not applied appropriately, the Public Body may have to decide whether the information must nevertheless be withheld under an exception in the Act.

[para 66] The Public Body has applied section 27(1) to all responsive records; the discussion in that section of the Order will apply to the information I found to be responsive at paragraph 60 (page 523 of file #F8329).

### **3. Are the records excluded from the application of the Act by section 4(1)(a) (court records)?**

[para 67] If section 4(1)(a) applies to the records at issue, I do not have jurisdiction to review the Public Body's decision to withhold them.

[para 68] Section 4(1)(a) of the Act states:

*4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*

*(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*

[para 69] This provision applies to information taken or copied from a court file (Order F2004-030 at para. 20 and F2007-007 at para. 25); it also applies to information copied from a court file to create a new document, such as a court docket (*Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (CanLII), 2003 ABQB 252). However, these orders state that records

emanating from the Public Body itself or from some source other than the court file are within the scope of the Act, even though duplicates of the records may also exist in the court file (Order F2010-031).

[para 70] The Public Body's initial submission briefly addressed the application of section 4(1)(a) to records in file #F8328; it states (at page 18):

Section 4(1)(a) was applied to the following responsive records in FOIP request 2012-P-0008: Pages 3869 to 4190, 4213 to 4215 and 4539 to 4585 - excluded in entirety under section 4(1)(a). These records relate to legal action that [the Applicant] initiated against the WCB, and are part of the Alberta court system. Information from a court file is excluded from the *FOIP Act* under section 4(1)(a). As these records are considered court records, the WCB submits that the *FOIP Act* does not apply to them.

The WCB submits that given the argument provided above, section 4(1)(a) applies to all of the records at issue.

[para 71] The initial submission also addresses the application of section 4(1)(a) to pages 716, 771, 773, 774-5, 778-91, 793-5, 798-819, 820-21, 824-833, 852, 854, 856-60, 866-958, 960-979, 984-1003, 1009, 1256-1265. The index of records provided with the submission indicates that this provision was applied to page 753 as well.

[para 72] In a more recent submission (stated March 9, 2017), the Public Body argued that section 4(1)(a) applied to additional records of file #F8329:

Section 4(1)(a) has been applied to correspondence between the Appeals Commission lawyer and the Court of Queen's Bench Trial Coordinator on pages 763 to 766. Please see the WCB's initial submission dated May 5, 2016 for a discussion related to section 4(1)(a) and the listing of other pages to which section 4(1)(a) has been applied.

[para 73] Reviewing the records, I noted that several pages included notations or other alterations that may not have appeared in the filed copy of the records. By letter dated February 16, 2018, I asked the Public Body the following:

The Public Body applied [section 4(1)(a)] to records that have handwritten notations and highlighting (for example, pages 778-781, and 1256, amongst other pages). If these notations do not appear on the filed court records, section 4(1)(a) seems not to apply; notations added to a copy of a court record mean that the record is now a *new* record. Please clarify *in each case* that the handwritten notations, highlighting, etc. are part of the records that are filed as part of a court file.

[para 74] In its March 15, 2018 response, the Public Body responded (at pages 4-5):

- The following pages contain highlighting and/or handwritten comments: 778-781, 782-784, 785-787, 790-791, 795, 800-807, 808-809, 810-819, 824-833, 960-964, 965-968, 969-975, 976-979, 984-1003, 1256-1265 (coversheet only)

The above noted pages contain handwritten notes or highlighting which, as you brought to our attention, creates a new record. WCB withdraws its application of section 4(1)(a) to these records,

but submits that section 27(1)(a)(b)(iii) applies. These documents are the WCB lawyer's working documents created in preparation for the judicial review.

- The following pages contain fax information between WCB and AC with no handwritten comments: 867-958

Pages 867 to 958 were faxed from the Appeals Commission to the WCB lawyer and thus have the fax send and receipt information on them. This information was exchanged between the WCB and the Appeals Commission in relation to the judicial review to which both were a party. The WCB submits that if section 4(1)(a) does not apply, section 27(1)(a), common interest privilege, as discussed in WCB's March 9, 2017 (pages 4-5) submission, applies.

- Contains fax information with no handwritten comments: 788-789, 793-794, 820-821, 852, 857 1009
- Contains handwritten fax number and fax information: 854, 856, 859, 860

The WCB submits documents to the court by fax. Once the documents are received and stamped, they are faxed back to the WCB by the court. The above noted pages contain a hand written fax number which is a part of the court record and fax sent and received information between the WCB and the court. The WCB submits section 4(1)(a) applies to these records as the only additional information included is the transmission information.

[para 75] The Public Body's March 15, 2018 response stated that it answered the questions only as they pertained to file #F8329. By letter dated March 23, 2018, I clarified that the questions in my February 16, 2018 letter applied to all the records at issue in the inquiry (i.e. for file #F8328 and #F8329). I asked the Public Body to also answer the questions as they pertained to file #F8328. It responded by letter received on April 5, 2018, stating (at page 1):

It was confirmed with the Senior Lawyer involved in the judicial proceedings that the handwritten marks on pages 4067 to 4071 are part of the Court Record. They were placed on the record by [the Applicant]; therefore, section 4(1)(a) applies.

Pages 4539, 4541, 4542, 4544 and 4548 contain highlighting and/or handwritten comments of the WCB Lawyer involved in the judicial proceedings.

[para 76] Unlike the Public Body's March 2018 response regarding file #F8329, the Public Body did not expressly specify in its April 2018 response that it was withdrawing its application of section 4(1)(a) to the pages containing handwritten notes of the WCB lawyer. It also did not expressly add the application of sections 27(1)(a) and (b) to those pages, unlike in its March 2018 response regarding similar records.

[para 77] I conclude that the Public Body's April 2018 response is intended to mean that it is withdrawing its application of section 4(1)(a) to pages 4539, 4541, 4542, 4544 and 4548 of file #F8328. This is because the Public Body acknowledged that these pages contain handwritten notes that are not part of the record on the court file, similar to the pages for which section 4(1)(a) was withdrawn in March 2018 (see excerpt of the response at para. 74 above). Because the handwritten notations are not part of the record on the court file, that information cannot be subject to section 4(1)(a).

[para 78] I also assume that the Public Body intends to apply section 27(1)(a) to pages 4539, 4541, 4542, 4544 and 4548 of file #F8328, based on the Public Body's March 2017 response that states section 27(1)(a) has been applied to all responsive records.

[para 79] Lastly, it seems likely that the Public Body also intended to apply sections 27(1)(b) to the information in pages 4539, 4541, 4542, 4544 and 4548 of file #F8328. This is because its April 2018 response states that the handwritten notations were made by a Public Body lawyer during a proceeding; similar information was withheld under section 27(1)(a), (b) and/or (c) elsewhere in the records at issue (whether correctly or not). As already discussed, the confusing nature of the materials before me in this inquiry have created uncertainty regarding which exceptions were and were not applied to each record. As I will be ordering the Public Body to re-review the records at issue and make new decisions on the proper application of various exceptions, I will leave it to the Public Body to determine which other exceptions it applied to information in these pages and whether those provisions were properly applied given the guidance provided in this Order. I note that some of the pages listed above are similar to pages 4534-4535; the application of section 27(1) to those pages is discussed at paragraph 194 and 225 of this Order.

[para 80] All of the pages for which the Public Body had claimed section 4(1)(a) but now claims section 27(1)(a) and (b)(iii) will be discussed later in the Order. I add page 753 of file #F8329 to the Public Body's own list, as that page consists of a screenshot of an online court form with handwritten notes that were clearly not part of the form.

[para 81] Most of the pages for which the Public Body continues to claim section 4(1)(a) fall within that section. All of the pages for which section 4(1)(a) is still claimed on file #F8328 are copies of filed court documents. Many of the pages on file #F8239 are also copies of filed court documents. Many of the documents have fax information at the header of the page – this is the typical fax information such as the date, time and number of pages. The documents that were “fax filed” are copies of filed court documents. This is true even where the documents contain handwritten fax numbers and fax information, as the Public Body explains that these notes are on the copies filed with the court.

[para 82] Pages 867-958 of file #F8329 consist of a copy of a filed court document that was faxed between the Public Body and the Appeals Commission; the fax information is at the top of the page, indicating it was either faxed to, or from, the Appeals Commission. If this document had been mailed, couriered, or emailed as an attachment, it would be a copy of a filed court document. The fact that it was faxed, and therefore contains the typical fax information at the top of the page does not change the characterization of the document; this is still a copy of a filed court document.

[para 83] The exceptions to the above are pages 763-766, and page 1256. The Public Body has described pages 763-766 as “correspondence between the Appeals Commission lawyer and the Court of Queen's Bench Trial Coordinator” (submission dated March 9, 2017). This correspondence is not a document that would be filed on a court file. Possibly the Public Body believes that these are records “relating to support services provided to the judges of any of the

courts referred to in [section 4(1)(a)]”. However, the Public Body has not provided any argument as to how correspondence between the Appeals Commission and a trial coordinator is a support service for a judge. The correspondence seems to be better described as a court administration record which is not excluded under section 4(1)(a). Rather, court administration records are specifically stated as *not* falling within the scope of section 4 of the Act. I also note that this type of correspondence does not fall within the definition of “judicial administration record” in section 4(3).

[para 84] In its March 2017 submission, the Public Body noted that it believed information in pages 763-66 was not responsive to the Applicant’s request. I agree; the information in these pages is about the administrative processing of files, similar to that described at paragraphs 50-52 of this Order. The Public Body also applied section 27(1) to these pages, but as I find they are not responsive, I do not need to consider that section.

[para 85] Page 1256 is the cover page to a copy of a document filed with the court (pages 1256-65). The cover page has a handwritten note that is not part of the copy on the court file. However, this note is not related to the Applicant’s request and therefore not responsive.

**4. Are the records excluded from the application of the Act by section 4(1)(d) (records related to an officer of the Legislature)?**

[para 86] If section 4(1)(d) applies to the records at issue, I do not have jurisdiction to review the Public Body’s decision to withhold them.

[para 87] Section 4(1)(d) of the Act states:

*4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*

*(d) a record that is created by or for or is in the custody or under the control of an officer of the Legislature and relates to the exercise of that officer’s functions under an Act of Alberta;*

[para 88] This provision excludes records that were created by or for an Officer of the Legislature, even where copies of those records are under the custody or control of another public body (Orders 97-008 at paras. 23-24, 2001-009, at para. 20).

[para 89] The pages withheld citing section 4(1)(d) in file #F8328 are correspondence between the Public Body and the Ombudsman regarding investigations into complaints made by the Applicant. The Ombudsman is an officer of the Legislature, and the correspondence relates to his function under the *Ombudsman Act*.

[para 90] The correspondence from the Ombudsman falls squarely within the scope of section 4(1)(d). In Order F2012-12, I considered the application of section 4(1)(d) to a letter from a public body to the Ombudsman. The letter was created by a public body in response to a recommendation to the public body by the Ombudsman in the course of an investigation by the Ombudsman. I said (at paras. 22, 24, 28 and 30-31):

These interpretations indicate that under section 4(1)(d), a record created “for” the relevant recipient does not include unsolicited information sent to the recipient. Nor does it apply to even a solicited record simply on the basis that it is “intended for” or provided to the recipient. However, a third party (e.g. a stakeholder) may develop advice etc. for (understood as “on behalf of”) a public body if it has a sufficiently close connection to the public body to be engaged in an advisory role. Similarly, information prepared and under the direction of a public body, to be used by that public body, may be “prepared for” (i.e. “on behalf of”) that public body.

...

At the same time, however, the letter from the Public Body responding to the Ombudsman’s recommendations is not unsolicited information. Further, in my view, the response differs in character from information that, though solicited, merely provides the views or opinions of third parties. Rather, the Public Body’s response is required by the Ombudsman pursuant to his power to require it under his legislation *so that he may reach a decision as to whether the response is “adequate and appropriate” in his view*, which, in turn, governs the further courses of action he will follow. It seems to me that in these particular circumstances, there is a sufficiently close connection between the purpose of the record and the work of the Ombudsman for the record to be said to have been created “for” the Ombudsman, in the sense that it is created at his request and to allow him to decide what further actions to take relative to the matter.

...

In this case, the letter written by the Public Body to the Ombudsman was clearly created directly in response to the Ombudsman’s recommendations to the Public Body and his request for the Public Body’s response to those recommendations.

...

The role of the Ombudsman’s authority to investigate and require information and responses from government bodies supports an interpretation of “for” that distinguishes records created at the request of the Ombudsman related to the exercise of his or her statutory function, from records that may be merely intended for or sent to an officer of the legislature or another public body.

For the foregoing reasons, I find that section 4(1)(d) applies to page 20, and I do not have jurisdiction under the FOIP Act with respect to this record.

[para 91] The same analysis applies to the correspondence from the Public Body to the Ombudsman in this case. It was created directly in response to requests for information from the Ombudsman and recommendations made by the Ombudsman. I find that section 4(1)(d) applies to all the information so cited by the Public Body in file #F8328, except page 2025. This page appears to be a copy or screenshot of an internal file management system. Although it relates to the Ombudsman’s investigation, it is not a record that would have been provided to the Ombudsman for the investigation. As it relates only to administrative file management, it does not appear to be responsive to the Applicant’s request (per paragraphs 50-52 of this Order).

[para 92] In file #F8329, many of the pages withheld citing section 4(1)(d) consist of correspondence from this Office to the Public Body in the course of the inquiry leading to Order F2013-54, such as copies of the Notice of Inquiry, and copies of the Order. The inquiry was conducted by me, as a delegate of the Commissioner; therefore, the records relate to the exercise

of the Commissioner's functions under the FOIP Act. The Commissioner is an officer of the Legislature. I agree that section 4(1)(d) applies to those records.

[para 93] Some pages are copies of submissions and related correspondence from the Public Body to this Office for that same inquiry. Those submissions detail arguments regarding the issues set out in the Notice of Inquiry leading to Order F2013-54. Submissions to an inquiry are requested by the Commissioner (or her delegate) in the Notice of Inquiry, so that the Commissioner or delegate can make a finding regarding the issues set out in the Notice. Following the reasoning in Order F2012-12, I find that section 4(1)(d) applies to this information.

[para 94] I find that section 4(1)(d) applies to the records so cited by the Public Body in file #F8329, except pages 627-682 and pages 1017-1031. Pages 627-682 were not provided to me as the Public Body has claimed solicitor-client privilege over the information therein. An affidavit provided by the Public Body (March 9, 2017) describes pages 627-643 as email correspondence between the Public Body's FOIP area and counsel, discussing the submissions to be made for the earlier inquiry. Pages 644-682 are described as draft submissions. Correspondence regarding submissions and draft submissions are not records that are excluded from the application of the Act under section 4(1)(d), as they are not records that were ever provided to an officer of the Legislature. I will consider the application of section 27(1) to those records.

[para 95] Pages 1017-1031 are described as "OIPC Order with notes". While the Order is a record excluded from the Act under section 4(1)(d), the notes added by the Public Body are not part of that excluded record because those added notes were not created by or for an officer of the Legislature. The Public Body has also applied section 27(1)(a) and (b) to those pages and I will consider that application below.

**5. Did the Public Body properly refuse to confirm or deny the existence of a record as authorized by section 12(2) of the Act (contents of response)?**

[para 96] The Public Body relied on section 12(2)(a) to refuse to confirm or deny the existence of the records. This section states:

*12(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of*

*(a) a record containing information described in section 18 or 20, or*

...

[para 97] In Order F2006-012, former Commissioner Work applied a purposive interpretation to section 12(2)(a) (at paras. 18 and 21):

Earlier orders of this Office have said that section 12(2) is to be used having regard to the objects of the Act, including access principles. In my view, in order to rely on section 12(2)(a) to refuse to say whether information exists that falls into a particular subsection of section 18 or 20, the Public Body should first consider what interest would be protected by withholding such information under the particular subsection of section 18

or 20, and then ask whether refusing to say if such information exists would, in the particular case, promote or protect the same interest.

...The sensible purpose for both provisions [sections 12(2)(a) and (b)] ... is to prevent requestors from obtaining information from a request indirectly that they cannot obtain directly. Requestors are denied access to information if access would cause harm to law enforcement, or unreasonable invasion of privacy. They should be denied information as to whether a record exists for the same reason, but not otherwise... This interpretation is also in accordance with the general principle in the Act of permitting access subject only to limited and specific exceptions.

[para 98] The Public Body's submissions indicate that sections 20(1)(a), (c) and (d) are relevant to its application of section 12(2). These sections state:

*20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*

*(a) harm a law enforcement matter,*

...

*(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,*

*(d) reveal the identity of a confidential source of law enforcement information,*

...

[para 99] "Law enforcement" is defined in section 1(h) of the Act, as follows:

*1(h) "law enforcement" means*

- i) policing, including criminal intelligence operations,*
- ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or*
- iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred;*

[para 100] The Public Body states that past Orders of this Office have concluded that a special investigation conducted by the WCB's Special Investigation Unit is a law enforcement matter under section 20 of the FOIP Act. In Order F2014-37 I agreed that an investigation by the Public Body into a claimant's alleged misrepresentation of her injury fell within the definition of "law enforcement". Misleading the Public Body and failing to report certain information to the Public Body that could affect a claimant's compensation is a contravention of the *Workers' Compensation Act* (WCA, section 151.1(1)) which is an offence under that Act (section 152).

[para 101] Any investigation into the Applicant falling within section 151.1 would fall within the definition of "law enforcement", if any investigation occurred.

[para 102] The Public Body has argued that informing a claimant of an ongoing investigation would harm the effectiveness of that investigation.

[para 103] Section 20(1)(a) has been interpreted as applying to specific, ongoing matters (Order F2006-012, at para. 25). If this requirement is met, the public body applying the exception must also meet the following “harms” test in order to determine whether there is a reasonable expectation of harm that would result from the disclosure as to the existence of the requested information:

- a. there must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
- b. the harm caused by the disclosure must constitute "damage" or "detriment" to the matter and not simply hindrance or minimal interference; and
- c. the likelihood of harm must be genuine and conceivable (see Order F2010-017, at para. 69)

[para 104] The Applicant’s most recent access request relevant to this inquiry was made in 2014. It seems unlikely that there is an investigation that is currently ongoing, that was also ongoing in 2014.

[para 105] The Public Body has argued (initial submission at page 23):

...if WCB were to apply section 12(2) in only those cases where there is an active investigation, this would essentially be confirming that an active investigation exists. Therefore, to protect the investigative process the WCB refers to section 12(2) in its final letters to all applicants.

Once an investigation has been completed by the WCB's Special Investigation Unit on a worker's claim file, the final report from the investigation, including any surveillance recordings, is placed on the claimant's WCB claim file, and is accessible to the claimant by submitting a request for claim file documents through the WCB’s Access to Information Department. These records are provided routinely without the need to submit a FOIP request.

Other records, such as the WCB' Special Investigation Unit's processes related to a closed investigation, can be accessed by submitting a FOIP request.

[para 106] According to the Public Body, if there had been an ongoing investigation when the Applicant made his access requests, the Applicant would have been informed once they were completed. The investigation or surveillance report is placed on the claim file at that time, and can be requested by the claimant. In that case, there is no reason for the Public Body to refuse to confirm or deny the existence of records relating to a completed investigation, if those records would be responsive to the Applicant’s 2012 or 2014 access requests. (Records relating to any investigation occurring after the Applicant’s access requests would clearly not be responsive.)

[para 107] As I will be ordering the Public Body to review the records at issue and respond again to the Applicant with respect to exceptions that were not properly applied, I will order the Public Body to respond to the Applicant, without relying on section 12(2), with respect to any investigation that has been completed since the Applicant’s access request (assuming any related

records are responsive to the 2012 or 2014 request). As the Public Body states that it informs claimants of investigations once they are completed, the Public Body may have already informed the Applicant and provided him with any related records. If so, the Public Body may comply with this part of the order by informing the Applicant of this.

[para 108] I have noted that it is unlikely that an investigation that was ongoing in 2014 (if any were undertaken) would still be ongoing now. The Public Body has not provided me with any information in this regard. However, in the event that an investigation was ongoing at the time of the Applicant's access requests remains ongoing, it would be appropriate for the Public Body to refuse to confirm or deny the existence of responsive records. Investigations into matters such as possible misrepresentations of an injury would be obviously hampered if the claimant knew s/he was being investigated. For example, behaviour could be altered, materially changing the evidence that can be collected by a medical practitioner observing the claimant, or by covert surveillance in a public setting. This represents actual damage, rather than a simple hindrance or mere interference. The likelihood of this harm is genuine and conceivable. Therefore, this falls within the scope of section 20(1)(a).

[para 109] The Public Body argues that section 12(2) cannot apply only when there *is* an ongoing investigation; otherwise, applicants would be alerted of an ongoing investigation in every instance in which this provision was applied. I agree. Therefore, the Public Body may continue to refuse to confirm or deny the existence of records relating to any ongoing investigation.

**6. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?**

[para 110] The Public Body applied sections 20(1)(d) to page 4589 in its entirety. This section states:

*20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*

...

*(d) reveal the identity of a confidential source of law enforcement information,*

...

[para 111] The Public Body states merely that page 4589 would reveal the confidential source of law enforcement information.

[para 112] I have discussed above that the Public Body is authorized to conduct investigations; these investigations fall within the definition of "law enforcement" in the Act. The Public Body will collect information at various points of the investigation, from various sources. This includes information that triggers an investigation (such as a complaint about a claimant or 'tip') as well as information collected during the course of an ongoing investigation. Information might be collected from health care providers, care givers, or other third parties who might have information about a claimant. It may also be collected directly from the claimant with or without their knowledge (such as covert surveillance).

[para 113] I have reviewed page 4589 and confirm that all of the information on that page is law enforcement information. Because of the format of the information on that page (the information is handwritten), disclosing any of the information could reveal the source of the information. It is also reasonable to conclude that the source provided the information in confidence, with an expectation that it would remain confidential.

[para 114] I agree that section 20(1)(d) applies to page 4589 of file #F8328 in its entirety.

**7. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?**

[para 115] The Public Body applied sections 24(1)(a) and (b) to some information in the records in file #F8329. These sections state:

*24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*

*(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*

*(b) consultations or deliberations involving*

*(i) officers or employees of a public body*

*(ii) a member of the Executive Council, or*

*(iii) the staff of a member of the Executive Council,*

...

[para 116] In previous orders, the Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action. (See Order 96-006, at p.9)

[para 117] In Order F2013-13, the adjudicator stated that the third arm of the above test should be restated as "created for the benefit of someone who can take or implement the action" (at para. 123).

[para 118] Further, section 24(1)(a) applies only to the records (or parts thereof) that reveal substantive information about which advice was sought. In Order F2004-026, former Commissioner Work clarified the scope of section 24(1) (including 24(1)(a) and (b)) as follows (at para. 71):

In my view, section 24(1) does not generally apply to records or parts of records that in themselves reveal *only* any of the following: that advice was sought or given, or that consultations or deliberations took place; that particular persons were involved in the seeking or giving of

advice, or in consultations or deliberations; that advice was sought or given on a particular topic, or consultations or deliberations on a particular topic took place; that advice was sought or given or consultations or deliberations took place at a particular time. There may be cases where some of the foregoing items reveal the content of the advice. However, that must be demonstrated for every case for which it is claimed.

[para 119] As indicated above, facts can be withheld if they are interwoven with the advice etc. such that they cannot reasonably be separated (Order F2009-008).

[para 120] As well, section 24(1)(a) does not apply to a decision itself (Order 96-012, at paras. 31 and 37).

[para 121] Regarding factual information, including opinions about factual situations, the adjudicator in Order F2012-10 found (at paras. 44-45):

That an employee offers an opinion regarding a factual situation does not, in and of itself, support a finding that the information is subject to either section 24(1)(a) or (b). Recently, in Order F2012-06, I rejected the argument that an objective evaluation or assessment of factual information constitutes information that is subject to section 24(1)(a), if that information reveals only a state of affairs, rather than advice or analysis directed at taking an action.

Similarly, in Order 97-007, former Commissioner Clark rejected the argument that a collection of facts, without evidence that the facts were collected and presented in order to influence a decision, is subject to section 24(1)(a).

Upon reviewing the briefing notes, I note that there is no reference to a possible course of action for the Minister. In short, the briefing notes appear to be a narration or a status report. The authors of the briefing notes were not advising the Minister as to what he should do or not do, nor were they providing an analyses of the events using their expertise. “Analyses” is defined in the *Concise Oxford Dictionary*, 9th edition, (New York: Oxford, 1995) as:

*a detailed examination of the elements or structure of a substance etc.; a statement of the result of this.*

While there is some discretion exercised in choosing which facts are gathered, without more, a compilation of facts is not an [analysis]. Gathering pertinent factual information is only the first step that forms the basis of an [analysis]. It is also the common thread of “advice, proposals, recommendations, or policy options” because they all require, as a base, a compilation of pertinent facts.

In Order 96-012, I stated that I took section 23(1)(a) to contemplate the protection of information generated during the decision-making process. There is nothing in the information to indicate a decision or a pending decision.

[para 122] In Order F2012-10, the adjudicator also clarified the scope of section 24(1)(b):

A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a)

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

[para 123] The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (section 24(1)(a)), or consultations or deliberations between specified individuals (section 24(1)(b)).

[para 124] Some of the pages to which the Public Body has applied section 24 were not provided to me for this inquiry, as the Public Body also claimed solicitor-client privilege over them. For the reasons provided in the relevant section of this Order, I have accepted this claim of privilege and do not need to decide whether section 24 also applies (pages 160, 164, 165, 166-179, 183-196 and 627-643 of file #F8329).

[para 125] Much of the information withheld under section 24(1) consists of email conversations. Some of the conversations are about the administration of a file (e.g. file assignment). These conversations do not fall within the scope of section 24(1)(a) or (b) as advice is not sought or given and there are no deliberations leading to a decision (see for example pages 212-217, 223, 224, 755-757). Merely expressing an opinion about how a file should be administratively assigned and processed is not the same as a substantive deliberation that involves weighing considerations before coming to a decision. The same can be said for information that merely relays instructions or plans as those indicate a decision has already been made (see for example pages 517, 524, 526).

[para 126] Information that reveals *that* a suggested response was drafted for an official does not fall within section 24(1) if it does not reveal the substantive content of the suggested response (see for example page 547). Similarly, information revealing that a consultation might occur in the future does not fall within the scope of section 24(1) (see for example, pages 212-217, 223, 224).

[para 127] Much of the information in the above pages was flagged by the Public Body, either in the original set of records or in one of the subsequent sets of records provided during the inquiry, as non-responsive. In each case identified by the Public Body, I agree that the information is non-responsive. In some cases, information that was *not* flagged as non-responsive is similar to the type of information that I have agreed was non-responsive elsewhere in the records. The Public Body is to use the discussion of responsiveness in this Order as guidance.

[para 128] As I will discuss in the section 27 portion of this Order, the Public Body has stated that it applied section 27(1) to all responsive records. Therefore, disclosure of any information not properly withheld under section 24(1) must also be considered under section 27(1). I will

consider the Public Body's application of section 27(1) to the information in these pages later in this Order.

[para 129] Information in the following pages was improperly withheld under section 24(1):

- Page 521 is an unsigned copy of a letter to the Applicant. There is no indication from that page (or the pages around it) that this letter was a draft. The Public Body has the burden of proof but has not provided any indication in its submissions that this letter is a draft. In contrast, a similar unsigned letter on page 550 (discussed below) has a clear indication that it is a draft. Given the information before me, I conclude that page 521 is the final version of the letter, and section 24(1) does not apply to it;
- Pages 547, 697, 700, 705, 747, 762, show that a suggested response was drafted or will be drafted but not any of the content of what was suggested or drafted. As discussed above, this does not fall within section 24(1);
- Pages 517, 524 and 526, reveal a decision that was made and/or instructions, which cannot be withheld under section 24(1);
- Pages 698-699 consist of a final version of a document sent from one public body employee to another for signature. Page 729 consists of emails sending final versions of documents. There is no indication that advice is being sought or given and section 24(1) does not apply;
- Pages 746, 748, 749 and 1004 consist of emails sharing information. No advice is being sought or given and section 24(1) does not apply;
- Page 754 consists of an email and handwritten notes. No advice is being sought or given and section 24(1) does not apply;
- Pages 701-703 and 706-707 appear to be drafts of a document that was intended to be filed with the court. Unlike pages 550-551 (discussed below), there is no indication that these drafts were created for an official, which could bring them within the scope of section 24(1). Drafts created by counsel for counsel's own use is not advice to an official or a deliberation. Therefore, section 24(1) does not apply.

[para 130] The Public Body's initial submission states that pages 180-182 were withheld in their entirety under section 24(1). These pages are comprised of internal email correspondence discussing a submission being drafted. The headers, addresses, dates, and signature lines do not reveal the substance of any advice or deliberations. While the subject lines on page 180 are descriptive, they only describe the subject of the advice/consultation, not the substance of what was discussed. Only the second paragraph (of two) on second email (of three) on page 180 reveals substance of deliberation such that section 24(1) applies. All of page 181 except the last sentence and the signature line consist of draft language for a submission; therefore section 24(1)(b) applies to that information. Page 182 contains only a continuation of the signature line at the end of page 181 so section 24 does not apply.

[para 131] Pages 210-211 also consist of emails in which one Public Body employee consulted with another regarding the content of a submission. The body of the emails on page 210 reveals the substance of the consultation but the remaining information on that page does not (i.e. dates, address lines, subject lines and signature lines). The body on the email on page 211 reveals only

background facts, not the substance of any consultation. The remaining information on that page is a signature line, which cannot be withheld under section 24(1).

[para 132] One sentence in an email on page 752 was withheld under section 24(1)(b). I agree that this sentence reveals information that was presented as an opinion on how to proceed on a matter, made to a person with the authority to make a decision. Therefore the exception applies.

[para 133] Pages 550-551 were withheld in their entirety under section 24(1). These pages consist of draft correspondence to a third party from an official. As such, section 24(1)(a) applies to all the information on these pages.

### *Exercise of discretion*

[para 134] 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.

[para 135] 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 be 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

[para 136] 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)

[para 137] The Public Body has provided some considerations it had taken into account in exercising discretion to withhold information under section 24(1). Some of the considerations discussed by the public body, such as whether there was a seeking of advice towards taking an action, and were responses from someone who was in a position to provide direction or advice are merely factors of the tests for applying section 24(1)(a) and (b). Considering whether the exception actually applies to the information in question is not exercising discretion. Exercising discretion is the step after determining that the exception *does* apply – the Public Body is to consider whether or not it *should* apply the exception.

[para 138] The Public Body states that it also considered that the purpose of the exception is to “foster open discussions in the deliberative process involving public body officials and staff” (initial submission at page 33). It argues that “It must be noted that disclosing information employees believe will be kept confidential will make the exchange of information between employees less candid, open and comprehensive” (August 22, 2016 submission, at page 9).

[para 139] I agree that the purpose of the exception is an appropriate factor to consider in exercising discretion to withhold information under section 24(1). However, stating the purpose of the exception is not sufficient. As stated, where an exception to access is discretionary, the Public Body must determine, on a case-by-case basis, how the purpose of the exception would be affected by the disclosure of the information at issue. Mandatory exceptions to access also have a purpose – but a public body does not have any discretion to disclose information falling within the scope of a mandatory exception.

[para 140] By merely stating the purpose of section 24(1), it appears that the Public Body may be applying that exception in a ‘blanket’ manner, rather than on a case-by-case basis. Therefore, I will order the Public Body to exercise its discretion to withhold the limited amount of information to which section 24(1) applies.

[para 141] One of the factors to consider is whether the purpose of section 24(1) is fulfilled by withholding information. In other words, would disclosing *each item* of information inhibit full and frank discussion? The Public Body has applied section 24(1) to items of information that, while falling within the scope the provision, appear innocuous. It is difficult to see, from my point of view, what harm could result from disclosing some of the information withheld by the Public Body. That said, the Public Body is familiar with these records, the context in which they were created, and the possible effect of disclosure of particular information to an extent that I am not. For this reason, the Public Body has the final decision to withhold or disclose information to which a discretionary exception applies. However, in making that decision, the Public Body must exercise its discretion fairly, and in consideration of all (and only) the appropriate factors, in every instance it is applying section 24(1).

#### **8. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?**

[para 142] Section 27 of the Act states:

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

*(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*

*(b) information prepared by or for*

*(i) the Minister of Justice and Solicitor General,*

*(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*

*(iii) an agent or lawyer of a public body,*

*in relation to a matter involving the provision of legal services, or*

- (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 143] The Public Body applied sections 27(1)(a), citing multiple privileges, as well as 27(1)(b) and (c). I will discuss the privileges under section 27(1)(a), then sections 27(1)(b) and (c).

#### *Section 27(1)(a)*

[para 144] In its March 9, 2017 submission, the Public Body states (at page 4):

Section 27(1)(a) was applied to all the records found to be responsive to this request, in their entirety. Some of the information in the records is not responsive; however, section 6(2) does not apply to allow severing of documents for which a legal privilege in section 27(1)(a) is claimed. If a legal privilege is claimed for a record, the privilege normally must be applied to the entire record and none of the information in that document may be disclosed. Because of this, section 27(1)(a) was applied to the records in their entirety.

[para 145] The Public Body claimed solicitor-client privilege to some records at issue, as well as statutory privilege (under the FOIP Act and *Ombudsman Act*), common interest privilege and work-product privilege. The Public Body had claimed litigation privilege but has since expressly rescinded that claim over some records, as the relevant litigation ended.

[para 146] In August 2016, the Public Body provided me with additional pages of records for both file #F8328 and F8329 that were previously withheld under solicitor-client privilege, as well as updated indices of records. The Public Body specified that solicitor-client privilege was no longer being claimed over these pages (see page 4 of August 22, 2016 submission).

[para 147] In March 2017, the Public Body provided me with additional pages of records for file #F8329 that were previously withheld under solicitor-client privilege. The Public Body specified that solicitor-client privilege was no longer being claimed over these pages. It also specified that litigation privilege was no longer being claimed over these pages (see page 3 of the March 9, 2017 submission).

[para 148] From this I had concluded that the Public Body is not (or no longer) claiming solicitor-client or litigation privilege over any of the records it has provided to me.

[para 149] The Public Body did apply common-interest and work product privilege over some of the records provided to me. As these privileges seems to also require a claim of solicitor-client and/or litigation privilege in order to apply (which I will discuss in more detail), I asked the

Public Body how these privileges apply where neither solicitor-client nor litigation privilege are being claimed (letter dated February 16, 2018).

[para 150] The Public Body's March 15, 2018 response states (at page 7, my emphasis):

Regarding the notes and working papers of the lawyer, the WCB submits that **in addition to solicitor-client privilege**, work product privilege also applies.

In addition to the information provided in the WCB's August 22, 2016 Additional Submission Regarding Privilege from R v. Card, 2002 ABQB 537, we add the following paragraphs from that Decision:

...

The WCB submits that **work product or solicitor-client privilege clearly attaches to the records noted** above hence section 27(1)(a) has been applied.

[para 151] The Public Body's March 2018 response appears to invoke solicitor-client privilege over records that have been provided to me. Therefore, my previous conclusion that the Public Body had withdrawn its claim of solicitor-client and litigation privilege over the records that were provided to me is now in doubt.

[para 152] Further, the Public Body specified in its letter of March 2018 that the arguments therein applied only to file #F8329. It is less clear that this recent (re)claim of solicitor-client privilege applies to any of the records provided to me for file #F8328.

[para 153] Given the above, I am not certain that I understand to which records the Public Body has claimed what privilege. I am also not certain that the Public Body has kept track of which privilege continues to be claimed over which records. This inquiry has been ongoing for an extended period of time, during which I have asked the Public Body to clarify its positions numerous times. As 6 submissions from the Public Body have failed to provide clarity, it does not appear to be in any party's interest to ask further questions.

[para 154] For this reason, I will order the Public Body to review all of the records to which it has applied section 27(1), following the guidance provided in this Order. According to the Public Body's March 2017 submission, this encompasses all of the records responsive to the Applicant's requests.

#### *Solicitor-client privilege*

[para 155] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky* [1980] 1 S.C.R. 821. The Court said:

... 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.

[para 156] The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 157] The Applicant has expressed confusion regarding the relationship between the Public Body's internal counsel and various employees of the Public Body and/or other areas or departments within the Public Body. Specifically he asks how the Public Body FOIP specialists and in-house counsel can "claim a Client-Solicitor Privilege where they [are] working together [for] the same management and control representing the same interest and principles and mission?" (September 2016 submission, at page 5). The Applicant suggests that this raises a conflict of interest and abuse of process.

[para 158] Past Orders of this Office have addressed the application of solicitor-client privilege by in-house government lawyers. In Order F2013-20, which also concerned the claim of solicitor-client privilege by WCB counsel, I said (at paras. 66-68):

Finally, with respect to the Applicant's third concern, the Public Body stated "the fact that counsel are also staff has no bearing whatsoever on the issue of privilege. Many companies and public bodies have in house legal representatives and there is no rationale or indeed authority that suggests that privilege ought to apply differentially in such cases."

I agree with the Public Body on this last point. In *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565, the Supreme Court of Canada stated:

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. One thing is clear: the fact that Mr. Leising is a salaried employee did not prevent the formation of a solicitor-client relationship and the attendant duties, responsibilities and privileges. This rule is well established, as set out in *Crompton (Alfred) Amusement Machines Ltd. v. Comrs. of Customs and Excise (No. 2)*, [1972] 2 All E.R. 353 (C.A.), *per* Lord Denning, M.R., at p. 376:

Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason the judge thought that they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.... I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned.

(at para. 50)

Following this authority, it does not matter whether the Public Body's counsel is in-house or external; if the information meets that test for legal privilege then section 27(1)(a) is applicable.

[para 159] I come to the same conclusion in this case: the fact that counsel may be in-house does not affect whether solicitor-client privilege can be claimed.

[para 160] In a later submission (March 23, 2017) the Applicant argues that the Public Body's claim of privilege indicates that counsel advised on the administration of his claims (i.e. whether he would receive a particular benefit, or the benefit level) and that advice is being withheld claiming privilege (see page 4). Whether or not the Public Body's counsel advised on the Applicant's claim and/or whether or not the Public Body's counsel *should* advise on a claim is not an issue that is within my jurisdiction to consider and therefore is not an issue in this inquiry.

[para 161] The Applicant also argues that decisions regarding his WCB claims are not made by lawyers; therefore, solicitor-client privilege cannot apply "in this decision process". Regarding communications with the Ombudsman, the Applicant argues that communications containing recommendations from the Ombudsman to the Public Body cannot be subject to solicitor-client privilege because the Public Body is not representing the Ombudsman or the Applicant. (September 2016 submission, at page 10)

[para 162] The Public Body has not claimed solicitor-client privilege over decisions about the Applicant's claim that did not involve counsel. The claim has been made over documents that involved counsel. In some cases, that includes documents involved in counsel's representation before the Appeals Commission and/or a reviewing court in defense of the claim decision. I will discuss the Public Body's claim of solicitor-client privilege in detail later in this Order; for now I can confirm that in each case the basis of the claim is counsel's involvement in the matter.

[para 163] Regarding proceedings with the Ombudsman, and previous proceedings before this Office, counsel may have provided legal advice to the Public Body in the course of making submissions to the respective Office. It is not the case that counsel would have had to be representing the Ombudsman (or this Office) for solicitor-client privilege to apply.

[para 164] In its initial submission, the Public Body states that the pages enumerated therein for file #F8328 were "prepared by a WCB lawyer in relation to a matter involving the provision of legal services to the WCB. They are emails between the WCB's Customer Service department and the WCB's Legal Services department, and involve the seeking and giving of legal advice" (at page 26). Regarding file #F8329, the Public Body states that the information withheld under section 27(1)(a) consists of "correspondence between WCB employees and a WCB lawyer in relation to a matter involving the provision of legal services to the WCB. They are discussions regarding an inquiry being conducted" (at page 35).

[para 165] By letter dated August 2, 2016, I asked the Public Body to provide a sworn affidavit to support its claim of privilege over the records that were not provided for the inquiry. I said:

The Public Body must establish that the records are subject to the privilege through evidence, preferably evidence from someone with direct knowledge, establishing the circumstances in which the records were created and the manner in which confidentiality of the records has been preserved. The evidence must provide an explanation as to why the individual has formed the opinion that the records contain a communication that meets all the requirements of the *Solosky* test. This must be done for every record (or part of a record) for which the privilege is claimed. Without more, reciting the elements of the *Solosky* test and stating that they are met will not discharge the burden of proof.

[para 166] The Public Body responded on August 22, 2016, stating:

...the assertion that the WCB must establish or prove that the records are in fact subject to solicitor-client privilege through specific evidence is unfounded. While we are unable to comply with your request for disclosure of documents or descriptions of materials for which solicitor-client privilege is claimed, we are able to provide substantiation of that claim. Please find enclosed an affidavit sworn by a WCB FOIP Specialist respecting the documents over which the WCB has asserted solicitor-client privilege.

[para 167] At that time, the Public Body also provided me with an affidavit sworn by a FOIP Specialist with the Public Body. The affiant swore that she was advised by WCB counsel that solicitor-client privilege applies to the records over which that privilege was claimed. The Public Body also provided me with 14 pages of records that had previously not been provided to me. The Public Body stated only that solicitor-client privilege was not being claimed over these records but did not address why they were not previously provided.

[para 168] After that response, the Supreme Court of Canada issued its decision in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 52 (CanLII) (*University of Calgary*). In that decision, the Court 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 request, or are applicable by analogy. (Decision F2017-D-01 explains this point further, at paras. 19-21).

[para 169] Following the Supreme Court decision, I again asked the Public Body for additional support for its claim of privilege (letter dated February 17, 2017). I asked the Public Body to follow the Office's new Privilege Practice Note, which incorporates the parameters set out in *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), 580 A.R. 265 (*Shawcor*), which was cited by the Supreme Court in *University of Calgary* as the relevant authority in Alberta.

[para 170] The Public Body responded on March 9, 2017. It provided additional arguments on its claim of privilege, and an additional sworn affidavit with a description of 92 pages of records over which the privilege is claimed.

[para 171] The Public Body also provided me with additional records that had previously not been provided for the inquiry. The Public Body stated only that solicitor-client privilege has not been claimed over these pages, and litigation privilege is no longer being claimed. Previous indices of records provided by the Public Body indicate that solicitor-client privilege had been

claimed over these pages previous to this submission. The Public Body did not explain its reasons for previously citing that privilege or for now rescinding that claim.

[para 172] The description of records provided with the March 9, 2017 affidavit indicates that these pages relate to advice sought and given in relation to submissions made during a previous inquiry. The Public Body states (at pages 2-3 of the March 9, 2017 submission):

The implication of the information and analysis provided to the OIPC during the course of an inquiry can be far reaching for public bodies. As noted above, Orders made by the OIPC are final and the decisions may only be reviewed through judicial review. Therefore preparing submissions for the purpose of inquiries is a collaborative effort between the LSD and the WCB FOIP Office to ensure all relevant information is included. This process involves the preparation of draft submissions which is then reviewed by both the LSD lawyer and members of the WCB's FOIP Office for their relevant legal and practical advice (e.g. advice regarding the application of the FOIP Act, the possible inclusion of any cases of law or OIPC Orders and any additional information that should be included in the submission). The seeking and giving of advice, in order to come to the final product that will be provided to OIPC, is an integral part of the response process and is done because of the potential implications the Inquiry process holds.

[para 173] The Public Body made a similar argument regarding submissions drafted for proceedings before the Appeals Commission.

[para 174] The records that were provided to me for the inquiry have provided context for the withheld records, in addition to the descriptions provided by the Public Body. Based on this information, I accept the Public Body's claim of solicitor-client privilege over the records described in the affidavit provided in March 2017.

[para 175] I am taking this opportunity to reiterate how beneficial it is to have sworn statements from individuals with direct knowledge of the records, especially the source of the claimed legal advice. In this case, the Public Body has claimed that pages 644-682 of file #F8329 are excluded from the scope of the Act under section 4(1)(d), and were also not provided to me citing solicitor-client privilege. Prior to the Public Body's March 9, 2017 submission and affidavit, I was concerned that these pages could not be protected by solicitor-client privilege as the Public Body's initial submission described these records as "correspondence between the OIPC and WCB, in relation to [a previous inquiry with this Office]". (This argument was made in relation to its application of section 4(1)(d).)

[para 176] It was not until the Public Body's March 2017 affidavit that it clarified that pages 644-682 are *drafts* of submissions made to this Office for a previous inquiry. While draft submissions are not excluded under section 4(1)(d) of the Act, I accept that these drafts are protected by solicitor-client privilege.

[para 177] As noted above, the Public Body's March 2018 submission implies that it is claiming solicitor-client privilege over some records that have been provided to me; specifically, to information to which the Public Body claims "work product" privilege.

[para 178] In its initial submission, the Public Body did not refer to litigation or work product privilege. It did cite Order 96-017 in support of its statement that “[s]olicitor’s briefing notes and working papers, directly related to the giving and seeking of legal advice, have been found to meet the criteria for solicitor-client privilege” (at page 25).

[para 179] In Order F2013-20, I accepted that “notes of counsel prepared for a proceeding – i.e. that reflect the preparation of the Public Body’s strategy – are protected under solicitor-client privilege. Such notes would be a continuation of counsel’s advice to the Public Body regarding its approach to the proceeding” (at para. 74). This followed previous Orders concluding that working papers of counsel that are directly related to the giving or seeking of legal advice meet the criteria for solicitor-client privilege (Order 96-017, cited by the Public Body).

[para 180] As stated by the Public Body, the notes and working papers must be directly related to the giving and seeking of legal advice. As discussed in *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39 (*Blank*), the purpose of solicitor-client privilege is to allow free and frank communications between a client and counsel, to allow fully and ready access to legal advice (see paras. 26 and 28). Notes and working papers of counsel that reveal the legal advice being formulated or given must also fall within the scope of the privilege.

[para 181] Many of the records provided to me in March 2017 contain communications between the Public Body and the Workers’ Compensation Appeals Commission regarding a judicial review brought by the Applicant regarding a decision of the Appeals Commission. Such communications would not usually fall within the scope of solicitor-client privilege. The Public Body has also claimed a common interest between itself and the Appeals Commission such that communications between them would be privileged. In its August 2016 submission, the Public Body states that “[i]n addition to Litigation Privilege, the WCB submits that as the Appeals Commission and the WCB are both respondents in the Judicial Review, Common Interest privilege also attaches to these records” (at page 7). At page 10 of the Public Body’s March 2018 submission it states:

The WCB and the Appeals Commission were both parties to the judicial review documented in the records; therefore, a common interest existed between the two parties. Disclosures that occurred between the WCB and the Appeals Commission respecting the ongoing litigation/judicial review did not in any way constitute a waiver of privilege of those documents

[para 182] The case law provided by the Public Body in support of its argument indicates that the common interest exception to waiver (common law privilege) can apply to records protected by both solicitor-client and litigation privilege. However, the Public Body’s arguments seem to relate only to records created for the purpose of litigation (i.e. records protected by litigation privilege). Nothing in the submissions or the records themselves indicate this exception to waiver is being claimed over records protected by solicitor-client privilege. Therefore, I will consider the Public Body’s arguments regarding common interest privilege in the next part of this Order discussing litigation privilege.

[para 183] To the extent that the “notes and working papers” of counsel are comprised of communications between the Public Body and Appeals Commission, the Public Body has failed to satisfy me that they can be protected by solicitor-client privilege.

[para 184] Some of the records that the Public Body seems to characterize as “work product” are records that appear to have been gathered or created for the purpose of a proceeding the Public Body was involved in. Such records may fall within the scope of litigation privilege, discussed below. In most cases, copies of public documents or documents filed with the court generally don’t fall within the scope of solicitor-client privilege.

[para 185] That said, pages 1017-1031 (of file #F8329) consist of a public document with highlighting and notations from counsel. The Public Body has not provided specific arguments on this record, but the notes suggest that they might have been made in the course of determining how the Public Body is to comply with a statutory requirement. If this is the case, I would accept that solicitor-client privilege applies. I cannot reach this conclusion without some arguments from the Public Body; however, the other likely meaning of the notes are that they were made in contemplation of a related matter (this inquiry) that is clearly ongoing. In that case, litigation privilege applies. In either case, these pages were properly withheld under section 27(1)(a). In saying this I note that the notes and highlighting are inseparable from the public document itself.

[para 186] Some records are similar to those discussed in Order F2013-20. For example, pages 981-983 and 1010-1012 of file #F8329 (provided to me in March 2017) consist of handwritten notes of Public Body counsel taken in preparation for or in the course of a proceeding. Following past precedents of this Office, such notes may be protected by solicitor-client privilege where the notes reveal the advice being made or formulated by counsel.

[para 187] If I am wrong in characterizing these notes as protected by solicitor-client privilege, they fall squarely within the scope of section 27(1)(b), which I will discuss below.

#### *Conclusion regarding solicitor-client privilege*

[para 188] I accept that the records described in the affidavit provided in March 2017 are protected by solicitor-client privilege. The Public Body appears to have claimed that privilege over other records that have been provided to me, but it is not clear which records. In the records I have reviewed, there are some instances of notes of counsel that could be characterized as protected by solicitor-client privilege, following past Orders of this Office. However, many of the records cannot be so characterized. I will consider the application of litigation privilege (including work product privilege) and section 27(1)(b) and (c) to those records as well.

#### *Litigation privilege*

[para 189] The Public Body has cited past Orders of this Office which have characterized litigation privilege (August 2016 submission, at page 5):

Litigation privilege applies to papers and materials created or obtained by a client for the use of the client's lawyer in existing or contemplated litigation. Litigation privilege applies to records created by a third party, or obtained from a third party on behalf of the client, for the lawyer's use in existing or contemplated litigation (Order 96-015 at para. 95).

In addition, litigation privilege will also apply to information that is not, strictly speaking a “communication”, but to records created or gathered for the dominant purpose of conducting litigation, or assisting in that purpose. Such records are sometimes referred to as "work product" (Order F2013-51 paras. 72-73).

[para 190] The Public Body also notes that “the ‘dominant purpose’ for which the documents were prepared was to submit them to a legal advisor for advice and use in the litigation, whether existing or contemplated” (August 2016 submission at page 6).

[para 191] There is some uncertainty in the law regarding whether records ‘gathered’ for the dominant purpose of litigation can be subject to litigation privilege and/or if such records are protected only if gathering the records required skill and judgement of counsel involved (see *Blank* at para. 62 and *Alberta v. Suncor Energy Inc.*, 2017 ABCA 221, at para. 27). However, this is not a point I need to decide in this case.

[para 192] The Public Body states that the records to which litigation privilege has been claimed for file #F8238 (pages 4331-4333, 4359-4361 and 4534-4535) relate to an appeal conducted by the Appeals Commission and that this matter is ongoing before the Alberta Court of Appeal. In its April 2018 submission, the Public Body states that sections 27(1)(a) and (b) were misapplied to pages 4333 and 4359 because these pages are fax cover sheets that do not contain information falling within these sections.

[para 193] Pages 4360-4361 are a faxed copy of pages 4331-4332; they are comprised of a letter from the Public Body to an independent decision maker. Although this correspondence clearly relates to a proceeding, a letter sent from a party to the decision maker does not seem to fall within the protection of a privilege the purpose of which is to create a “zone of privacy”, as stated by the Supreme Court in *Blank* (at paras. 32 and 34). However, the Public Body has also applied section 27(1)(c) to this information, which I will discuss below.

[para 194] Pages 4534 and 4535 are copies of correspondence with additional handwritten notes of counsel. The correspondence and notes are related to the judicial review proceeding, with the dominant purpose clearly being that proceeding. I accept the Public Body’s application of section 27(1)(a) to these pages, provided that the proceeding is still ongoing. As there remains the possibility that the proceeding (and related proceedings) have ended, I will also discuss the Public Body’s application of section 27(1)(b) to these pages in the relevant section of this Order.

[para 195] The records over which litigation privilege was claimed for file #F8329 was described in the Public Body’s August 2016 submission as correspondence related to an OIPC inquiry, and a judicial review involving the Applicant, and both the Public Body and Appeals Commission as respondents. In its March 2018 submission, at page 7, the Public Body rescinded its claim of litigation privilege over the matter at judicial review, stating that the matter had ended.

[para 196] Regarding the pages in file #F8329 relating to a proceeding with this Office, it is clear that the proceeding is ongoing. However, the information on pages 212-217, and 223-224 was not created for the dominant purpose of a legal advisor’s advice and use in litigation. I have described these pages as related to internal file administration and assignment (see paras. 125-

126 of this Order). Correspondence assigning responsibility for a file and discussing photocopies are not the type of information requiring protection under litigation privilege. The fact that correspondence or other record was created *because of* an inquiry for this Office does not meet the test of having been created for use in litigation. The Public Body has also applied sections 27(1)(b) and (c) (and flagged information as non-responsive), which I will discuss below.

[para 197] Pages 690, 752, 754 and 758 relate to a judicial review, which the Public Body says has ended. Therefore, litigation privilege ceases to apply. The Public Body has also applied sections 27(1)(b) and (c) (and flagged information as non-responsive), which I will discuss below.

[para 198] The Public Body has also argued that common interest privilege and work product privilege apply to some information.

[para 199] In *Griffiths McBurney & Partners v. Ernst & Young YBM Inc.*, 2000 ABCA 284, the Alberta Court of Appeal explained common interest privilege as follows (at para. 18):

Common interest privilege extends the litigation privilege where the document or information has been shared with a third party (other than the client and the lawyer) provided that third party has a common interest with the client in the same anticipated or current litigation.

[para 200] I asked the Public Body (by letter dated February 16, 2018) how this privilege applied to records over which neither solicitor-client nor litigation privilege are being claimed by the Public Body. The Public Body said only that a common interest existed between it and the Appeals Commission in a judicial review such that disclosures between them did not constitute a waiver of privilege. However, the Public Body has told me that the proceedings relating to the judicial review have ended.

[para 201] If litigation privilege can no longer be claimed because of the relevant litigation has ended, the logical extension is that any related common interest privilege can no longer be claimed. The Public Body has not provided me with any reason to expect that common interest privilege extends a claim of litigation period beyond its usual lifespan. (As discussed above, had the Public Body argued that it was claiming common interest privilege as an extension of solicitor-client privilege, the end of the proceedings would not be a factor).

[para 202] The same can be said for the Public Body's application of work product privilege. To the extent that the Public Body means to apply work product privilege as a part of solicitor-client privilege (i.e. to working notes of counsel), I have discussed that above.

[para 203] The case law provided by the Public Body with respect to work product privilege is *R. v. Card*, 2002 ABQB 537, indicates that work product privilege is a subset of litigation privilege. As with common interest privilege, where the relevant proceedings have ended, it cannot be claimed.

*Conclusion regarding litigation, common interest and work product privilege*

[para 204] I accept the Public Body’s claim of litigation privilege to the small number of records created for the dominant purpose of counsel’s use in litigation, where the proceedings are ongoing.

[para 205] I do not accept the Public Body’s claim of common interest or work product privilege to information not protected by litigation privilege (except to the extent that I found information was protected by solicitor-client privilege, as discussed above). In cases where the Public Body claimed privilege over correspondence of an internal administrative nature, or has withdrawn its claim of privilege due to the ending of proceedings, it cannot claim common interest or work product privilege.

*Statutory privilege*

[para 206] The Public Body has argued that section 58 of the FOIP Act and section 25(3) of the *Ombudsman Act* create a “statutory privilege” such that records that were “a part of” a proceeding under either Act fall within section 27(1)(a). These provisions state:

*58 Anything said, any information supplied or any record produced by a person during an investigation or inquiry by the Commissioner is privileged in the same manner as if the investigation or inquiry were a proceeding in a court.*

*25(3) Any thing said or any information supplied or any document, paper or thing produced by any person in the course of any inquiry by or proceedings before the Ombudsman under this Act is privileged in the same manner as if the inquiry or proceedings were proceedings in a court.*

[para 207] By letter dated February 16, 2018, I asked the Public Body for case law to support its claim of “statutory privilege.” In its response, dated March 15, 2018, the Public Body pointed to Order F2003-012, which found that section 25(3) of the *Ombudsman Act* creates a “statutory privilege” such that section 27(1)(a) applies to “information in the course of an inquiry by or proceedings before the Ombudsman under that legislation (at para. 27).

[para 208] However, in a 2005 decision of the Alberta Court of Queen’s Bench, the Court rejected the argument that section 58 of the FOIP Act creates a “statutory privilege” (*Alberta (Information and Privacy Commissioner) v. Alberta Federation of Labour*, 2005 ABQB 927 (CanLII)). The Court said, in relation to section 58 of the FOIP Act (at para. 22):

I do not believe that Section 58 of the Act provides a legal basis for the type of “statutory privilege” which the Commissioner asserts. Rather, in my view that the privilege being referred to in Section 58 of the Act is an immunity privilege, such as the absolute privilege confirmed in defamation statutes; for example, Section 11(1) of the *Defamation Act*, R.S.A. 2000, c. D-7. I test this conclusion by reference to some of the words in Section 58 of the Act, including some slight editing to make my point. My edited version reads:

S. 58 Anything said... by a person during an ... inquiry by the Commissioner is privileged in the same manner as if the ... inquiry were a proceeding in a court.

This equates to a statement made by someone in a court which is absolutely privileged in the sense that the speaker is protected from any legal action for having made the statement. In my view, these words show that the Alberta Legislature intended to confer an immunity privilege or absolute privilege on participants in an inquiry conducted by the Commissioner so that they would be protected from claims such as defamation actions. In my opinion, the Legislature did not intend by adopting Section 58 of the Act to create some sort of new privilege akin to a solicitor-client privilege or a litigation privilege. Very clear words would have to be used in a statute to create the new type of privilege being asserted by the Plaintiff.

[para 209] The Court further states (at paras. 25-26):

The Commissioner urges me to fill the gap by finding the existence of the privilege based on the principles enunciated by Wigmore. I was referred to those principles as they were considered in the case of *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*, 1998 ABQB 455 (CanLII), [1998], 61 Alta. L.R. (3d) 38, [1998] 10 W.W.R. 663, 229 A.R. 191, 10 W.W.R. 633, [1998] A.J. No. 575.

In this case there is not the sort of relationship where a privilege would arise. The Commissioner is to determine whether the public body must disclose the Documents. There is no confidentiality agreement as between the Board and the Commissioner and all of the parties involved in the inquiry process are quite independent of each other.

[para 210] This decision from the Court is clear that section 58 of the FOIP Act does not create a statutory privilege. Section 25(3) of the *Ombudsman Act* is substantially similar to section 58 of the FOIP Act. As such, the Court decision effectively overturns the decision in F2003-012, cited by the Public Body.

[para 211] Given this, I find that the Public Body cannot apply section 27(1)(a) claiming privilege vis-a-vis section 58 of the FOIP Act or 25(3) of the *Ombudsman Act*.

*27(1)(b) and (c)*

[para 212] The Public Body's initial submissions on its application of sections 27(1)(b) and (c) are brief. Regarding its application of section 27(1)(b), the Public Body's initial submission states (at page 26):

In Order 96-017 (paras. 37 and 38) it was determined "(t)he ordinary dictionary meaning of 'legal services' would include any law-related service performed by a person licensed to practice law".

The following pages contain information that was prepared by a WCB lawyer in relation to a matter involving the provision of legal services to the WCB. They are, specifically, notes or working papers of a WCB lawyer used as preparation for responding to issues of hearings being conducted. These records state facts in relation to which the advice was sought, thus forming part of the "continuum of communications" in the seeking and giving of advice.

[para 213] In its August 2016 submission, the Public Body noted that Order 96-017 also states that section 27(1)(b) is more broad than solicitor-client privilege as it encompasses information prepared *in relation to* a legal service (at page 7).

[para 214] Where section 27(1)(c) was applied, the Public Body stated that the pages include correspondence between a WCB lawyer and other parties “which constitute the provision of legal services or advice in respect of” various Appeals Commission and court proceedings, as well as a prior inquiry by this Office (see initial submission at page 36).

[para 215] Orders F2014-R-01 and F2014-38 both specify that sections 27(1)(b) and (c) require the information withheld under those provisions to reveal *substantive information about* the relevant legal services. Order F2014-R-01 states that “[i]nformation ‘prepared by or for an agent or lawyer of a public body’ within the terms of section 27(1)(b) is *substantive information*”. In other words, section 27(1)(b) applies to substantive information prepared by or for a person listed in that provision, about a matter involving the provision of a legal service. Similarly, section 27(1)(c) protects substantive information in correspondence between the persons listed in that provision, about a matter involving the provision of advice or other legal services (see Order F2014-R-01 at para. 69).

[para 216] Order F2008-028 made a similar point (at paras. 157-158):

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 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.

... 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. ...

[para 217] Past Orders of this Office have made clear that where the Act says “by or for”, it means “by or on behalf of” (see Orders 97-007, at para. 29, F2008-008, at paras. 42-44). In other words, for section 27(1)(b) to apply, the information must have been “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 (Order F2010-007, at para. 37).

[para 218] The information to which the Public Body has applied sections 27(1)(b) and/or (c) is information prepared by or for Public Body counsel, or information in correspondence with Public Body counsel and is generally connected with a legal service provided by that lawyer. In other words, none of the documents created by or for Public Body counsel lawyer or in correspondence with counsel relate to matters other than counsel’s role in providing legal services to the Public Body.

[para 219] That said, past Orders of this Office make it clear that sections 27(1)(b) and/or (c) don't apply to any and all information that is in some way connected to a legal service. The information must reveal substantive information about the matter involving the provision of legal services or advice. There must be a matter (an issue, proceeding, set of circumstances, etc.) and a legal service (advice or otherwise) that has been provided in relation to that matter. For sections 27(1)(b) or (c) to apply, the information at issue must reveal something substantive about the matter to which the legal service relates.

[para 220] The Public Body's submissions have described some of the information in the records as information about its own internal administrative processes. Emails discussing who has, or who needs, photocopies of what documents simply are not the type of information to which sections 27(1)(b) or (c) were intended to apply. The information withheld under both sections 27(1)(b) and (c) at the top of page 212 and occurring again on pages 213 and 216 (file #F8329) is purely administrative and does not reveal substantive information about the matter for which legal services were provided. At most, this information reveals the existence of a matter that would involve legal services. (I have discussed earlier in this Order whether such information is responsive to the Applicant's request).

[para 221] Similarly emails (or portions of emails) that reveal only *that* the Public Body has discussed matters (or intends to discuss matters) with the Appeals Commission in relation to a judicial review do not fall within the scope of sections 27(1)(b) or (c) unless the emails reveal something substantive about the matter discussed. While sections 27(1)(b) and (c) are broadly drafted, they are not so broad as to encompass any notes or correspondence that counsel has had pass through their office or email account.

[para 222] Referring back to correspondence between Public Body counsel and the Appeals Commission in relation to a judicial review, section 27(1)(c) could apply to the portions of the correspondence that reveal the substance of discussions. For example, the body of the letter at pages 4331-4332 (file #F8328, found again at pages 4360-4361) reveals substantive information about the matter regarding which legal services were provided.

[para 223] Even where notes or correspondence reveals such substantive information, information such as the names of the correspondents and dates generally do not reveal substantive information about the matter and cannot be withheld under this provision. Subject lines of correspondence must be considered as to whether they reveal substantive information about the matter to which the legal service relates. Therefore, the Public Body must sever out the information to which sections 27(1)(b) or (c) properly apply, and provide the remainder to the Applicant.

[para 224] In some cases, the records do not lend themselves to severing. For example, pages 1010 and 1011 (file #F8329) are pages of handwritten notes – the entire page is 'substantive'.

[para 225] Pages 4534 and 4535 (file #F8328) are copies of correspondence with additional handwritten notes of counsel. I found above that section 27(1)(a) applies only if related proceedings are ongoing. Even if they have ended and section 27(1)(a) no longer applies, the Public Body applied section 27(1)(b). While the headers/footers/dates/to/from etc. information in

correspondence generally cannot be withheld under section 27(1)(b) or (c), it is the handwritten notes that are subject to section 27(1)(b) and it would be difficult for the Public Body to sever those notes from the page such that the remainder could be provided to the Applicant. This is because the notes (including highlighting) occur throughout the page. In such a case, the pages can be withheld in their entirety.

[para 226] Page 690 (file #F8329) does not contain any substantive information relating to a legal service and cannot be withheld under sections 27(1)(b) or (c) (however, I have noted at para. 58 that some information was properly withheld as non-responsive). The same applies to page 758.

[para 227] Section 27(1)(c) was also applied to pages 752 and 754 (file #F8329). These pages include correspondence to or from Public Body counsel regarding a proceeding. However, the correspondence on these pages is of an administrative nature, and does not reveal substantive information relating to the legal service. A possible exception to this is the sentence on page 752 that was also withheld under section 24(1) (that application of section 24(1) was upheld at paragraph 132).

[para 228] Page 754 also contains handwritten notes in addition to the correspondence; section 27(1)(b) was applied to some, but not all, of these notes. Although the Public Body has not provided an explanation as to why the provision was applied to some of the notes and not others, it appears that the provision was applied to notes that revealed what counsel planned to do; the remaining notes appear to relate to actions already taken or decisions already made. I agree with this application of section 27(1)(b).

#### *Exercise of discretion – section 27(1)(a)*

[para 229] The Public Body pointed out that once solicitor-client privilege has been established, withholding the information is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036, and F2012-08 citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* (cited above)).

[para 230] I agree and given the Supreme Court of Canada's recent discussion of litigation privilege in *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, I would extend this rationale to information protected by litigation privilege.

#### *Exercise of discretion – sections 27(1)(b) and (c)*

[para 231] As noted above, the Public Body described the following factors as relevant for its exercise of discretion regarding both sections 24(1) and 27(1) (August 22, 2016 submission, at page 9):

- Each record was reviewed and it was determined that although section 27(1)(a) applies to the records, section 24(1)(b) and 27(1)(b) and (c) also apply to the responsive information.
- The WCB's FOIP Coordinator is delegated to make decisions regarding the application of the FOIP Act, based on the recommendations of the FOIP Specialists. FOIP Specialists consider

views on disclosure provided by the applicable program areas. In this case, the records were reviewed by the WCB lawyer. Based on this review and the review conducted by the FOIP Specialist, recommendations were provided to the FOIP Coordinator, who made the final decisions regarding the application of section 24 and 27 of the FOIP Act to the records.

[para 232] With respect to section 27(1)(b) and (c) specifically, the Public Body states (at page 9):

- Consideration was given to the wording of the exception and the interests which the section attempts to balance. Section 27 of the FOIP Act allows a public body to withhold information that is subject to a legal privilege, or related to the provision of legal services or the provision of advice or other services by a lawyer. The responsive records are emails which entail the legal services as well as working papers and notes prepared by the WCB lawyer, used in preparation for responding to issues of hearings being conducted.
- Consideration was given to the nature of the information (for example, was there information prepared by or for a lawyer of a public body in relation to a matter involving the provision of legal services? Is there information in correspondence between a lawyer of a public body and any other person in relation to a matter involving the provision of advice or other services by the lawyer?).

In considering the application of section 24 and 27, WCB weighed the Applicant's right of access to information against the consultative and privileged nature of the information.

It must be noted that disclosing information employees believe will be kept confidential will make the exchange of information between employees less candid, open and comprehensive. Further, disclosing information of a privileged nature wholly undermines the nature of a solicitor and client relationship, the court's recognition of that relationship and what it entails, and the ability of a lawyer to canvas all possible arguments in giving advice and preparing for a hearing.

[para 233] As I have accepted the Public Body's exercise of discretion to withhold privileged information under section 27(1)(a), the references above to protecting privileged information are not relevant to the discussion regarding sections 27(1)(b) and (c).

[para 234] I said above, regarding the Public Body's exercise of discretion in applying section 24(1), that a consideration as to whether the exception actually applies to the information in question is not exercising discretion. Exercising discretion is the step after determining that the exception *does* apply – the Public Body is to consider whether or not it *should* apply the exception.

[para 235] The Public Body states that it also considered that the purpose of the exception is to “foster open discussions in the deliberative process involving public body officials and staff” (initial submission at page 33). It argues that “It must be noted that disclosing information employees believe will be kept confidential will make the exchange of information between employees less candid, open and comprehensive” (August 22, 2016 submission, at page 9).

[para 236] I agree that the purpose of the exception is an appropriate factor to consider in exercising discretion to withhold information under section 27(1). However, stating the purpose

of the exception is not sufficient. As stated, where an exception to access is discretionary, the Public Body must determine, on a case-by-case basis, how the purpose of the exception would be affected by the disclosure of the information at issue.

[para 237] By referring only to the importance of protecting privileged information under the heading of section 27(1), the Public Body seems to have not considered the purpose of sections 27(1)(b) or (c) in exercising discretion. Much like its application of section 24(1), it seems that the Public Body may be applying sections 27(1)(b) and (c) in a ‘blanket’ manner, rather than on a case-by-case basis. Therefore, I will order the Public Body to exercise its discretion whether to withhold the information to which sections 27(1)(b) and/or (c) apply.

## **V. ORDER**

[para 238] I make this Order under section 72 of the Act.

[para 239] I find that the Public Body did not properly charge fees to the Applicant insofar as it improperly charged for colour copies. I order the Public Body to refund the Applicant per paragraph 41.

[para 240] I find that the Public Body properly withheld some information as non-responsive to the Applicant’s request.

[para 241] I find that the Public Body properly applied section 4(1)(a) to the records, with the exception of the records described at paragraph 83, which I have found to be non-responsive (at paras. 83 and 84).

[para 242] I find that the Public Body properly applied section 4(1)(d) to the records, with the exception of the records described at paragraphs 94 and 95.

[para 243] I find that the Public Body properly refused to confirm or deny the existence of a record relating to any ongoing investigation (if any record exists). However, the Public Body must respond to the Applicant, without relying on section 12(2), with respect to any records relating to an investigation completed since the Applicant’s access requests, per paragraph 108 (if any records exist).

[para 244] I find that the Public Body properly applied section 20(1) to page 4589.

[para 245] I find that the Public Body properly applied section 24(1) to some information in the records.

[para 246] I find that the Public Body properly applied section 27(1) to some information in the records.

[para 247] I order the Public Body to review the records at issue and amend its application of sections 24(1) and 27(1) in accordance with the examples and guidance provided in this Order. I also order the Public Body to again exercise its discretion in applying sections 24(1) and 27(1)(b)

and (c), in accordance with the guidance in this Order. The Public Body should also consider what information is non-responsive, in a more consistent manner, in accordance with the examples and guidance provided in this Order.

[para 248] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek  
Adjudicator