

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2019-26

August 21, 2019

ALBERTA HEALTH

Case File Numbers F6748/F6749

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Summary: The Applicant made two separate access to information requests to Alberta Health [Public Body] under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 [FOIP Act]. The first access request was for the Contingency Fee Agreement [CFA] and the second for documents related to the CFA, in particular, records regarding the arrangements the Province made with outside counsel to pursue litigation under the *Crown's Right of Recovery Act*, S.A. 2009, c. C-35 to recoup smoking-related health care costs.

During the beginning of the Inquiry in 2014, the External Adjudicator raised a Preliminary Evidentiary Issue [PEI], which resulted in a phase of the Inquiry taking place regarding the PEI and the release of Decision F2014-D-05/Order F2014-52.

On August 30, 2018, the External Adjudicator issued Interim Decision F2018-D-02/Order F2018-39 [2018 Interim Decision/Order]. The 2018 Interim Decision/Order confirmed the Public Body's decision to deny the Applicant access to those Records at Issue where it had met its burden of proof that it had properly relied on s. 27(1) of the *FOIP Act*. The 2018 Interim Decision/Order also held that the Public Body failed to meet its burden of proof, pursuant to s. 71(1) of the *FOIP Act*, for other Records at Issue where it had claimed legal privilege.

Because of the fundamental importance of solicitor client privilege and litigation privilege, rather than order the immediate release of the records where the burden of proof had not been met, the External Adjudicator decided, in the circumstances, it was reasonable to issue an interim decision to give the Public Body the opportunity to provide additional evidence. This opportunity came as part of the 2018 Interim Decision/Order [the interim decision part referred to throughout as the 2018 Interim Decision], rather than a demand letter, as the External Adjudicator had consistently made requests for further evidence and the Public Body had been given many opportunities to respond. The 2018 Interim Decision applied to the Records at Issue over which the Public Body had claimed legal privilege pursuant to s. 27(1) where it had failed to meet its burden of proof pursuant to s. 71(1) of the *FOIP Act*. The Public Body provided two submissions in response to the 2018 Interim Decision, in which it submitted a 2018 Revised Index for each Case File, that included new descriptions for the Records at Issue in the Additional Information Columns. The Public Body made it clear these were to be added to form part of its submissions in the Inquiry.

In the 2018 Interim Decision, the External Adjudicator proposed the Public Body provide direct evidence from the Affiant of the 2017 Affidavit of Record or affidavit evidence from government officials. Having failed to do so in its initial response to the 2018 Interim Decision, the Public Body was asked by the External Adjudicator to confirm that the Affiant of the 2017 Affidavit of Records could attest to the new evidence provided in the Additional Information Columns in the 2018 Revised Indexes, which confirmation the Public Body failed to provide with its second and final submission.

In addition to relying on its earlier submissions and affidavits from when the Inquiry began in 2014, the Public Body submitted the 2017 Affidavit of Records (in-house counsel) with Exhibited Indexes [2017 Exhibited Indexes] for the Records at Issue, all of which was submitted to meet its evidentiary burden of proof for the exceptions claimed, in particular, its claim to both solicitor client privilege and litigation privilege pursuant to s. 27(1).

As in this Inquiry, where a public body claims legal privilege over records, it may elect not to provide the Records at Issue to an adjudicator. In such instances, the onus is on a public body to provide sufficiently clear, convincing, and cogent evidence in order to meet its burden of proof under s. 71(1) of the *FOIP Act*, in accordance with the *Solosky* test for solicitor client privilege or the *Lizotte* criteria for litigation privilege, and the evidentiary requirements as set out in *ShawCor*, the Alberta Rules of Court and the *OIPC Privilege Practice Note (2016)*.

The evidence submitted for some of the Records at Issue over which legal privilege had been claimed, however, did not meet the *Solosky* test for solicitor client privilege or the *Lizotte* criteria for litigation privilege and fell short in meeting the evidentiary requirements as set out in *ShawCor*, the Alberta Rules of Court and the *OIPC Privilege Practice Note (2016)*. For the Records at Issue where the Public Body had failed to discharge its burden of proof, the External Adjudicator issued the 2018 Interim Decision giving the Public Body the opportunity to gather evidence and authority to support its decision to withhold the Records at Issue, subject to the terms of the 2018 Interim Decision. The External Adjudicator reasoned that because of the importance of legal privilege, she was not prepared to issue an Order requiring the Public Body to give the Applicant access to these records, which could potentially place legally privileged information in jeopardy of being revealed, simply because the Public Body had fallen short in meeting its duty to provide sufficiently clear, convincing, and cogent evidence to meet its burden of proof. Details of the significant gaps in the evidence were provided in the 2018 Interim Decision/Order.

The External Adjudicator issued an Order for each of the Case Files as each involved a separate set of Records at Issue. Based on the “*Additional Information*” provided by the Public Body, the External Adjudicator was able to decide that the Public Body had met its burden of proof that it had properly *relied* on s. 27(1) of the *FOIP Act* for some of the Records at Issue described in the Orders as “*Properly withheld as privileged.*” On this basis, the External Adjudicator confirmed the decision of the Public Body to refuse the Applicant access to these Records at Issue. Where the Public Body has met its burden of proof that it has properly relied on s. 27(1), the External Adjudicator decided it was unnecessary to consider the exercise of its discretion as that issue had been decided in the 2018 Interim Decision/Order where she indicated the ruling with respect to discretion would apply to the Records at Issue to be considered under the terms of the 2018 Interim Decision: that is, the Public Body properly applied the s. 27(1) exception by exercising its discretion to refuse access to legally privileged information.

In the Orders, where the Public Body had failed, on a balance of probabilities, to meet its burden of proof that it had properly relied on s. 27(1) of the *FOIP Act*, the External Adjudicator ordered the Public Body to give the Applicant access to those Records at Issue in their entirety, described in the Orders as “*Producible.*” For other Records at Issue described in the Orders as “*Producible [possible redactions]*”, the External Adjudicator ordered the Public Body to reconsider its decisions and provide the Applicant access to the Records at Issue in redacted form, thereby providing access to the Applicant of any information not protected by legal privilege, in accordance with s. 6(2) of the *FOIP Act*.

The External Adjudicator discussed the fact that the Public Body submitted the “*Additional Information*” evidence in the new Columns of the 2018 Revised Indexes, which it provided without a supporting new Affidavit of Records or an amended 2017 Affidavit of Records. The new evidence in the Additional

Information Columns of the 2018 Revised Indexes amended, corrected and added new evidence that in effect replaces or displaces evidence in the previously submitted 2017 Exhibited Indexes. She considered that the more reasonable approach for the Public Body to have taken would have been to provide a correcting or supplementary affidavit because the 2018 Revised Indexes had been upgraded with new evidence by way of the “*Additional Information*.” In this case, however, the External Adjudicator did not consider it reasonable to totally discount the unsworn evidence because the Public Body had failed to provide the new evidence in the form of a new or amended Affidavit of Records but rather she stated it was a question of the weight to be given to the new evidence. The External Adjudicator also commented on the fact that the evidence in the “*Additional Information*” could have been provided earlier in the Inquiry as it was evidence available to the Public Body since the outset of the Inquiry, was not information protected by legal privilege, and by doing so may have avoided some of the delay in the proceedings, including the necessity for the 2018 Interim Decision. The External Adjudicator stated her opinion that the preferred approach would be for the Public Body to bring the same vigour with which it claims to be protecting legally privileged records to producing sufficiently clear, convincing, and cogent evidence to support that claim in a timely fashion.

For the other discretionary exceptions relied on by the Public Body, the External Adjudicator referred back to the Findings laid out in the 2018 Interim Decision/Order. Where the Public Body had been unsuccessful in meeting its burden of proof to establish it properly relied on s. 27(1), it was unnecessary to consider the application of other exceptions because of the Finding in the 2018 Interim Decision/Order with respect to public interest pursuant to s. 32 of the *FOIP Act*. The Public Body did not claim any mandatory exceptions in the Inquiry.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2(a), 6(2), 16, 17, 24(1), 27(1), 27(1)(a), 29, 29(1), 32, 71, 71(1), 72, 72(2)(a), 72(2)(b); *Crown’s Right of Recovery Act*, S.A. 2009, c. C-35.

Authorities Cited: AB: Decision F2014-D-05/Order F2014-52; Interim Decision F2018-D-02/Order F2018-39.

Cases Cited: *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289; *Solosky v. The Queen*, [1980] 1 SCR 821; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52; *Calgary (Police Service) v. Alberta (Information and Privacy Commissioner)*, 2019 ABQB 109; *Alberta v. Suncor Inc*, 2017 ABCA 221; *Alberta (Municipal Affairs) v. Alberta (Information and Privacy Commissioner)*, 2019 ABQB 436.

Other Sources Cited: Alberta Rules of Court, Part 5, ss. 5.7, 5.8, 5.10, 5.27 and Part 10: ss. 10.7-10.8; *OIPC Privilege Practice Note (2016)*.

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I. BACKGROUND

[para 1] On August 30, 2018, I issued Interim Decision F2018-D-02/Order F2018-39 [2018 Interim Decision/Order]. Included as part of the 2018 Interim Decision/Order was an interim decision [which is referred to *infra* as the 2018 Interim Decision] that gave rise to the last phase of the Inquiry. The 2018 Interim Decision read as follows:

VII. INTERIM DECISION

...

I have found that I am unable to decide whether the Public Body has properly relied on s. 27(1)(a) of the FOIP Act to claim solicitor client privilege and/or litigation privilege for the Records at Issue described at paras. 12.1.D, 12.1.E, 12.1.F, 12.1.I and 12.2.B supra. For some of these Records at Issue, the Public Body has described the record as legally privileged while at the same time claiming s. 24(1) or s. 29(1) and not s. 27(1)(a). The Public Body has not established that the information it withheld is legally privileged and, therefore, that it properly fits under the s. 27(1)(a) exception; though it remains possible that the information may be subject to legal privilege. Because of the fundamental importance of safeguarding against the erosion of privileged information, rather than order the disclosure of these records to the Applicant, pursuant to s. 72(2)(b) of the FOIP Act, I have decided to provide the Public Body with the opportunity to gather evidence and authority, presently absent from the 2017 Affidavit of Records and Exhibited Indices, with respect to its application of s. 27(1)(a) for both solicitor client privilege and litigation privilege for the Records at Issue described at paras. 12.1.D, 12.1.E, 12.1.F, 12.1.I and 12.2.B supra and, thereafter, to make a decision in a manner that complies with the evidentiary requirements as set out in ShawCor, the Alberta Rules of Court and the OIPC Privilege Practice Note. Specifically, but not limited to, the Public Body should consider providing the following kinds of evidence: direct evidence from in-house counsel that is not general in nature but that addresses legal privilege for each specific Record at Issue, direct evidence from senior government officials attesting to those specific Records at Issue where they were providing legal advice versus policy advice, direct evidence from senior government officials attesting to those specific Records at Issue where they were acting in the role as a representative of a client public body versus when acting in the capacity as a solicitor in a 'solicitor client' relationship, where a Record at Issue involves conversations by non-solicitor representatives of a public body that may be part of a continuum discussing legal advice, an unredacted copy of the Exhibited Index B for Case File #F6749 in camera, (details of the Records at Issue that have been REDACTED described at para. 12.1.F supra) and complete descriptors for the professional title or role for individuals named in the Records at Issue described at para. 12.1.M supra where the Public Body elects to continue to rely on s. 27(1)(a).

The Public Body will have 60 days from the date it receives this Interim Decision to gather evidence and authority to support its application of s. 27(1)(a). If the Public Body determines that neither solicitor client privilege nor litigation privilege applies to the Records at Issue to which it has applied s. 27(1)(a), then it must disclose the records to the Applicant after the 60 days have expired. On or before that date, the Public Body will provide a decision to the Applicant, copied to me, explaining whether it is withholding the Records at Issue on the basis of solicitor client privilege and/or litigation privilege or whether it has decided to provide the Applicant access to any of the Records at Issue that are the subject of the Interim Decision.

I reserve jurisdiction over this Inquiry with respect to the Interim Decision only. Following the 60 days, the Inquiry will resume, if necessary, to dispose of any outstanding issues in relation to the Public Body's compliance with this Interim Decision, specifically, its disposition regarding the Records at Issue described at paras. 12.1.D, 12.1.E, 12.1.F, 12.1.I and 12.2.B supra. If the subject records are disclosed to the Applicant because the Public Body decides that s. 27(1)(a) does not apply, that will end the matter. For those Records at Issue where the Public Body decides that either or both legal privileges under s. 27(1)(a) apply, the Inquiry will resume to

determine if the Public Body has met its burden of proof in its decision made under the Interim Decision.

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

[2018 Interim Decision/Order, at paras. 209-212]

[para 2] It is unnecessary for present purposes to review the most recent Order in this Inquiry, which are fully laid out in the 2018 Interim Decision/Order, at paras. 213-222. To my knowledge (as no copy was received), the Public Body did not provide a decision to the Applicant where it had decided to withdraw its reliance on previously claimed exceptions, in particular s. 27(1), in order to comply with the terms of the 2018 Interim Decision.

[para 3] The rationale for my decision to issue an interim decision was discussed in the opening paragraph of the 2018 Interim Decision, which read as follows:

One preliminary point regarding the Interim Decision that follows. I am unwilling to issue an Order in either Case File requiring the disclosure of Records at Issue thereby placing potentially legally privileged information in jeopardy because the Public Body has failed to discharge its burden of proof to provide sufficiently clear, convincing, and cogent evidence that the information in any specific Record at Issue is subject to legal privilege. Therefore, I have made a decision to give the Public Body the opportunity to make a decision for specific Records at Issue pursuant to the Interim Decision where it has fallen short in satisfying its burden of proof. In some circumstances, other adjudicators have addressed this type of evidentiary gap through correspondence with the Public Body prior to completing the Inquiry. In this Inquiry, however, the 2017 Notice of Continuation and subsequent correspondence, detailed supra, already put the Public Body on notice of what evidence was required and, therefore, this Interim Decision is the next logical step in this Inquiry. [Refer to Order F2014-38/Decision F2014-D-02]
[2018 Interim Decision/Order, at para. 208]

[para 4] On November 2, 2018 the Public Body provided its first response to the 2018 Interim Decision, within the time allotted, a copy of which it provided to the Applicant. The cover letter read as follows:

RE: Case File Numbers F6748/F6749 (the "Inquiry")

We write with reference to your Interim Decision F2018-D-02, Order F2018-39 (the "Interim Decision") which was delivered August 30, 2018.

As part of the Interim Decision, you have extended the option to the Public Body to provide additional information and evidence where, in your view, it has fallen short of satisfying its burden of proof with respect to the claims of privilege over certain records.

Accordingly, please find enclosed two copies of the Index [sic] of Records, which have been revised to provide additional information with respect to the privilege claims made by the Public Body in the Inquiry (the "Revised Indexes"). Please note that the body of the Revised Indexes remains unchanged from the Indexes attached to the Affidavit of [name of in-house counsel] sworn November 15, 2017. Instead, we have added an extra column labelled "Additional Information" which provides either a further and better description of the record, or provides a correction, as the case may be. No further evidence in the nature suggested at page 96 of the Interim Decision will be forthcoming from the Public Body, as we take the position that the information provided in the Revised Indexes is more than sufficient to support the claims of privilege over the Records at Issue in the Inquiry.

We understand that after reviewing this additional information you will then be in a position to provide a Final Decision with respect to the Inquiry and look forward to receipt of the Final Decision in due course.

Should you have any issues accessing the Revised Indexes please do not hesitate to contact me directly.

[Emphasis added]

[para 5] The Public Body's letter of November 2, 2018 gave rise to a number of issues. As a result, on November 30, 2018, I corresponded with the Public Body seeking further clarification, which correspondence, copied to the Applicant, read as follows:

Re: Inquiry #F6748/#F6749: Public Body Response to Interim Decision F2018-D-02

I refer to your recent correspondence, dated November 2, 2018, which you indicated was in reference to the Interim Decision F2018-D-02 [Interim Decision]. In that letter you stated:

As part of the Interim Decision, you extended the option to the Public Body to provide additional information and evidence where, in your view, it has fallen short of satisfying its burden of proof with respect to the claims of privilege over certain records.

Accordingly, please find enclosed two copies of the Index [sic] of Records, which have been revised to provide additional information with respect to the privilege claims made by the Public Body in the Inquiry (the "Revised Indexes"). Please note that the body of the Revised Indexes remains unchanged from the Indexes attached to the Affidavit of [name of in-house counsel] sworn November 15, 2017. Instead, we have added an extra column labelled "Additional Information" which provides either a further and better description of the record, or provides a correction, as the case may be. No further evidence in the nature suggested at page 96 [para. 209 on pages 95-96] of the Interim Decision will be forthcoming from the Public Body, as we take the position that the information provided in the Revised Indexes is more than sufficient to support the claims of privilege over the Records at Issue in the Inquiry. [Emphasis added]

On my initial review of your cover letter, I was heartened by what you said you had provided. You are correct that the November 2018 Revised Indexes provide an additional column with a further description or a correction for some of the Records at Issue which fall under the Interim Decision. In the cases of these records, the newly added column appears to have been populated with substantive information. This is a good start.

But you are not correct that the body of the November 2018 Revised Indexes remains unchanged from the Exhibited Indexes attached to [name of in-house counsel]'s 2017 Affidavit of Records.

A. The Revised Indexes do not remain unchanged

Relying on the 2017 Affidavit of Records, as upgraded, to conduct a comparison with the November 2018 Revised Indexes you provided in response to the Interim Decision, the following are a few examples of how the November 2018 Revised Indexes, referred to as Indexes below, does not, in fact, remain unchanged:

- 1. The "Count" Column [far left column] has been completely eliminated.*
- 2. A new column [second from the far right] has been added: "PageCnt". This is unnecessary because the Indexes already have two columns "Document ID" and "End Document ID" which provide the page range.*

3. *The titles of some of the Columns in the November 2018 Revised Indexes have been altered and the order these Columns appear in the Indexes is switched with no explanation: "People or Organizations To" and "People or Organizations From" have replaced "People/Organizations From" and "People/Organizations To." The information in the two Columns that have been switched may be the same, though this will require further scrutiny. This is, nevertheless, a change to the Indexes.*
4. *Information has been removed for some records from the "People or Organizations Between" Column. This appears at first glance to be for records that do not fall under the Interim Decision, but this is, nevertheless, a change to the Indexes.*

The Findings, Interim Decision and Order are wholly reliant on the "Doc Count" number to identify each specific Record at Issue. It would be greatly appreciated if you could restore the "Count" Column. Please note that if space is an issue in the Revised Indexes, you can remove the "PageCnt" Column as it was not in the Exhibited Indexes and is redundant.

- B. *The Revised Indexes do not provide a description/correction for all the Records at Issue that fall under the Interim Decision*

The "Additional Information" populating the Revised Indexes is the information required but unfortunately has only been provided for some of the Records at Issue that fall under the Interim Decision. There is a gap for some of the Records at Issue. In the Interim Decision, I listed each specific record by reference to its Doc Count number where I found the Public Body had failed to meet its burden of proof pursuant to s. 71 of the FOIP Act to establish the record was subject to either or both legal privileges. There are a few records where there is a gap in the "Additional Information" Column, examples follow:

Case File #F6748

In para. 12.2.B under Findings, I listed each specific record by reference to its Doc Count number where I found the Public Body had failed to meet its burden of proof pursuant to s. 71 of the FOIP Act to establish the record was subject to either legal privilege. The "Additional Information" Column has not been populated with any information for a few of the Doc Counts listed under paras listed supra: for examples Doc Counts 8, 10, 13 and 15, which fall under the Interim Decision. There may be other examples. These all appear to relate to the CFA. In that regard, please refer to para. 67 of the Interim Decision reproduced infra. Parts or all of the CFA may or may not fall under either legal privilege thus the kind of substantive evidence you have already provided in your November 2018 Revised Indexes would be appropriate for the Doc Counts referred to herein where evidence has not been provided.

Case File #F6749

In paras. 12.1.D., 12.1.E, 12.1.F and 12.1.I under Findings, I listed each specific record by reference to its Doc Count number where I found the Public Body had failed to meet its burden of proof pursuant to s. 71 of the FOIP Act to establish the record was subject to either legal privilege. The "Additional Information" Column has not been populated with any information for at least one Doc Count that falls under the Interim Decision: Doc Count 8. There may be other examples. Checking for any other gaps would be advisable.

You indicated that you have chosen not to provide any of the other evidence referred to in the Interim Decision. On that basis, I trust that you appreciate the significance of the weight that must be given to the "Additional Information" evidence in the Revised Indexes, as that is all there is to measure whether or not the Public Body has met its burden of proof as outlined in the Interim Decision. It would be inherently unfair to the Applicant and dismissive of the adjudication process if any submissions regarding specific records like the CFA were to be held in reserve. As I stated at para. 67 of the Interim Decision:

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

This absence of evidence for the affected Records at Issue needs to be addressed where "Additional Information" has not been provided and, thus, remains an outstanding task.

As your response to the Interim Decision is based solely on a revision of the Exhibited Indexes to the 2017 Affidavit of Records, please confirm that [name of in-house counsel] remains the affiant of the November 2018 Revised Indexes, which incorporate the "Additional Information" Columns. If this is not the case, please indicate the source of the evidence.

To conclude, what you stated in your cover letter that you were providing is what is required by the Interim Decision. What you provided is not what you stated you were providing: Revised Indexes consistent with the text of your November 2, 2018 correspondence.

It is acknowledged that preparing this kind of evidence can be intense and time-consuming. It requires attention to detail. What appears to be required for your response to fulfill what is set out in the Interim Decision and what is stated in your cover letter is time. It is clear that the Interim Decision did not provide you with sufficient time to prepare your complete and intended response.

Therefore, I am extending the response time (taking into account the upcoming holiday season) for an additional 70 days.

[para 6] On February 1, 2019, the Public Body provided its second and final submission in response to my correspondence seeking clarification, within the time allotted, a copy of which it provided to the Applicant, which read as follows:

RE: Inquiry F6748/F6749: Public Body Response to Interim Decision F2018-D-02

We are in receipt of your correspondence dated November 30, 2018. In order to address the concerns raised in your letter, we have reviewed the information contained in the Indexes provided to you on January 17, 2018 (the "January Indexes"), as well as the information provided in the Index [sic] provided to you on November 3, 2018 [sic] (the "Revised Indexes").

As noted in our correspondence from January 17, 2018, the January Indexes were intended to form part of the submissions of the Public Body. We apologize for any confusion caused by only referring to the "Indexes attached to the Affidavit of [name of in-house counsel] in our November 2, 2018 letter, rather than the January Indexes.

To be clear, the January Indexes, and now the Revised Indexes, form part of the evidence of the Public Body in this Inquiry. Further, it was not the intention of the Public Body to change or alter any of the substantive information provided in the January Indexes in the Revised Indexes, other than to add and populate a column called "Additional Information."
As such, we have investigated the suggestion in your most recent letter that the Revised Indexes have changed from the January Indexes.

After reviewing the Indexes and consulting with our paralegal (who generated the Revised Indexes), we provide the following responses to the issues specifically enumerated in your letter:

1. You are correct in identifying that the "count" column was not included in the Revised Indexes. In order to avoid any issues or further confusion in future, please find enclosed a searchable PDF copy of the Revised Indexes with this column added back.
2. The column called "Page CNT" was included in both the January Indexes and the Revised Indexes. We do not understand how this could be considered [a] substantive change to the Revises [sic] Indexes.
3. You note that the order of some of the columns have been switched. I have spoken to our paralegal who advises this was merely a function of the information being generated by our document review software. At the time that the "Additional Information" column was added to the Indexes and then regenerated, it would appear that the order of these columns switched. However, there were no changes to any of the substantive information in either of these columns either by our paralegal or by anyone in our office.
4. You suggest that information has been removed for some records under the "People or Organizations Between" column. We have reviewed both the January Indexes and the Revised Indexes and have been unable to identify what information has been removed or changed.

For final and further clarification, we confirm that other than the addition of the "Additional Information" column, the Public Body has not made any substantive changes to the information provided in the Revised Indexes. To the extent that software has rearranged some of the information in the Indexes when they were re-generated, this was done through inadvertence and was in no way intended to represent a substantive change to the evidence of the Public Body in this Inquiry. **We further confirm that the Revised Indexes form part of the submissions of the Public Body in this Inquiry.**

In your correspondence you note that additional information has been provided by the Public Body with respect to some but not all of the Records at Issue in the Inquiry. This is correct. It has been and continues to be the Public Body's position that it has provided more than sufficient evidence to substantiate its claims with respect to the privilege asserted over the records as identified in the Revised Indexes in this Inquiry.

*In light of your generous extension of time and invitation to provide even further evidence, the Public Body has carefully reviewed the Records at Issue, as well as the information provided in the Revised Indexes, and **confirms that no additional information will be forthcoming from the Public Body in this Inquiry.***

As such, we look forward to the receipt of your final decision in this Inquiry.

[Emphasis added]

[para 7] On February 8, 2019 I issued an Extension Letter for the anticipated completion date of the Inquiry to October 31, 2019 to the Minister for the Public Body, copied to the parties.

II. RECORDS AT ISSUE

[para 8] The 2018 Revised Indexes provided by the Public Body in response to the 2018 Interim Decision on November 2, 2018 (and a second modified copy provided February 1, 2019) have been examined with respect to the Records at Issue that were the subject of the 2018 Interim Decision (plus one record not at issue [Doc Count 107] for which the Public Body provided a submission, discussed *infra*). The Records at Issue for both Case Files that fall under the terms of the 2018 Interim Decision, described at paras. 12.1.D, 12.1.E, 12.1.F, 12.1.I, and 12.2.B of the 2018 Interim Decision/Order, are as follows:

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

...

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

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

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

...

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

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

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

69-76

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

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

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

201-203, 205, 230-232

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

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

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

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

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

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

...

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

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

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

69-76

...

2. Case File #F6748: 2017 Affidavit of Records and Exhibited Index [Exhibit A]

The following Records at Issue are the subject of the 2017 Affidavit of Records along with its attached Exhibited Index A. No Records at Issue in Case File #F6748 were provided to me. There are no Records at Issue where information has been shown as REDACTED in the Exhibited Index A.

...

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

[NOTE: Records at Issue over which solicitor client privilege and/or litigation privilege have been claimed where the Public Body has failed to meet its burden of proof with sufficiently clear, convincing, and cogent evidence that either legal privilege applies. These Records at Issue will form part of the Interim Decision. In the Exhibited Index for Case File #F6748, no descriptors for the Records at Issue have been REDACTED.]

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

2-3, 10-11, 13, 15-16

[2018 Interim Decision/Order, at para. 206]

[para 9] I turn now to outline the issues.

III. ISSUES IN THE INQUIRY

[para 10] There are two issues to consider at this stage of the Inquiry with respect to the Public Body's submissions in response to the 2018 Interim Decision, which are as follows:

Issue #1

- Whether the Public Body met its burden of proof under s. 71(1) of the FOIP Act by providing sufficiently clear, convincing, and cogent evidence to comply with the legal and evidentiary terms set out in the 2018 Interim Decision with respect to its reliance on s. 27(1) of the FOIP Act; and

Issue #2

- Whether the Public Body's decision to submit the "Additional Information" in the newly added Columns of the 2018 Revised Indexes without providing a supplementary/correcting Affidavit of Records impacts on the weight to be given to the new evidence.

IV. DISCUSSION OF ISSUES

- A. **Issue #1: Whether the Public Body met its burden of proof under s. 71(1) of the FOIP Act by providing sufficiently clear, convincing, and cogent evidence to comply with the legal and evidentiary terms set out in the 2018 Interim Decision with respect to its reliance on s. 27(1) of the FOIP Act.**

[para 11] The Public Body provided two submissions in response to the terms of the 2018 Interim Decision, reproduced *supra*. The first submission included a 2018 Revised Index for each of the Case

Files to which the Public Body added a whole new Column entitled “*Additional Information.*” After receiving a request from me, the Public Body submitted a second submission that included a modified 2018 Revised Index for each of the Case Files. In this submission, the Public Body provided further clarification as to how the 2018 Revised Indexes of Records at Issue for each of the Case Files had been modified but which revisions, the Public Body submitted, other than the addition of the Additional Information Column, did not substantively change the content of the body of the 2017 Exhibited Indexes attached to the 2017 Affidavit of Records and/or the updated Indexes provided on January 17, 2018. The Public Body indicated it was able to provide clarification after reviewing the respective indexes and consulting with its paralegal, who was responsible for generating both of the 2018 Revised Indexes, and who indicated that it was simply a function of the information being re-generated by the document review software.

[para 12] The following describes the kinds of information submitted by the Public Body in the new Additional Information Columns added to the 2018 Revised Indexes:

- supplementary evidence to provide a more detailed description for specific Records at Issue including descriptors of parties to the record (including names and professional titles) and more detail about the nature of the communication for each;
- new information for the affected Record at Issue where the descriptions had previously been REDACTED in one or more Columns in the 2017 Exhibited Indexes to the 2017 Affidavit of Records; and
- corrections of errors for records (not at issue) and for Records at Issue where the Public Body removed and/or replaced exceptions on which it was relying for records (not at issue) and for specific Records at Issue.

[para 13] The first issue is with respect to the Public Body’s reliance on s. 27(1) in claiming legal privilege over the Records at Issue as set out in the 2018 Interim Decision. Section 27(1) of the *FOIP Act* reads as follows:

The head of a public body may refuse to disclose to an applicant

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

[para 14] In reviewing the Public Body’s submissions, I have been cognizant of a recent decision in the Court of Queen’s Bench of Alberta, which laid out a useful list of questions to consider with respect to the issue of legal privilege. On February 19, 2019, Mr. Justice Hall released a decision in *Calgary (Police Service) v. Alberta (Information and Privacy Commissioner)*, in which he outlined a series of questions to be asked to test for legal privilege for each disputed Record at Issue, in the case before him, as follows:

Having heard counsel’s submissions and reviewed relevant case law, I have determined, in this case, that the appropriate test for privilege in respect of each of the disputed records, is as follows:

- 1) *Is there a communication between a solicitor and a client?*
- 2) *Does the communication entail the seeking, giving or receiving of legal advice?*
- 3) *Is the communication intended by the parties to be confidential?*
- 4) *Is the lawyer acting as a lawyer?*
- 5) *What was the purpose for which the record came into existence?*
- 6) *Is the particular communication part of a continuum in which legal advice is given?*
- 7) *Does the particular communication reveal that legal advice has been sought or given?*
- 8) *If there is any privileged information, can it be reasonably severed from the rest of the record, without revealing the privilege?*

[*Calgary (Police Service) v. Alberta (Information and Privacy Commissioner)*, 2019 ABQB 109, at para. 6]

[para 15] I have found Justice Hall's list of questions instructive in reviewing the evidence submitted by the Public Body in response to the terms of the 2018 Interim Decision. I have emulated the format adopted by Mr. Justice Hall to lay out my Findings *infra* for each Record at Issue: identify the Record at Issue (by page number or Doc Count) and make a Finding. In this case, in addition, I have added an Order for each Record at Issue incorporating all three into the Tables *infra*, one for each of the two Case Files. In making a Finding with respect to whether the Public Body has met its burden of proof that it properly *relied* on legal privilege for each specific Record at Issue where it has been claimed under s. 27(1) of the *FOIP Act*, I have also taken into account the discussion regarding legal privilege set out in the 2018 Interim Decision/Order [Refer to paras. 50-121]. For many of the Records at Issue that fall under the terms of the 2018 Interim Decision, I find the Public Body has met its burden of proof under s. 71(1) of the *FOIP Act* by providing sufficiently clear, convincing, and cogent evidence to comply with the terms set out in the 2018 Interim Decision with respect to its reliance on s. 27(1). The Orders for these Doc Counts read "*Properly withheld as privileged*" in the Tables *infra*. Where the Public Body has met its burden of proof that it has properly relied on s. 27(1), it is unnecessary to go on to consider the exercise of its discretion as that was decided in the 2018 Interim Decision/Order [Refer to paras. 122-126]. As I discussed in the 2018 Interim Decision/Order:

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

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

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

We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in McClure, stressed the categorical nature of the privilege:

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

Accordingly, we would uphold the Commissioner's decision on the s. 19 claim.

...

*No case-by-case analysis or balancing of interests or rights is necessary or appropriate with respect to s. 27(1)(a) where proper reliance has been demonstrated. For those Records at Issue where, based on the evidence provided, I am able to decide, on a balance of probabilities, that the Public Body has properly relied on solicitor client privilege and/or litigation privilege, detailed under Findings *infra*, I find the Public Body has properly applied the s. 27(1)(a) exception by exercising its discretion to refuse access to the Applicant to legally privileged information. **This will apply equally under the Interim Decision for those Records at Issue where the Public Body is able to meet its burden of proof to demonstrate that s. 27(1)(a) applies.***

[2018 Interim Decision/Order, at paras. 124 and 126]

[Emphasis added]

[para 16] Where the Public Body has failed to meet its burden of proof with respect to its reliance on s. 27(1), the Orders for these Doc Counts read “*Producible*” or “*Producible [possible redactions]*” in the Tables *infra*. In making a Finding that the Public Body has or has not met its burden of proof with respect to its claim to legal privilege for some of the Records at Issue, it is important to discuss some of the evidentiary issues that arose.

[para 17] I begin with examples of where new evidence has been added to the 2018 Revised Indexes. In this Inquiry, there are a total of 12 Records at Issue for Case File #F6749 where information had been REDACTED in the 2017 Exhibited Index attached to the 2017 Affidavit of Records. The Public Body relied on s. 27(1) for the majority of these Records at Issue and, therefore, they were not made available for review. There was no information REDACTED in the 2017 Exhibited Index for Case File #F6748. The Public Body relied on s. 27(1) for 11 of these Records at Issue and s. 29(1) for 1 Record at Issue, all of which had been REDACTED. In the 2018 Revised Index, the Public Body changed its claim from s. 29(1) to s. 27(1) for 1 Record at Issue. These Records at Issue are all subject to the terms of the 2018 Interim Decision, at para. 209:

Doc Counts where s. 29(1) claimed then changed to s. 27(1) and REDACTED:

75

[2018 Interim Decision/Order, at para. 206, para. 12.1.D]

Doc Counts where s. 27(1) claimed and REDACTED:

24, 78, 79, 80, 102, 116, 141, 142, 237, 238, 239

[2018 Interim Decision/Order, at para. 206, para. 12.1.F.ii]:

[para 18] In one instance, the Public Body appears to have provided the exact text for some or all of the REDACTED information in the Additional Information Column [Refer to Doc Count 24 in Case File #F6749]. The “*Additional Information*” for Doc Count 24 reads as follows:

“The redacted information states “Big Tobacco- Intro to AHW Billing/Diagnostic codes””

[para 19] For all of these Records at Issue, I have found that the “*Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.*” This relates to a question I raised in the 2018 Interim Decision/Order: has the REDACTED information not been made available to me because it would reveal legally privileged information? In its 2017 PBSS when referring to the 2017 Affidavit of Records, the Public Body submitted that certain information had been REDACTED from the 2017 Exhibited Indexes because it would allow a party to ascertain the content of the privileged information [Refer to the 2018 Interim Decision/Order, at para. 42(18)]. I find that on a review of the “*Additional Information*” provided for the REDACTED Records at Issue, the answer to the question is ‘no’ in all cases: it does not reveal privileged information. I appreciate that the “*Additional Information*” in the 2018 Revised Indexes may not, in all instances, be the exact text that was REDACTED, with the exception of Doc Count 24. Without the records available, I have no way of determining that. But this raises a follow-up question: why was the text put in the 2017 Exhibited Indexes and then REDACTED in the first place? In lieu of redacting the Indexes of the Records at Issue, the Public Body could have provided the “*Additional Information*” it submitted in response to the 2018 Interim Decision in order to establish that the Applicant has no right of access to each specific Record at Issue by meeting its burden of proof pursuant to s. 71(1) of the *FOIP Act* at some point earlier in this Inquiry.

[para 20] The Additional Information Columns have been populated with new information, which may or may not quote, paraphrase or summarize what has been REDACTED [Refer to Doc Count 24 for an example of where REDACTED information is in quotations]. What the new information in the Additional Information Columns appear to do is describe relevant details about the communication in the specific record without disclosing any legally privileged information. It is important to recall what was said in the Discussion in the 2018 Interim Decision/Order: there was not one example where the Affiant of the 2017 Affidavit of Records attested to a *specific* record or provided information as to why information for a specific Record at Issue had been REDACTED. This highlights the fact that some of the “*Additional*

Information” amounts to unsworn evidence as there is no way for me to confirm how the evidence in the Additional Information Columns relates to what has been REDACTED: what did the Affiant of the 2017 Affidavit of Records actually attest to? It is acknowledged that evidence in quasi-judicial hearings need not be in affidavit form. In this case, however, it is the indexes exhibited to the 2017 Affidavit of Records that have been revised, which when submitted as the 2017 Exhibited Indexes, were sworn evidence. The issue regarding information that had been REDACTED in the 2017 Exhibited Indexes provided by the Public Body was fully discussed in my 2018 Interim Decision/Order [Refer to paras. 105-113].

[para 21] Who may have prepared the Records at Issue and Indexes may have changed over time: the FOIP Coordinator collected and reviewed the responsive records and the Exception Sheets originally exhibited to his/her affidavit [Refer to the 2014 Affidavit discussed at para. 41 of the 2018 Interim Decision/Order], the Affiant of the 2017 Affidavit of Records [in-house counsel] and/or a paralegal. This observation is not a criticism as it is up to a public body how it manages its records and prepares its documentation. What bears attention, however, is the weight to be given to the “*Additional Information*” in the 2018 Revised Indexes. The Public Body did not indicate who prepared, revised and/or amended the 2018 Revised Indexes and simply indicated they were re-generated by its paralegal and that it had reviewed them. It is, in my opinion, important to keep in mind, given the significance of legal privilege, that the Affidavit of Records and its accompanying Indexes form the foundation of the evidence the Public Body must provide in order to meet its burden of proof to establish, on a balance of probabilities, it has properly relied on s. 27(1) of the *FOIP Act* with respect to its claim of legal privilege for specific Records at Issue.

[para 22] The Public Body submits that, other than adding in the Additional Information Columns, the 2018 Revised Indexes have not substantively changed the 2017 Exhibited Indexes attached to the 2017 Affidavit of Records and/or the updated Indexes provided on January 17, 2018, a submission I do not find persuasive. The fact is that the evidence in the Additional Information Column, in addition to providing new information, also amends/changes information in columns in the previously submitted 2017 Exhibited Indexes. In addition to the discussion *supra* regarding new evidence to replace the REDACTED parts of the 2018 Revised Indexes, the fact is that the Public Body has acknowledged its errors with respect to s. 27(1): by adding in a new claim to s. 27(1) or withdrawing its reliance on s. 27(1) for specific Records at Issue, details of which are discussed here and outlined in the Tables *infra*. All of these Records at Issue, reproduced at para. 8 *supra*, fell under the terms of the 2018 Interim Decision [Refer to the 2018 Interim Decision, at paras. 208-211]. Of particular importance is how the 2018 Revised Indexes have been changed with respect to the Public Body’s reliance on s. 27(1) in claiming legal privilege for specific Records at Issue. The following provides an overview of relevant examples:

i. **Case File #F6749**

A. **Public Body has *added* its reliance on s. 27(1):**

Doc Counts: 69, 70, 71, 72, 73, 74, 75, 76

B. **Public Body has *withdrawn* its reliance on s. 27(1):**

Doc Counts: 9, 44, 52, 53, 151, 201, 202, 203, 205, 229, 230, 231, 232

ii. **Case File #F6748**

A. **Public Body has *added* its reliance on s. 27(1):**

Doc Counts: Nil

B. **Public Body has *withdrawn* its reliance on s. 27(1):**

Doc Counts: 2, 3

[para 23] The 2018 Revised Indexes submitted in response to the 2018 Interim Decision also contained errors or omissions including:

A. Public Body failed to provide *any* Additional Information for Records at Issue subject to the terms of the 2018 Interim Decision

i. Case File #F6749

There are a total of 6 Records at Issue subject to the terms of the 2018 Interim Decision where the Public Body failed to submit *any* Additional Information in the 2018 Revised Index. By doing so, the Public Body has, as a result, failed to meet its burden of proof it properly relied on s. 27(1) of the *FOIP Act* and thus failed to comply with the terms of the 2018 Interim Decision.

Doc Counts: 8, 27, 101, 110, 129, 255

ii. Case File #F6748

There are a total of 4 Records at Issue subject to the terms of the 2018 Interim Decision where the Public Body failed to submit *any* Additional Information in the 2018 Revised Index. By doing so, the Public Body has, as a result, failed to meet its burden of proof it properly relied on s. 27(1) and has thus failed to comply with the terms of the 2018 Interim Decision:

Doc Counts: 10, 13, 15, 16

B. Public Body has provided Additional Information for a record not subject to the terms of the 2018 Interim Decision: Not a Record at Issue

i. Case File #F6749

There is a total of 1 record *not* at issue under the 2018 Interim Decision for which the Public Body has provided "*Additional Information.*"

Doc Count: 107

[para 24] Without considering it necessary to make a specific finding in this regard, I make the following observation: there is evidence to suggest that the Public Body may have adopted the "*blanket*" approach in claiming reliance on s. 27(1) of the *FOIP Act* and/or populating the Privilege Columns in its 2017 Exhibited Indexes in this Inquiry. Some of the deficiencies discussed *supra* support this observation and, therefore, it is important to note that this approach is contrary to the purpose set out in s. 2(a) of the *FOIP Act*: "*to allow any person a right of access to the records ... subject to limited and specific exceptions as set out in this Act*" and to what the case law has held to be required. As I stated in the 2018 Interim Decision/Order:

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

Suncor cannot, merely by having legal counsel declare that an investigation has commenced, throw a blanket over all materials "created and/or collected during the internal investigation" or "derived from" the internal investigation, and thereby extend solicitor-client privilege or litigation privilege over them. This Court stated in

ShawCor, at para 84, that “[b]ecause the question is the purpose for which the record was originally brought into existence, the mere fact that a lawyer became involved is not automatically controlling.” And further, at para 87, the Court stated that “the purpose behind the creation of a record does not change simply because the record is forwarded to, or through, in-house counsel, or because in-house counsel directs that all further investigation records should come to him or her.”

[Alberta v. Suncor Inc, 2017 ABCA 221, at para. 34]

[2018 Interim Decision/Order, at para. 59; Refer also to paras. 96-98]

[Emphasis added]

[para 25] I fully understand that not all evidence submitted in quasi-judicial hearings needs to be in affidavit form. In this case, however, the 2017 Affidavit of Records and its 2017 Exhibited Indexes were submitted as sworn evidence from in-house counsel. The 2018 Revised Indexes submitted in response to the 2018 Interim Decision provided a significant amount of new evidence, which has been added to the 2018 Revised Indexes that in effect replace or displace evidence in the 2017 Exhibited Indexes attached to the 2017 Affidavit of Records, long after the latter was sworn. The new “*Additional Information*” evidence has been added into what has been submitted as the 2018 Revised Indexes, which have not been provided with an affidavit(s). I find that adding the “*Additional Information*” to the 2018 Revised Indexes amounts to the Public Body submitting new evidence in the Inquiry, which constitutes a substantive change to the foundational indexes exhibited to the 2017 Affidavit of Records. Based on that Finding, what requires discussion is the weight to be given to the “*Additional Information*” in the 2018 Revised Indexes when the Public Body has failed to provide that evidence in affidavit form: either by submitting a re-affirmed 2017 Affidavit of Records, with amended exhibited 2018 Revised Indexes, to acknowledge and attest to the substantive additions/corrections to its 2017 Exhibited Indexes or by submitting a newly sworn supplementary Affidavit of Records to accompany the 2018 Revised Indexes. I find that the “*Additional Information*” is unsworn evidence submitted by the Public Body in substantively 2018 Revised Indexes. This leads to a discussion of the next issue, to which I now turn.

B. Issue #2: Whether the Public Body’s decision to submit the Additional Information in the newly added Columns of the 2018 Revised Indexes without providing a supplementary/correcting Affidavit of Records impacts on the weight to be given to the new evidence.

[para 26] It is, in my opinion, important to keep in mind that an exhibited index that is attached to an affidavit of records forms the foundation of the evidence provided by a public body to meet its burden of proof under s. 71(1) of the *FOIP Act* as to whether it has properly relied on legal privilege for each specific Record at Issue. This is particularly the case when the Records at Issue claimed to be legally privileged are not made available to an adjudicator for review. In its November 2, 2018 submission, the Public Body made it clear that the Indexes “*have been revised to provide additional information with respect to the privilege claims made.*” The new evidence, in the Additional Information Columns that have been added to the 2018 Revised Indexes, has not been provided with a supporting affidavit. I find that adding the “*Additional Information*” to the 2018 Revised Indexes amounts to the Public Body submitting new unsworn evidence in the Inquiry, which evidence makes substantive changes *both* by providing new information in the Additional Information Columns *and* by that information amending, correcting or changing information in *other* columns of the 2017 Exhibited Indexes and the 2018 Revised Indexes. Based on that Finding, what requires discussion is the weight to be given to the “*Additional Information*” in the 2018 Revised Indexes.

[para 27] I found it inexplicable as to why the Public Body failed to provide the new evidence with a supporting affidavit; such as, a supplementary or correcting Affidavit of Records with the “*Additional Information*”. It remains unclear why this step was not taken. No explanation was provided other than what the Public Body stated in its cover letter dated November 2, 2018, which correspondence is reproduced at para. 4 *supra*. Despite having already made this request, in my letter dated November 30, 2018, I made a final attempt by soliciting a minimal response from the Public Body, which is reproduced at para. 5 *supra*. The Public Body’s response reproduced at para. 6 *supra* did not respond to my specific

request to provide a confirmation that the Affiant could attest to the new evidence submitted in the 2018 Revised Indexes. In this case, the 2018 Revised Indexes with the Additional Information Columns were submitted long after the sworn evidence in the 2017 Affidavit of Records from the in-house counsel Affiant. That means, by way of example, that the Affiant of the 2017 Affidavit of Records swore certain records were or were not subject to legal privilege, which claim has now been reversed by the new evidence submitted. In my opinion, this demonstrates the need for a supplementary or correcting Affidavit of Records or, at the very least, sworn confirmation from the Affiant with respect to the “Additional Information” added to the 2018 Revised Indexes, which indexes prior to the revisions were exhibited to his/her 2017 Affidavit of Records. [Refer to the discussion in the 2018 Interim Decision/Order, at para. 43, where the details of the evidence of the Affiant of the 2017 Affidavit of Records and its 2017 Exhibited Indexes reports that s/he attested to having reviewed all of the Records at Issue in the 2017 Exhibited Indexes and submits that the Public Body objects to produce the Records listed as subject to solicitor client privilege, litigation privilege or both].

[para 28] It is well understood that adjudicators delegated under the *FOIP Act* are not obliged to strictly adhere to the practice rules governing Court proceedings. But in response to the recent Supreme Court of Canada decisions about records over which legal privilege is claimed not being producible, the Alberta Information and Privacy Commissioner [OIPC Commissioner], relying on the Alberta Rules of Court as adopted in the *ShawCor* decision, issued the *OIPC Privilege Practice Note (2016)*, which reads in part as follows:

*In Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53 (CanLII), the Supreme Court of Canada (SCC) suggested that **the rules applicable to claims of solicitor-client privilege in the context of civil litigation apply to privilege claims in the context of access requests.** The SCC also cited *Canadian Natural Resources Ltd. v. ShawCor Ltd., 2014 ABCA 289 (CanLII), 580 A.R. 265* as the relevant authority in Alberta. **In this case, the Alberta Court of Appeal discussed the application of Rules 5.7 and 5.8 of the Rules of Court (producible records, and records for which there is an objection to produce).** The Court stated (at paras. 42-43):*

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

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

This is the basis for the practice note for the provision of evidence by Respondents claiming solicitor-client privilege over records. The practice note also applies to litigation privilege on the basis of the significance attributed to that privilege by the SCC in *Lizotte v. Aviva Insurance Company of Canada, 2016 SCC 52.*
[*OIPC Privilege Practice Note (2016)*, at p. 1]
[Emphasis added]

[para 29] This points to how both the Courts and the OIPC Commissioner have turned to the Alberta Rules of Court as the legal and logical source for the rules governing the provision of evidence. As the *OIPC Privilege Practice Note (2016)* states the “(SCC) suggested that the rules applicable to claims of solicitor-client privilege in the context of civil litigation apply to privilege claims in the context of access requests.” On that basis, I consider it appropriate to turn to the Alberta Rules of Court for

guidance in this situation where new evidence with respect to the Public Body's claim of legal privilege has been submitted. Submission of the "Additional Information" in this Inquiry may be seen as analogous or similar to when a new relevant and material record arises in a proceeding, [Alberta Rule of Court 5.10], which requires a supplementary Affidavit of Records, or when a person questioned on an Affidavit of Records provides an incorrect or misleading answer as a result of new information [Alberta Rule of Court 5.27], which requires a correcting affidavit. The importance of affidavit evidence was brought to the attention of the Public Body in the 2017 Notice of Continuation of the Inquiry and in the 2018 Interim Decision/Order:

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

[2018 Interim Decision/Order, at para. 77]

[Emphasis added]

[para 30] For some of the Records at Issue, the evidence in the "Additional Information" in the 2018 Revised Indexes has produced new descriptive information record by record, as required by the *Solosky* decision, which reads, in part, as follows:

*... privilege can only be claimed **document by document**, with each document being required to meet the criteria for the privilege ...*

[*Solosky v. The Queen*, [1980] 1 SCR 821, at p. 838; See also discussion of the *ShawCor* decision in the 2018 Interim Decision/Order, at para. 75]

[Emphasis added]

[para 31] The "Additional Information", however, which adds new and amends existing evidence, has not been provided as a sworn exhibit to an Affidavit of Records. In order to be able to give the appropriate weight to the evidence in the Additional Information Columns in the 2018 Revised Indexes, which amended or substantively changed evidence *throughout* the 2017 Exhibited Indexes, I turned to the Alberta Rules of Court for guidance. In this case, even when prompted to do so, the Public Body disregarded my request as if it considered a new affirmation or a re-affirmation an unnecessary step. This amounts to the Public Body submitting new evidence in the Inquiry in order to meet its burden of proof that it has properly relied on legal privilege pursuant to s. 27(1) without an accompanying up-to-date affidavit of records and exhibited indexes. Given the importance of legal privilege as the primary issue in this Inquiry and the central role the 2017 Affidavit of Records and its 2017 Exhibited Indexes play in meeting its evidentiary burden *particularly where there are substantive changes to the evidence*, I find that it would have been reasonable for the Public Body to turn its attention to the Alberta Rules of Court for guidance and to have the Affiant re-affirm his/her 2017 Affidavit of Records, as amended by the 2018 Revised Indexes, or swear a supplementary Affidavit of Records attaching the 2018 Revised Indexes that contain the "Additional Information."

[para 32] In this case, I do not consider it reasonable to totally discount the evidence in the Additional Information Columns in the 2018 Revised Indexes simply because the Public Body failed to provide the new evidence in the form of an amended or supplementary Affidavit of Records. Rather, it was a question of the weight to be given to the new evidence. For some of the Records at Issue where the evidence in the Additional Information Columns is sparse, submitting the 2018 Revised Indexes with an accompanying affidavit as sworn evidence, would have assisted the Public Body *vis à vis* its burden of proof. I have, however, considered the Public Body's submissions in their totality, applying the evidentiary standard of a balance of probabilities, in order to make my Findings record by record [Refer to the 2018 Interim Decision/Order, at paras. 47 and 54]. The unsworn "Additional Information", however, is

being given less weight than it might otherwise be given because the Public Body failed to provide an amended or supplementary Affidavit of Records with its 2018 Revised Indexes: confirmation from the Affiant that s/he could attest to the information populating the Additional Information Columns in the 2018 Revised Indexes, as that evidence adds to, amends and/or corrects what the Public Body has submitted for each specific Record at Issue.

[para 33] I turn now to the final discussion regarding the evidence. Equally problematic to the evidence not being provided in affidavit form is the fact that the Public Body has failed to provide *any* “Additional Information” for one category type/title of Record at Issue: any record described in whole or in part as the “Contingency Fee Agreement” including CFA drafts. There are a total of 4 Records at Issue for Case File #F6748 under the Interim Decision to which this applies [Doc Counts 10, 13, 15, 16] and 1 Record at Issue for Case File #F6749 [Doc Count 255]. The Public Body continued to treat any Record at Issue described as the CFA, in its entirety, as subject to legal privilege, for which it was unnecessary for it to provide any evidentiary base and has, as a result, not met its burden of proof that it properly relied on s. 27(1). This pattern was brought to the attention of the Public Body many times including in the 2018 Interim Decision/Order [Refer to para. 67] and more recently in my November 30, 2018 correspondence, reproduced at para. 5 *supra*, the relevant part of which read as follows:

*These all appear to relate to the CFA. In that regard, please refer to para. 67 of the Interim Decision reproduced infra. **Parts or all of the CFA may or may not fall under either legal privilege thus the kind of substantive evidence you have already provided in your November 2018 Revised Indexes would be appropriate for the Doc Counts referred to herein where evidence has not been provided.***

...

It would be inherently unfair to the Applicant and dismissive of the adjudication process if any submissions regarding specific records like the CFA were to be held in reserve. As I stated at para. 67 of the Interim Decision:

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

This absence of evidence for the affected Records at Issue needs to be addressed where “Additional Information” has not been provided and, thus, remains an outstanding task.
[Emphasis added]

[para 34] The issue of the CFA was discussed in the 2018 Interim Decision/Order [Refer to paras. 62-78]. It is recognized that there are competing authorities regarding contingency fee agreements, retainers and lawyers’ bills *vis à vis* legal privilege. As a result, in this case, I specifically requested, but did not receive, evidence to support the Public Body’s position regarding the CFA. The Alberta Rules of Court [Part 10 ss. 10.7-10.8] detail the *mandatory* particulars in order for a CFA to be enforceable. Some of these may amount to template-type provisions in the CFA. No explanation was forthcoming from the Public Body as to why it failed to populate the Additional Information Columns, other than to indicate it would not be doing so. Nor did the Public Body explain why it was unable to redact the legally privileged information from any of the CFA-related Records at Issue, thus enabling it to fulfil its statutory obligation to provide the Applicant access to as much information as possible, pursuant to s. 6(2) of the *FOIP Act*. As Justice Hall stated as one of his questions for the appropriate test for legal privilege in his decision that I referred to at para. 14 *supra*: “*If there is any privileged information, can it be reasonably severed from*

the rest of the record, without revealing the privilege?” The Findings *infra* reflect the outcome of the Public Body *failing to provide any evidence* in the Additional Information Columns for the Records at Issue subject to the terms of the 2018 Interim Decision described as the CFA or draft CFA.

[para 35] One concluding point with respect to the discussion regarding legal privilege. On examination of the contents of the Additional Information Columns, the name and/or roles in the descriptors for people or organizations who are a party to the communication and the subject matter of that communication or document have been added for many Records at Issue. The reason for drawing attention to this fact is for the following reasons: first, in every instance where “*Additional Information*” has been provided, it is reasonable to assume all that information would have been available to the Public Body when the Inquiry began; second, none of it is information that would have disclosed legally privileged information; third, had the information been provided years ago, in many instances, it would have constituted sufficient evidence for the Public Body to meet its burden of proof in a more timely fashion; and fourth, providing this information years ago may have avoided these Records at Issue being the subject of the 2018 Interim Decision, which also contributed to the long life of this Inquiry.

[para 36] While being cautious in managing legally privileged information contained within Records at Issue is understandable and correct, the Public Body adopted a minimalist approach in preparing and providing evidence to establish it properly relied on s. 27(1) of the *FOIP Act* up until its submissions in response to the 2018 Interim Decision and, in some instances, including in those submissions. The preferred approach, in my opinion, would be for the Public Body to bring the same vigour with which it claims to be protecting legally privileged records to producing sufficiently clear, convincing, and cogent evidence to meet its burden of proof under s. 71(1) of the *FOIP Act* that it has properly *relied* on s. 27(1) for information that is subject to legal privilege in a timely fashion.

V. FINDINGS

[para 37] I turn now to the Findings for the final phase of the Inquiry. The Findings are limited solely to the specific Records at Issue stipulated in the 2018 Interim Decision. At the outset of the Inquiry, the OIPC Commissioner consolidated the two Case Files on the understanding the responsive records were the same. During the Inquiry, the Public Body clarified that the Records at Issue for each of the respective Case Files were not the same (identical) and, on that basis, I advised the parties that there were be two separate Orders. Thus what follows is a Table for each Case File with Findings for each set of Records at Issue. The evidence for each of these specific Records at Issue in the respective Case Files has been reviewed as it has been described by the Public Body in the multiple indexes submitted, summarized as follows:

- Indexes received August 6, 2014 as part of the 2014 Public Body Initial Submission
- Indexes (updated) received January 19, 2017 with copies of a portion of the Records at Issue provided to the External Adjudicator only
- 2017 Exhibited Indexes received November 15, 2017 attached to the 2017 Affidavit of Records as part of the 2017 Public Body Initial (supplementary) Submission
- Electronic searchable copy of 2017 Exhibited Indexes received on November 21, 2017
- Indexes (updated) received January 17, 2018 with the 2017 Public Body Rebuttal Submission
- 2018 Revised Indexes received November 2, 2018 in the Public Body’s first response to 2018 Interim Decision
- 2018 Revised Indexes (modified) received February 1, 2019 in the Public Body’s second and final response to the 2018 Interim Decision

[para 38] The Public Body made it clear in its responses to the 2018 Interim Decision that the 2018 Revised Indexes are to form part of its submissions in the Inquiry and, therefore, all of the indexes submitted over the course of the Inquiry have been considered. For the purpose of adjudicating the Public Body’s response to the terms of the 2018 Interim Decision in relation to the specific Records at Issue, it is the 2017 Exhibited Indexes (with the 2017 Affidavit of Records) and the 2018 Revised Indexes

that have been given the greatest attention, the latter two in the list *supra* being the indexes into which the Public Body incorporated the Additional Information Columns.

[para 39] The first issue to be decided is whether the Public Body has met its burden of proof to establish it has properly *relied* on s. 27(1) of the *FOIP Act*, with respect to claiming solicitor client privilege and/or litigation privilege. In answering the question, I have considered all of the evidence submitted by the Public Body including the “*Additional Information*” in the 2018 Revised Indexes despite the fact that the latter evidence has not been submitted in affidavit form. Throughout the 2018 Revised Indexes, in some instances, the Public Body has met its burden of proof for solicitor client privilege (some of which may also be protected by litigation privilege). For examples (***not an exhaustive list but a sample only***), refer to:

i. **Case File #F6749**

Doc Counts: 155, 164

ii. **Case File #F6748**

Doc Counts: 11

[para 40] There are other instances, however, where the Public Body has not met its burden of proof for solicitor client privilege but has met the burden of proof for litigation privilege. For examples, refer to (***not an exhaustive list but a sample only***):

i. **Case File #F6749**

Doc Counts: 7, 13, 24, 42, 50, 78, 81, 111, 112, 117, 148, 152, 154, 159, 181, 190, 262, 263

ii. **Case File #F6748**

Doc Counts: No examples

[para 41] In the Tables that follow *infra*, the Order for each specific Record at Issue where the Public Body has, on a balance of probabilities, met its burden of proof that it has properly relied on s. 27(1), reads as “*Properly withheld as privileged.*” For these Records at Issue, it is unnecessary to consider the exercise of its discretion as that was decided in the 2018 Interim Decision/Order [Refer to paras. 122-126]. These include all of the Records at Issue where the information in the 2017 Exhibited Index for Case File #F6749 [there are no REDACTED Records at Issue in Case File #F6748] had been REDACTED, which are included in the Table *infra*, the Doc Counts for which are reproduced at para. 8 *supra* [Refer to the 2018 Interim Decision/Order, at para. 12.1.F.ii]. For the other Records at Issue where the Public Body has, on a balance of probabilities, failed to meet its burden of proof that it has properly relied on s. 27(1), the Orders for each of these specific Records at Issue in both Case Files is “*Producible.*” I have made Orders for some of these Records at Issue in both Case Files that read “*Producible [possible redactions]*”, where it appears that the Records at Issue may contain some information protected by legal privilege but which record should be redacted so that the Public Body can provide access to the Applicant to the part of the information in the record not protected by legal privilege.

[para 42] Just to be clear: there is no issue with respect to any mandatory exception, as neither s. 16 nor s. 17 have been claimed by the Public Body in this Inquiry. Where the Public Body has failed to meet its burden of proof to establish it properly relied on s. 27(1), it is unnecessary to consider the application of other exceptions [Refer to discussion and Findings with respect to public interest under s. 32 of the *FOIP Act* in the 2018 Interim Decision/Order, at paras. 171-205]. As I stated in the 2018 Interim Decision/Order at paras. 194 and 199, the decision with respect to the s. 32 public interest override does not apply to Records at Issue protected by solicitor client privilege and/or litigation privilege as for those Records at Issue protected by legal privilege, the public interest is served by preserving and protecting the privileged information.

[para 43] The following Tables contain a Finding and a disposition for each of the specific Records at Issue that fall under the terms of the 2018 Interim Decision. I begin with Case File #F6749:

Findings for 2018 Interim Decision Records at Issue at paras. 12.1.D and 12.1.I:

Doc Count	Findings	Order for Case File #F6749
69	Additional information provided by the Public Body to correct its error by replacing its reliance on s. 29, publicly available, with reliance on s. 27(1) claiming the Record at Issue is subject to legal privilege. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
70	Additional information provided by the Public Body to correct its error by replacing its reliance on s. 29, publicly available, with reliance on s. 27(1) claiming the Record at Issue is subject to legal privilege. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
71	Additional information provided by the Public Body to correct its error by replacing its reliance on s. 29, publicly available, with reliance on s. 27(1) claiming the Record at Issue is subject to legal privilege. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
72	Additional information provided by the Public Body to correct its error by replacing its reliance on s. 29, publicly available, with reliance on s. 27(1) claiming the Record at Issue is subject to legal privilege. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
73	Additional information provided by the Public Body to correct its error by replacing its reliance on s. 29, publicly available, with reliance on s. 27(1) claiming the Record at Issue is subject to legal privilege. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged

Doc Count	Findings	Order for Case File #F6749
74	Additional information provided by the Public Body to correct its error by replacing its reliance on s. 29, publicly available, with reliance on s. 27(1) claiming the Record at Issue is subject to legal privilege. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
75	Additional information provided by the Public Body to correct its error by replacing its reliance on s. 29, publicly available, with reliance on s. 27(1) claiming the Record at Issue is subject to legal privilege. The 2017 Exhibited Index had information redacted. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
76	Additional information provided by the Public Body to correct its error by replacing its reliance on s. 29, publicly available, with reliance on s. 27(1) claiming the Record at Issue is subject to legal privilege. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged

Findings for 2018 Interim Decision Records at Issue by Doc Count at para. 12.1.E:

Doc Count	Findings	Order for Case File #F6749
201	Additional information provided by the Public Body to correct its error thereby withdrawing its claim of legal privilege in the Privilege Column.	Producible
202	Additional information provided by the Public Body to correct its error thereby withdrawing its claim of legal privilege in the Privilege Column.	Producible
203	Additional information provided by the Public Body to correct its error thereby withdrawing its claim of legal privilege in the Privilege Column.	Producible
205	Additional information provided by the Public Body to correct its error thereby withdrawing its claim of legal privilege in the Privilege Column.	Producible
230	Additional information provided by the Public Body to correct its error thereby withdrawing its claim of legal privilege in the Privilege Column.	Producible

Doc Count	Findings	Order for Case File #F6749
231	Additional information provided by the Public Body to correct its error thereby withdrawing its claim of legal privilege in the Privilege Column.	Producible
232	Additional information provided by the Public Body to correct its error thereby withdrawing its claim of legal privilege in the Privilege Column.	Producible

Findings for 2018 Interim Decision Records at Issue by Doc Count at para. 12.1.F:

[Note: Records at Issue where the information in the 2017 Exhibited Index had been REDACTED are included in the Doc Counts below: Doc Counts 24, 78, 79, 80, 102, 116, 141, 142, 237, 238, 239]

Doc Count	Findings	Order for Case File #F6749
7	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
8	No Additional Information provided by the Public Body to meet its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Producible
9	Additional information provided by the Public Body to correct its error by replacing its reliance on s. 27(1) to claim legal privilege and s. 24(1) with s. 29 as the Public Body now claims the Record at Issue is publicly available.	Producible
10	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
13	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
24	The 2017 Exhibited Index had information redacted. Additional information provided included quoted redacted information means the Public Body has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
25	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged

Doc Count	Findings	Order for Case File #F6749
27	No Additional Information provided by the Public Body to meet its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Producible
32	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
42	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
44	Additional information provided by the Public Body to correct its error by replacing its reliance on s. 27(1) to claim legal privilege with s. 29 as the Public Body now claims the Record at Issue is publicly available.	Producible
45	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
50	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
51	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
52	Additional information provided by the Public Body to correct its error by replacing its reliance on s. 27(1) to claim legal privilege with s. 29 as the Public Body now claims the Record at Issue is publicly available.	Producible
53	Additional information provided by the Public Body to correct its error by replacing its reliance on s. 27(1) to claim legal privilege with s. 29 as the Public Body now claims the Record at Issue is publicly available.	Producible
54	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
[NOTE: Findings with respect to Doc Counts 69-76 under paras. 12.1.D and 12.1.I <i>supra</i> .]		

Doc Count	Findings	Order for Case File #F6749
78	The 2017 Exhibited Index had information redacted. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
79	The 2017 Exhibited Index had information redacted. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
80	The 2017 Exhibited Index had information redacted. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
81	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
82	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
83	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
88	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
90	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
92	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
97	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged

Doc Count	Findings	Order for Case File #F6749
99	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege. Key is that individual named in the 2017 Exhibited Index is identified in the Additional Information known to be a senior employee (not identified as a lawyer) of the Public Body and the nature of the communication.	Properly withheld as privileged
100	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege. Key is that individuals not shown as parties in the 2017 Exhibited Index are identified in Additional Information: known to be in-house legal counsel in communication with another identifiable lawyer and copied to other employees of the Public Body and the nature of that communication.	Properly withheld as privileged
101	No Additional Information provided by the Public Body to meet its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Producible
102	The 2017 Exhibited Index had information redacted. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
104	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege. Key is that individuals not shown as parties to the Record at Issue in the 2017 Exhibited Index are identified in the Additional Information: known to be in-house legal counsel in communication with another senior employee of the Public Body and the nature of that communication.	Properly withheld as privileged
[Note: Additional information provided for Doc Count 107, which is not a Record at Issue under the terms of the 2018 Interim Decision]		
109	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
[Note: The description for Doc Count 109 is identical to the description for the record at Doc Count 93 [JSG000577], not a Record at Issue under the terms of the 2018 Interim Decision where only s. 24(1) has been claimed. Given the additional information provided for Doc Count 109, the Public Body may want to reconsider the exception(s) it has claimed or not claimed for the record at Count 93. Refer to the 2018 Interim Decision/Order, at para. 117 (13)]		

Doc Count	Findings	Order for Case File #F6749
110	No Additional Information provided by the Public Body to meet its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Producible
111	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
112	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
116	The 2017 Exhibited Index had information redacted. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
117	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
118	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
119	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
122	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
124	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
129	No Additional Information provided by the Public Body to meet its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Producible

Doc Count	Findings	Order for Case File #F6749
131	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
132	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege. Key is that individuals not shown as parties in the 2017 Exhibited Index are identified in Additional Information: known to be in-house legal counsel in communication with another identifiable lawyer and copied to other employees of the Public Body and the nature of that communication.	Properly withheld as privileged
139	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
141	The 2017 Exhibited Index had information redacted. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
142	The 2017 Exhibited Index had information redacted. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
143	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
147	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
148	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
151	Additional information provided by the Public Body to correct its error for claiming legal privilege [blank page].	Producible

Doc Count	Findings	Order for Case File #F6749
152	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
154	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
155	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
159	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
164	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege. Key is that individual not shown as a party in the 2017 Exhibited Index is identified in Additional Information: identifiable lawyer in communication with employees of the Public Body and the nature of that communication.	Properly withheld as privileged
167	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege. Key is that one individual not shown as a party in the 2017 Exhibited Index is identified along with the professional roles for the named parties to the communication and the nature of that communication.	Properly withheld as privileged
168	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
169	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
170	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged

Doc Count	Findings	Order for Case File #F6749
172	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
173	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
175	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
176	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
177	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
178	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
179	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
180	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
181	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
187	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged

Doc Count	Findings	Order for Case File #F6749
188	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
189	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
190	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
194	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
195	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
196	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
[Note: Findings for Doc Counts 201-203 and 205 discussed <i>supra</i> under para. 12.1.E.]		
204	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
[Note: Doc Count 205 discussed <i>supra</i> under para. 12.1.E.]		
206	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
208	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged

Doc Count	Findings	Order for Case File #F6749
209	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege because this Doc Count has been linked sufficiently to Doc Count 208, for which the Public Body has met its burden.	Properly withheld as privileged
210	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege because this Doc Count has been linked sufficiently to Doc Count 208, for which the Public Body has met its burden.	Properly withheld as privileged
211	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege because this Doc Count has been linked sufficiently to Doc Count 208, for which the Public Body has met its burden.	Properly withheld as privileged
212	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege because this Doc Count has been linked sufficiently to Doc Count 208, for which the Public Body has met its burden.	Properly withheld as privileged
213	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege because this Doc Count has been linked sufficiently to Doc Count 208, for which the Public Body has met its burden.	Properly withheld as privileged
214	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
215	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
216	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege because this Doc Count has been linked sufficiently to Doc Count 215, for which the Public Body has met its burden.	Properly withheld as privileged

Doc Count	Findings	Order for Case File #F6749
217	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege because this Doc Count has been linked sufficiently to Doc Count 215, for which the Public Body has met its burden.	Properly withheld as privileged
218	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege because this Doc Count has been linked sufficiently to Doc Count 215, for which the Public Body has met its burden.	Properly withheld as privileged
219	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege because this Doc Count has been linked sufficiently to Doc Count 215, for which the Public Body has met its burden.	Properly withheld as privileged
220	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege because this Doc Count has been linked sufficiently to Doc Count 215, for which the Public Body has met its burden.	Properly withheld as privileged
221	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
223	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
224	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege because this Doc Count has been linked sufficiently to Doc Count 223, for which the Public Body has met its burden.	Properly withheld as privileged
225	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege because this Doc Count has been linked sufficiently to Doc Count 223, for which the Public Body has met its burden.	Properly withheld as privileged

Doc Count	Findings	Order for Case File #F6749
226	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege because this Doc Count has been linked sufficiently to Doc Count 215, for which the Public Body has met its burden.	Properly withheld as privileged
227	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege because this Doc Count has been linked sufficiently to Doc Count 215, for which the Public Body has met its burden.	Properly withheld as privileged
228	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege because this Doc Count has been linked sufficiently to Doc Count 215, for which the Public Body has met its burden.	Properly withheld as privileged
229	Additional information provided by the Public Body to correct its error claiming of privilege on the basis of s. 27(1).	Producible
[Note: Findings for Doc Counts 230-232 discussed <i>supra</i> under para. 12.1.E. No reliance on s. 27(1).]		
234	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
237	The 2017 Exhibited Index had information redacted. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege. Key is that individual not shown as a party in the 2017 Exhibited Index is identified in the Additional Information: known to be in-house legal counsel in communication with another employee of the Public Body and the nature of that communication.	Properly withheld as privileged
238	The 2017 Exhibited Index had information redacted. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged

Doc Count	Findings	Order for Case File #F6749
239	The 2017 Exhibited Index had information redacted. Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
241	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
255	No Additional Information provided by the Public Body to meet its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege. I find, however, that it is probable that this Record at Issue, which is described as " <i>Retainer and Contingency Fee Agreement</i> ", will contain some information that is protected by legal privilege and, therefore, must be redacted prior to the Public Body providing access to the Applicant of the remaining information not protected by legal privilege.	Producible [possible redactions]
260	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege. Key is that individual not shown as a party in the 2017 Exhibited Index is identified in the Additional Information: known to be in-house legal counsel in communication with another employee of the Public Body and the nature of that communication.	Properly withheld as privileged
262	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
263	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged

[para 44] Next I turn to Case File #F6748:

Findings for 2018 Interim Decision Records at Issue by Doc Counts at para. 12.2.B

Doc Count	Findings	Order for Case File #F6748
2	Additional information provided by the Public Body to correct its error by replacing its claim of legal privilege on the basis of s. 27(1) and reliance on s. 24(1) with s. 29 as the Public Body now claims the Record at Issue is publicly available.	Producible
3	Additional information provided by the Public Body to correct its error by replacing its claim of legal privilege on the basis of s. 27(1) and reliance on s. 24(1) with s. 29 as the Public Body now claims the Record at Issue is publicly available.	Producible
10	No Additional Information provided by the Public Body to meet its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege. I find, however, that it is probable that this Record at Issue, which is described as <i>"Retainer and Contingency Fee Agreement"</i> , will contain some information that is protected by legal privilege and, therefore, must be redacted prior to the Public Body providing access to the Applicant of the remaining information not protected by legal privilege.	Producible [possible redactions]
11	Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege.	Properly withheld as privileged
13	No Additional Information provided by the Public Body to meet its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege. I find, however, that it is probable that this Record at Issue, which is described as <i>"Retainer and Contingency Fee Agreement"</i> , will contain some information that is protected by legal privilege and, therefore, must be redacted prior to the Public Body providing access to the Applicant of the remaining information not protected by legal privilege.	Producible [possible redactions]
15	No Additional Information provided by the Public Body to meet its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege. I find, however, that it is probable that this Record at Issue, which is described as <i>"Retainer and Contingency Fee Agreement"</i> , will contain some information that is protected by legal privilege and, therefore, must be redacted prior to the Public Body providing access to the Applicant of the remaining information not protected by legal privilege.	Producible [possible redactions]

Doc Count	Findings	Order for Case File #F6748
16	No Additional Information provided by the Public Body to meet its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege. I find, however, that it is probable that this Record at Issue, which is described as “ <i>Retainer and Contingency Fee Agreement</i> ”, will contain some information that is protected by legal privilege and, therefore, must be redacted prior to the Public Body providing access to the Applicant of the remaining information not protected by legal privilege.	Producible [possible redactions]

[para 45] The challenges in making a determination about whether exceptions apply to specific Records at Issue in the absence of having those records available to review are self-evident. For those Records at Issue where the Public Body has met its burden, I have made an Order that the Record has been “*Properly withheld as privileged.*” For some of the Records at Issue where the Public Body has failed to meet its burden because it did not provide any “*Additional Information*”, I have made an Order that the Record is “*Producible.*” But for some of the subject Records at Issue where the Public Body has not met its burden of proof, I have made an Order that the Record is “*Producible [possible redactions].*” This is for two reasons: first, the Order for the applicable Records at Issue is “*Producible [possible redactions]*” because the evidence was not sufficiently clear, convincing and cogent for the Public Body to meet its burden of proof for legal privilege, which had it done so, would have meant an Order confirming the Public Body’s decision to withhold the Records at Issue in their entirety. The insufficiency of the evidence has been measured, in part, because the sparse evidence submitted is unsworn and thus given less weight than had it been submitted with a supporting Affidavit of Records; second, to avoid an ill-advised decision to order the Public Body to give access to the Applicant of potentially legally privileged information that may be contained within a Record at Issue [Refer to *Alberta (Municipal Affairs) v. Alberta (Information and Privacy Commissioner)*, 2019 ABQB 436]. Instead, when it complies with the Orders *infra*, the Public Body will reconsider its decisions and provide access in part, appropriately redacting any information protected by legal privilege, in accordance with s. 72(2)(b) of the *FOIP Act*, while at the same time maximizing the information to which it provides access to the Applicant in accordance with s. 2(a) of the *FOIP Act*.

[para 46] In this Inquiry, I have considered all of the evidence and authorities submitted by the Public Body and the Applicant. This is a stand-alone Inquiry, which I have adjudicated, under the terms of my delegation from the OIPC Commissioner, in order to decide all questions of fact (reasonableness) and law (correctness) arising in this Inquiry, and, thereafter, to make the two Orders *infra*. The scope of the adjudication is based on the Applicant’s two access to information requests, the specific responsive Records at Issue identified by the Public Body in the 2018 Revised Indexes (and other indexes submitted over the course of the Inquiry) and the issues arising therefrom. No submissions or evidence from any other inquiries regarding other access to information requests related to a similar subject matter have been taken into account, as to do so would, in my opinion, be inappropriate.

VI. ORDERS

[para 47] I make the following Orders, one for each Case File, pursuant to s. 72 of the *FOIP Act*, which reads, in part, as follows:

72(1) On completing an inquiry under section 69, the Commissioner must dispose of the issues by making an order under this section.

(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:

(a) require the head to give the applicant access to all or part of the record, if the Commissioner determines that the head is not authorized or required to refuse access;

(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access;

(c) require the head to refuse access to all or part of the record, if the Commissioner determines that the head is required to refuse access.

...
(4) The Commissioner may specify any terms or conditions in an order made under this section.

1. ORDER FOR CASE FILE #F6749 RECORDS AT ISSUE

[para 48] For the Records at Issue where I have made a Finding that the *“Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege”*, pursuant to s. 72(2)(b) of the *FOIP Act*, I confirm the decision of the Public Body to refuse the Applicant access to the Records at Issue described as *“Properly withheld as privileged”* in the Table at para. 43 *supra*.

[para 49] For the Records at Issue where I have made a Finding that *“No Additional Information provided by the Public Body to meet its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege”*, I order the Public Body to give the Applicant access to the Records at Issue listed in the Table at para. 43 *supra*, pursuant to s. 72(2)(a) of the *FOIP Act*, described as *“Producible”*, in their entirety, or, in accordance with s. 72(2)(b) of the *FOIP Act*, described as *“Producible [possible redactions]”*, in part.

[para 50] I further order the Public Body to notify me and the Applicant, in writing, within 50 days of being given a copy of the Order for Case File #F6749, that it has complied with it.

2. ORDER FOR CASE FILE #F6748 RECORDS AT ISSUE

[para 51] For the Records at Issue where I have made a Finding that the *“Additional Information provided by the Public Body means it has met its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege”*, pursuant to s. 72(2)(b) of the *FOIP Act*, I confirm the decision of the Public Body to refuse the Applicant access to the Records at Issue described as *“Properly withheld as privileged”* in the Table at para. 44 *supra*.

[para 52] For the Records at Issue where I have made a Finding that *“No Additional Information provided by the Public Body to meet its burden of proof to establish it has properly relied on s. 27(1) with respect to its claim of legal privilege”*, I order the Public Body to give the Applicant access to the Records at Issue listed in the Table at para. 44 *supra*, pursuant to s. 72(2)(a) of the *FOIP Act*, described as *“Producible”*, in their entirety, or, in accordance with s. 72(2)(b) of the *FOIP Act*, described as *“Producible [possible redactions]”*, in part.

[para 53] I further order the Public Body to notify me and the Applicant, in writing, within 50 days of being given a copy of the Order for Case File #F6748, that it has complied with it.

S. Dulcie McCallum, LL.B.
External Adjudicator