ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2021-24

June 24, 2021

JUSTICE AND SOLICITOR GENERAL

Case File Number 006547

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Summary: An individual made an access request to Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records relating to the capture of wild horses under section 9 of the *Stray Animals Act*.

The Public Body located responsive records but withheld them in their entirety, citing section 27(1)(a).

The Applicant requested a review of the Public Body's response, including its application of section 27(1)(a), its search for responsive records, and the content of the Public Body's response to the Applicant.

The Adjudicator determined that the Public Body met its duty to assist the Applicant under section 10, but did not provide sufficient detail about the responsive records in its response to the Applicant to meet its obligation under section 12(1)(c)(i).

The Adjudicator also upheld the Public Body's claim of solicitor-client privilege under section 27(1)(a).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 27, 71, 72, *Stray Animals Act*, R.S.A. 2000, c.S-20, s. 9, *Government Organization Act*, R.S.A. 2000, c. G-10, *Wildlife Act*, R.S.A. 2000, c.W-10, s. 7, Horse

Capture Regulation, Alta Reg. 59/1994, ss. 3, 5, Designation and Transfer of Responsibility Regulation, Alta Reg. 44/2019

Authorities Cited: AB: Orders 96-022, 97-003, 97-006, 2001-016, F2007-007, F2007-014, F2007-029, F2008-028, F2009-001, F2009-009, F2010-007, F2010-013, F2010-026, F2010-029, F2010-036, F2012-08, F2012-13, F2016-20, F2017-29, F2020-13, F2021-02, F2021-12

Cases Cited: *Canada v. Solosky*, [1980] 1 S.C.R. 821, *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), *University of Alberta v. Alberta (Information and Privacy Commissioner), 2010 ABQB 89*

I. BACKGROUND

[para 1] An individual made an access request dated May 24, 2017, to Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for:

> 1. Any record that, with respect to any horse that is a horse referred to in s. 9(2) of the *Stray Animals Act*, specifies who, at the point a license is, or is contemplated to be, issued under the authority granted in s. 9(2) of the *Stray Animals Act* and any related regulation, has a property interest to any degree in any such horse;
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> 2. Any record that specifies the authority that the Minister has, or may have, to dispose of the property in any horse that is captured pursuant to a license issued under the provisions of s. 9(2) of the *Stray Animals Act*, or any related regulation, and any record that identifies the instrument the Minister may use to effect any such disposition;
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> 3. With respect to the document attached, headed "Memorandum of Understanding', any record respecting the authority in the Minister to enter into the disposition arrangement contained in Item 1 of that document. In particular, to grant the Wild Horses of Alberta Society authority to dispose of any horse referred to in that document and in Item 2 of that document to grant the Wild Horses of Alberta Society authority to both enter onto those lands administered under the Public Lands Act and to administer the drug PZP-immuno-contraception vaccine to any such horse; and
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> 4. Any record that considers s. 9(7) of the *Stray Animals Act* in respect to the authority of the Minister to enter into the attached "Memorandum of Understanding".

[para 2] The Public Body located 32 pages of responsive records, withholding all in their entirety under section 27(1)(a).

[para 3] The Applicant requested a review of the Public Body's response, including its application of section 27(1)(a), as well as its search for responsive records and the content of the Public Body's response to the Applicant. The Commissioner authorized an

investigation to settle the matter. This did not resolve the issues between the parties and the Commissioner agreed to conduct an inquiry.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of the 32 pages of records that have not been provided to the Applicant.

III. ISSUES

[para 5] The issues for this inquiry were set out in the Notice of Inquiry, dated October 17, 2019 as follows:

1. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

2. Did the Public Body comply with section 12(1) of the Act (contents of response)?

3. Did the Public Body properly apply section 27(1)(a) (privileged information) to the information in the records?

IV. DISCUSSION OF ISSUES

1. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

[para 6] As stated in the Notice of Inquiry, this issue addresses the adequacy of the Public Body's search for responsive records.

[para 7] A public body's obligation to respond to an applicant's access request is set out in section 10, which states in part:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 8] A public body's duty to assist an applicant under section 10(1) of the Act includes the obligation to conduct an adequate search (Order 2001-016 at para. 13; Order F2007-029 at para. 50). The Public Body has the burden of proving that it conducted an adequate search (Order 97-003 at para. 25; Order F2007-007 at para. 17). An adequate search has two components in that every reasonable effort must be made to search for the actual records requested, and the applicant must be informed in a timely fashion about what has been done to search for the requested records (Order 96-022 at para. 14; Order 2001-016 at para. 13; Order F2007-029 at para. 50).

[para 9] The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the applicant (see Order 97-006, at para. 7).

Did the Public Body conduct an adequate search for records?

[para 10] In Order F2007-029, the former Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

> In general, evidence as to the adequacy of a search should cover the following points:
>
> - The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> - The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> - The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> - Who did the search
> - Why the Public Body believes no more responsive records exist than what has been found or produced (at para. 66)

[para 11] In their initial submission, the Applicant provides an explanation for their access request, and the records they expected to be responsive. They argue that the Government does not seem to have any property rights in wild horses; its states that this is in contrast to the Government's stated property rights in other wild animals as set out in the *Wildlife Act*, R.S.A. 2000, c.W-10, at section 7. Section 9 of the *Stray Animals Act*, R.S.A. 2000, c.S-20 grants authority to the responsible Minister to grant a licence to persons to capture wild horses on designated public land. It states:

> *9(1) The Minister responsible for the administration of the Public Lands Act may designate public land for which a licence under this section may be issued if, in the opinion of the Minister, it is necessary to protect, maintain or conserve the range, forage, soil, reforestation, wildlife habitat or other resource or for the safety of the public or of horses or as provided for in the regulations.*
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> *(2) The Minister responsible for the administration of the Public Lands Act may, in accordance with the regulations, issue licences that authorize the licence holder to capture horses on public land designated under subsection (1) and to confine, transport and dispose of those horses.*
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> *(3) The Minister may*
>
> *(a) prescribe how many horses may be captured pursuant to the licence, and*
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> *(b) include any other terms and conditions in the licence that the Minister considers appropriate.*

> *(4) A person who holds a licence under this Act shall comply with the terms and conditions of the licence and the person may capture, confine, transport and dispose of a horse captured on public land only in accordance with the licence and the regulations.*
>
> *(5) The Minister may delegate the Minister's powers and duties under this section to an inspector or a forest officer appointed under the Forests Act.*
>
> *(6) Notwithstanding subsection (7), a person who owns a horse or who is the agent of a person who owns a horse does not require a licence to capture, confine or transport that horse on public land.*
>
> *(7) If land is designated under subsection (1), no person shall capture, confine or transport a horse on that land unless the person holds a licence that authorizes the capturing, confinement or transportation of the horse.*

[para 12] The Applicant also points to the Horse Capture Regulation, which states that a licence "does not determine ownership of a horse" (at section 5(8)). However, captured horses have been sold by the Government at auction. The Applicant argues that "[t]he combination of the government's apparent lack of property interest in the wild horses coupled with its ostensible transfer of property rights at best obtained by others presents an incongruity" (initial submission, at para. 18).

[para 13] The Applicant states that the other two items in their access request relate to a Memorandum of Understanding (MOU) between the responsible Minister and the Wild Horses of Alberta Society (WHOAS) that sets out WHOAS' authority to capture wild horses for an adoption project and contraception project.

[para 14] The Applicant questions the responsible Minister's authority to enter into the MOU with WHOAS, as the Horse Capture Regulation states that a licence to capture wild horses may be granted only to adult individuals (section 3(a) of that Regulation). The Applicant believes that the responsible Minister would have communicated with the Public Body with respect to granting licences to an organization; two items of their access request relate to such communications.

[para 15] The Applicant states that their request would include communications with a number of other third parties, such as other licencees and persons involved in public horse auctions, as well as the Feral Horse Advisory Committee established by the Government. The Applicant believes that records relating to property rights in wild horses, and records relating to granting a licence to WHOAS for the adoption and contraception programs, would likely have been shared with this Committee.

[para 16] In its initial submission, the Public Body states that it is not the department responsible for the *Stray Animals Act*; the Designation and Transfer of Responsibility Regulation under the *Government Organization Act*, R.S.A. 2000, c. G-10 sets out department responsibilities for the administration of statutes. That Regulation currently designates the Minister of Agriculture and Forestry as the responsible Minister.

[para 17] The Public Body states that any interaction it would have with respect to that Act would be limited to Public Body lawyers providing advice to the responsible

department as a client. As such, any responsive records would be located within its Legal Services Division.

[para 18] The Public Body states that it provided the Applicant's request to the FOIP contact for that Division, verbatim. The Public Body further states (initial submission at paras. 9-13):

> JSG FOIP contacts are subject matter experts within their area, very familiar with the operation of their work units and record keeping systems and are best suited to initiate a records search within their program area. They are knowledgeable of the various formats which constitute a record (hard copy, electronic, transitory, etc) and of locations where records may-exist. They are responsible for circulating the records request to all relevant areas and contacts and advise the JSG FOIP Office of any other program areas identified within the Ministry which may hold responsive records.
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> Upon receiving a request, the FOIP contact for Legal Services Division conducts multiple word searches on the topic of the request. The director is typically consulted on the search to ensure all legal teams which may hold responsive records are identified. For the Applicant's request, the search included the Agriculture & Forestry and Environment teams. The request is then circulated to the relevant teams and staff to search all physical and electronic locations such as electronic files and all email folders.
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> As the Division responsible to provide legal advice to the departments and responsible for the identified legislation and activities under that legislation, the Legal Services Division of the Public Body provided records to the JSG FOIP Office in response to the search request. These records were determined to be subject to solicitor-client privilege.
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> Upon providing records, Legal Services Division did not identify any other areas within the Public Body which may hold responsive records.
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> For the reasons outlined above, the Public Body believes no more responsive records exist other than those located in the initial search.

[para 19] In their rebuttal submission, the Applicant refers to the general description of the responsive records provided by the Public Body in its initial submission (reproduced in the discussion of issue 3, below). The descriptions include references to developing a formal document, advising on an inquiry by a member of the public, developing a response to the public, and notations made on documents. The Applicant raises the possibility that there are final versions of the referenced documents, and that the final versions would not be protected by privilege. In response, the Public Body states that no other documents were located; it also reiterates that the only responsive records it would have would be in connection with legal advice provided by the Public Body to the client department.

[para 20] I accept the Public Body's explanation regarding the scope of its search. I also accept its response to the Applicant's question about final versions of documents. The client department requested legal advice from the Public Body in its development of certain documents; the Public Body was not ultimately responsible for the final version of

the documents. Presumably the final version would be in the custody of the client department (Agriculture and Forestry).

[para 21] The Applicant had also raised the possibility that third parties, such as WHOAS, other licencees, persons involved with auctions, and/or the Feral Horse Advisory Committee would be involved in communications with the Public Body. However, as the Public Body has pointed out, it is not responsible for the *Stray Animals Act*. It was also the Minister of another department who signed the MOU, and is responsible for licences and otherwise regulating the capture of wild horses. There is no reason to expect that this Public Body would have custody of records containing discussions with licencees, administrators of auctions, or the Committee.

[para 22] I find that the Public Body conducted an adequate search for records.

Did the Public Body inform the Applicant in a timely fashion about what has been done to search for the requested records?

[para 23] In their initial submission, the Applicant cites Order F2017-29 (at paras 12-13), which states that the duty to assist includes a duty to inform the applicant of the steps taken by the public body to conduct an adequate search (citing Order F2009-009). The Applicant states that the Public Body did not provide it with any information about the search it conducted. They argue that the Public Body failed to meet its duty to assist the Applicant because it did not provide this information in its response to the Applicant.

[para 24] The Public Body disagrees that section 10 requires it to inform the applicant of the search conducted in every case. It states (initial submission at paras. 15-16):

> The Alberta Court of Appeal has established that as long as the Public Body has put forth a good faith interpretation of its duties and has utilized reasonable efforts then section 10(1) has been complied with. [(2016 ABCA 110 at paragraphs 37, 40)]
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> The Applicant argues that the Public Body's failure to provide the Applicant with information regarding the search it conducted to locate records is a failure to meet its obligations under section 10 of the Act. The Public Body disagrees with this position and maintains that fulfilling duties under section 10 of the Act does not necessarily encompass providing details to an applicant of steps taken regarding a records search. The Public Body submits that by conducting an adequate, good faith, search for responsive records as described and by advising the applicant of the outcome of that search, along with reasons for withholding the pages, the Public Body has complied with its duty to assist the applicant in accordance with section 10(1) of the Act.

[para 25] As stated earlier, an adequate search has two components: the reasonable effort to search for the requested records, and informing the applicant in a timely fashion what has been done to search for the requested records. This latter component has also been referred to as the "informational component".

[para 26] Regarding *Edmonton (City) v Alberta (Information and Privacy Commissioner), 2016 ABCA 110*, cited by the Public Body above, the Court was

discussing whether a public body has failed to meet its duty to assist an applicant by virtue of making an error in its application of the Act (in that case, the public body mischaracterized an access request as a request for general information rather than a request for personal information). The Court found that when a public body responds to an applicant with an incorrect interpretation of the Act, the duty to assist may still be fulfilled if the error was made in good faith. In other words, the Court did not find that a public body needn't provide applicants with information about the search or responsive records; the Court found that providing inaccurate or erroneous information when providing an applicant with information about the search or responsive records is not necessarily a breach of the duty to assist if done in good faith.

[para 27] The informational component of a public body's duty to conduct an adequate search for records was discussed more directly in *University of Alberta v. Alberta (Information and Privacy Commissioner), 2010 ABQB 89*. The Court found (at paras. 41-45):

> The University argues that it provided a full, complete and accurate response, and that it was unreasonable to find that it failed in the information component of the duty to assist. In particular, the University says that the Adjudicator unreasonably required it to explain why it believes no further responsive records exist and failed to describe the steps it took to identify the location of responsive records.
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> The University's submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, ***Lethbridge Regional Police Commission,*** F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):
>
> > In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps taken to identify and locate all records and possible repositories of them, and **why the Public Body believes that no more responsive records exist than what has been found or produced**.
> >
> > (Emphasis added)
>
> Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University's rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords would not lead to responsive records, its reasons for concluding that no more responsive records existed.
>
> The University argues that the Adjudicator's reasoning is circular because she unreasonably expanded the search by ignoring the proper scope of the Request and the University's reasonable steps to ascertain the likely location of records, and then asks the University to explain why it did not search further. That argument is itself circular, presupposing that the University's search parameters were reasonable.

> In my view, the Adjudicator's conclusion that the University either expand its search or explain why such a search would not produce responsive records was reasonable in the circumstances and based on the evidence.

[para 28] The Order cited in this decision, Order F2009-001, concludes (at para. 26):

> While it may not be necessary in every case for a public body to give an applicant all of the foregoing information in order to meet its obligation of telling the applicant what was done to search for responsive records, a public body should provide greater detail about the search that it conducted when the applicant, as here, specifically asked it for a confirmation of whether particular records did or did not exist.

[para 29] More recently, the Director of Adjudication said in Order F2020-13 (at para. 79):

> In some earlier orders of this office, the Adjudicator held that the fact a very thorough search had been conducted and records were not found was itself an adequate explanation for the belief that no further records exist. While I agree with the logic of this in the appropriate case, in circumstances such as the present, where the Applicant is able to demonstrate with certainty for some of the records she describes that the public body was once in possession of them, or that this is reasonably likely, I believe the duty under section 10 includes giving an explanation as to what happened to them or likely happened to them that would account for their no longer being in the public body's possession

[para 30] In this case, the Public Body's response to the Applicant included how many pages were responsive to their request, the reason for withholding the records, and the relevant provision from the FOIP Act (section 27). The Public Body also provided the contact number for a FOIP Advisor if the Applicant had further questions. As far as I am aware, the Applicant did not contact the Public Body for clarification of its response.

[para 31] As stated in previous Orders, a public body is not required to explain its search for records in every case. An explanation may be required where a public body has failed to locate a particular record that an applicant has provided reasons to expect it exists. In this case, the Applicant explained their rationale for making the access request, which provided context for the records they expected to receive. However, the correspondence between the Applicant and Public Body also indicates that the Applicant was aware that the Public Body does not have responsibility for the *Stray Animals Act*, and therefore would not have custody or control over all records relating to that Act.

[para 32] In my view, the Public Body's response to the Applicant was sufficient to meet its duty to assist the Applicant. In contrast to previous Orders where an additional explanation was required, there is no obvious gap between the Applicant's request and the Public Body's response that begs for additional explanation. Had the Applicant asked follow-up questions about the response, the Public Body would have had a duty to respond as best it could; however, there is no indication the Applicant did so.

[para 33] Lastly, the Applicant also points out that the Public Body initially failed to search for responsive records at all; rather, it informed the Applicant by letter dated June 6, 2017 as follows:

> As I mentioned in our telephone conversation this morning, our office has determined that the records you seek are not in the custody or under the control of JSG. I discussed this request with Environment and Parks on June 5, 2017 and the FOIP Advisor there indicated that they have a similar request from you and would incorporate the information being requested of JSG into your access request with Environment and Parks. Therefore, your access request of JSG is being closed and your cheque # 1770 in the amount of $25 is being returned to you.

[para 34] On July 25, 2017, the Public Body responded to the Applicant again, informing them of the records located and reason for withholding them.

[para 35] The Public Body's first response, that it did not have custody or control over any responsive records was clearly in error, as records were later located. In my view, this is the type of "good faith" error the Court of Appeal was referring to in *Edmonton (City) v Alberta (Information and Privacy Commissioner)*, cited above. The Public Body seems to have believed the Applicant made their access request to the wrong public body; it contacted the public body responsible for the *Stray Animals Act* to transfer the request there. It informed the Applicant of this fact in a timely manner. That the Public Body was initially wrong in its conclusion regarding the Applicant's request does not mean that it failed in its duty to assist the Applicant.

[para 36] I find that the Public Body met its duty to assist the Applicant.

2. Did the Public Body comply with section 12(1) of the Act (contents of response)?

[para 37] With respect to this issue, the Notice of Inquiry states:

> Although the Applicant framed her concerns about the Public Body's failure to identify the specific types of records and the specific type or types of privilege it was applying under section 27(1)(a) in its initial response as a failure to comply with section 10, previous Orders of this office have found that the duty to assist under section 10 does not encompass other more specific duties under the Act including those found within section 12 (see Order F2007-013 at para 29). Instead, complaints regarding a failure to provide reasons for withholding records, beyond naming the section numbers relied on, have been identified as possible compliance issues with section 12(1)(c)(i) (see Order F2004-026 at para 13).
>
> Accordingly, these concerns have been framed as an issue with respect to compliance with section 12(1) of the Act. As these concerns specifically deal with section 12(1)(c)(i), I would ask the parties to provide submissions on whether the Public Body's response complied with this particular section.

[para 38] Section 12 of the FOIP Act sets out a Public Body's obligations as to what a response under the Act must contain. It states, in part:

12(1) In a response under section 11, the applicant must be told

(a) whether access to the record or part of it is granted or refused,

(b) if access to the record or part of it is granted, where, when and how access will be given, and

(c) if access to the record or to part of it is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.

[para 39] In its request for review, the Applicant states:

> Section 27(1)(a) gives a public body the discretion to refuse to disclose information that is subject to any type of legal privilege. However, there are several types of legal privilege, including: solicitor-client privilege; litigation privilege; common interest privilege; parliamentary privilege; police informer privilege; case-by-case privilege for private records and for Crown records; settlement negotiation privilege; and statutory privilege. The letter from [the Public Body] does not identify the specific types of records, nor the specific type of privilege claimed.
>
> Section 27 is an exception to disclosure of information that allows a public body to withhold information, however, it should not be used as a smoke screen to allow for non-disclosure. In order for the FOIP Act to operate as intended, the public body should identify the types of documents, or at the very least, the type of privilege being claimed.
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> We are submitting the enclosed Request for Review in order for the OIPC to review the 32 pages responsive to our request and identify whether or not Section 27(1)(a) applies, and if so, what specific privilege is being relied upon.
>
> Section 10(1) of the FOIP Act provides that the head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely. It is our opinion that Alberta Justice and Solicitor General has failed in its duty to assist as the response was vague and incomplete.

[para 40] In Order F2016-20, the adjudicator considered what section 12 requires a public body to tell an applicant when it is withholding information under section 17 of the Act (disclosure harmful to personal privacy). She found (at para. 9):

> In Order F2004-026, former Commissioner Work decided that section 12 does not require detailed reasons for refusing access in addition to the provision on which a public body has relied in every case. He said:

> The Applicant says that naming a section number is not enough and that a reason or explanation must also be given.
>
> I do not accept this complaint. In my view, the language of section 12 does not imply that a reason must in every case be given *in addition to* the naming (or quoting or summarizing) of a particular statutory exception. There are some circumstances in which both parts of the requirement in subsection (i) can be fulfilled by naming the section number (or describing the provision). While in some circumstances more in the way of an explanation may be called for, in others there would be nothing more that could usefully be said by way of providing a reason than what the provision creating the exception says. I accept that this was so in this case.
>
> However, I do read into section12(1)(c)(i) the requirement that in a response, responsive records that are being withheld be described or classified insofar as this is possible without revealing information that is to be or may be excepted, and that the reasons be tied to particular records so described or classified.

[para 41] In Order F2010-026, the adjudicator found (at para. 67):

> On the other hand, I find that the Public Body did not provide sufficient reasons under section 12(1)(c)(i) for its refusal to disclose information in reliance on section 20(3)(a). The Public Body cited section 20(3)(a) in the package of redacted records provided to the Applicant, but its letter of March 16, 2009 to the Applicant provided no information whatsoever regarding its reasons for applying that section. While the Public Body's letter made reference to the content of section 20(1)(d), it made no reference to anything in relation to section 20(3)(a). It is not sufficient for a public body to merely cite a section of the Act in the package of records provided to an applicant, and expect the applicant to infer the reasons for withholding information by reading the particular section. In addition to indicating the provision being applied, section 12(1)(c)(i) requires a public body to give reasons for its refusal to grant access, which reasons mean at least some form of substantive explanation.

[para 42] In Order F2010-029, the adjudicator found (at paras. 25-28):

> As for conveying its reasons for refusing access and the provision of the Act on which the refusal was based, the Public Body cites Order F2008-028 (at para. 274), which in turn cited one of the paragraphs of Order F2004-026 reproduced above, for the proposition that the language of section 12 does not imply that a reason for withholding the information must be provided in addition to the naming of a particular statutory exception. However, those Orders also noted that there may be situations in which more of an explanation is called for. In my view, a public body's decision to apply section 16(1) of the Act is one such situation.
>
> Under section 16(1), there are a variety of types of information contemplated, and a variety of potential consequences that require a public body to withhold information that would reveal it. Therefore, to meet the requirements of section 12(1)(c)(i), a public body should give some detail about the way in which section 16(1) applies in the circumstances of the case. Unless it would reveal the information being withheld, a public body should generally give an indication of the nature of the business information

> that it believes would be revealed on disclosure of records to the applicant, for instance in reference to the general categories set out in section 16(1)(a) (i.e., trade secrets, commercial information, financial information, labour relations information, scientific information and/or technical information). It should also indicate the harm or consequence under section 16(1)(c) that it believes would arise on disclosure of the information being requested (i.e., whether disclosure could reasonably be expected to harm significantly the competitive position of a third party, interfere significantly with the negotiating position of a third party, result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied, result in undue financial loss to a person or organization, result in undue financial gain to a person or organization, and/or reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute).
>
> In order to provide proper reasons under section 12(1)(c)(i), insofar as the application of section 16(1) is concerned, a public body may choose to cite or incorporate the language of specific sub-paragraphs of section 16(1) – that is, sub-paragraphs 16(1)(a)(i), 16(1)(a)(ii), 16(1)(c)(i), 16(1)(c)(ii), 16(1)(c)(iii) and/or 16(1)(c)(iv). Alternatively, it may provide its own wording that adequately explains its application of section 16(1). A public body is free to determine the specific content of its reasons for refusing access, provided that the reasons provide a minimum level of detail, in one form or another, as to how or why it applied section 16(1).
>
> Here, the Public Body's response of May 14, 2009 did not adequately provide its reasons under section 12(1)(c)(i), as it merely referred to and reproduced the whole of section 16(1). However, the Public Body's response of June 1, 2009 provided adequate reasons, as the response indicated the specific sub-paragraphs that the Public Body was applying as well as provided additional detail about the reasons for its decision, such as the fact that section 16(1) sets out a mandatory exception to disclosure, the applicable test for non-disclosure, and the fact that the Public Body consulted with the Affected Party and considered its response (implying that the Affected Party objected to disclosure).

[para 43] The Public Body argues that it provided the Applicant with sufficient detail to meet its obligation under section 12, by providing the number of pages withheld and citing section 27(1)(a) as the relevant provision. It cites Order F2008-028, which states (at para. 274):

> Generally speaking, the language of section 12 does not imply that a reason for withholding the information must be provided *in addition to* the naming of a particular statutory exception (Order F2004-026 at para. 98). While there may be situations in which more explanation may be called for, I would not find, in this inquiry, that the Public Body was required to more fully explain why it applied section 27 to the information that it withheld under that section.

[para 44] From the past Orders of this Office, I conclude that section 12(1)(c)(i) sometimes requires an explanation of the reasons for withholding information, in addition to citing the relevant provision, depending on the circumstances.

[para 45] I acknowledge that in Order F2008-028 the adjudicator found it was sufficient to merely cite section 27 without providing additional explanation for applying

that provision. However, I find the more recent Orders discussing when additional explanation is required, to be more persuasive. Specifically, I find the discussion in Order F2010-029, regarding the scope of an exception and the varied type of information to which the exception can be applied, to be helpful.

[para 46] Some exceptions apply to very specific circumstances, such that citing the exception alone is sufficient. For example, section 19(1) states:

> 19(1) The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body when the information is provided, explicitly or implicitly, in confidence.

[para 47] In other cases, citing a specific subsection may be necessary to provide an applicant with detail about why it is being applied. For example, section 24(1) applies to "advice from officials" broadly, but citing the subsections would provide additional detail: section 24(1)(a) applies to "advice, proposals, recommendations, analyses or policy options"; section 24(1)(b) applies to "consultations and deliberations" between the listed persons; section 24(1)(c) applies to "positions, plans, procedures, criterial or instructions" given in the stated circumstances, etc. Where a public body applies section 24(1), citing the specific subsection would permit an applicant to understand the type of information being withheld.

[para 48] Order F2010-029, quoted above, points out that section 16 applies to a broad range of "business" information, and that citing the specific subsections or describing which applies to the information at issue, may be necessary in order to fulfil the obligation in section 12(1)(c)(i). These comments regarding the varied types of information encompassed by that provision can also be made about a claim of privilege, absent other contextual hints. As the Applicant has pointed out, there are many different types of privilege that could be claimed and there is no indication in the Public Body's response to the Applicant which privilege it was claiming.

[para 49] Section 27(1)(a) applies to any legal privilege, which is a fairly broad category. Some privileges, such as litigation privilege, have an end. In that case, it may be helpful for an applicant to know that litigation privilege was being applied, such that they may argue, if such is the case, that the litigation has ended, or seek that information at a later date, when all related litigation has ended.

[para 50] In some cases, it may be clear from the access request, and/or other records that may have been provided to an applicant, which privilege a public body is claiming. In such a case, an additional explanation may not be required.

[para 51] In other cases, providing additional detail may reveal the content of the records or other information the public body is permitted to withhold under the Act. In such cases, the public bodies are limited in the explanation they can provide under section 12(1)(c)(i).

[para 52] Neither of these factors apply here. In this case, it was not clear what privilege was being claimed, whether several privileges were being claimed, etc. It was not until the Applicant requested a review by this Office that they learned the Public Body was claiming solicitor-client privilege, as the records relate to advice from the Public Body to the public body responsible for the *Stray Animals Act*. Given the function of the Public Body, it may have been obvious to it which privilege was relevant; however, it was not obvious to the Applicant.

[para 53] Further, the Public Body cited the applicable privilege and provided additional information about the claim of privilege in its exchanged submission. Therefore, I conclude that the Public Body did have a concern about revealing the content of the records in its explanation.

[para 54] I find that in order to meet its obligations stated in section 12(1)(c)(i) – to provide reasons for withholding information from the Applicant – the Public Body ought to have cited which privilege it was claiming in its response to the Applicant. Absent this explanation, the Public Body's response did not provide sufficient reasons as to why it was withholding the information. As the Public Body has provided these reasons in its submissions, I do not need to order it to respond again to the Applicant.

[para 55] The Applicant also argues that the Public Body should have provided still more detail in its response. It states (initial submission, at paras. 46-51):

> As to the number of records being withheld, the Public Body has failed to provide the Applicant that information, saying only that it has located 32 pages. The obligation is not to identify the number of pages, but the number of records.
>
> As to a description or classification without revealing potentially excepted information, the Public Body has also failed to provide that to the Applicant. For instance, the Public Body has not told the Applicant: what type of record each of the 32 pages is; the dates of those records; if the records are correspondence or were attached to correspondence, to and from whom they were sent; or which categories in the Request the records relate to.
>
> Those dual failures compound the Public Body's contravention of section 12(1)(c)(i) in preventing the Applicant from assessing the basis for withholding the 32 pages.
>
> If, for instance, the Public Body has excerpted 32 pages from 32 different records, it is reasonable to expect the Applicant would have grounds to contest the Public Body's withholding the balance of those 32 records.
>
> If the 32 pages are extracted from a single record, the Public Body's decision to identify only those as responsive to the Request, and to withhold them, would raise concern about the responsiveness of the balance of the record.
>
> The Public Body has blocked any proper discussion of the matter by its inadequate response.

[para 56] Regarding the number of pages versus the number of responsive records, former Commissioner Work discussed this distinction in Order F2010-013. He said (at paras. 26, emphasis added):

> Section 12 requires a public body to provide the following (see Order F2004-026):
>
> > (i) A description of the responsive records - The public body must describe or classify the responsive records without revealing information that is to be or may be excepted. At a minimum, a public body should disclose the number of "records", or in other words the number of documents, withheld and the number of pages within each document.
> >
> > (ii) The statutory exception applied - A public body must provide the statutory exception for withholding the pages of records and tie those exceptions to the particular records. However, a public body does not, in every case, have to provide reasons in addition to a statutory exception. There are circumstances in which section 12(c)(i) may be fulfilled by naming the section number or describing the provision, as nothing more could be said without revealing information that may be excepted.

[para 57] In Order F2012-13, the adjudicator noted that the duty to inform an applicant how many records are responsive to the request may be subject to whether disclosing the number of records would reveal information the Public Body is permitted to withhold (at para. 15).

[para 58] I agree with former Commissioner Work in Order F2010-013; the Applicant has also raised valid reasons for finding that page numbers alone are not sufficient in this case. The Public Body should also have informed the Applicant how many *records* were responsive to the request. There are 32 pages of records; it would not have been onerous for the Public Body to also provide the number of responsive records. The Public Body's affidavit of records, provided with its initial submission, show nine separate records were responsive to the Applicant's request. All appear to have been withheld in their entirety.

[para 59] As the Public Body's affidavit of records includes this information, the Public Body clearly did not have concerns about whether disclosing this information would reveal the contents of the records. And since the Applicant has now been provided with this information, I do not have to order it to respond to the Applicant again.

[para 60] Finally, the Applicant has argued that the Public Body ought to have also provided the following information in its response to them (initial submission, at para. 47):

> … the dates of [the responsive] records; if the records are correspondence or were attached to correspondence, to and from whom they were sent; or which categories in the Request the records relate to.

[para 61] In my view, this level of detail, while helpful to an applicant, is more than what is contemplated by the phrase "reasons for the refusal and the provision of this Act

on which the refusal is based" under section 12(1)(c)(i). The Public Body needn't provide this detail in order to meet its obligations under this provision. Further, in some cases, some of the requested information could be subject to privilege.

Conclusions regarding section 12(1)(c)

[para 62] I find that the Public Body did not provide sufficient detail in its response to the Applicant to satisfy its obligations under section 12(1)(c). The Public Body ought to have identified which privilege it was claiming under section 27(1)(a), as well as the number of records it located as responsive. In this case, doing so would not have been unduly onerous and would not have revealed the content of the records or other information the Public Body is authorized to withhold.

[para 63] As this information has been provided to the Applicant in the course of this inquiry, I do not need to order the Public Body to provide a new response to the Applicant.

3. Did the Public Body properly apply section 27(1)(a) (privileged information) to the information in the records?

[para 64] The Public Body applied section 27(1)(a) to all of the responsive records in their entirety, citing solicitor-client privilege. It did not provide a copy of these records for this inquiry.

[para 65] Section 27 of the Act states:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
>
> *(b) information prepared by or for*
>
> *(i) the Minister of Justice and Solicitor General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services, or*
>
> *(c) information in correspondence between*
>
> *(i) the Minister of Justice and Solicitor General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer.*

[para 66] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821. The Court said:

> … privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[para 67] The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 68] Section 71(1) of the Act states:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 69] Therefore, the burden of proof lies with the Public Body to prove that section 27(1)(a) of the Act applies to the records at issue.

[para 70] Where a public body elects not to provide a copy of the records over which solicitor-client or litigation privilege is claimed, the public body must provide sufficient information about the records, in compliance with the civil standards set out in the *Rules of Court* (Alta Reg 124/2010, ss. 5.6-5.8). These standards were clarified in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*). *ShawCor* states that a party claiming privilege must, for each record, state the particular privilege claimed and provide a brief description that indicates how the record fits within that privilege (at para. 36 of *ShawCor*).

[para 71] The role of this Office in reviewing claim of privilege was discussed in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*), at paras. 77-112. In Order F2021-12, the adjudicator summarized the Court's conclusion as follows (at para. 210):

> My understanding, then, in light of *EPS*, *ShawCor*, and rule 5.8, is that I am to consider whether the description of a record enables me to recognize that the elements of solicitor-client privilege set out in *Solosky* are present. At that point, the Public Body will have satisfied the *ShawCor* standard and established a rebuttable presumption that the records are subject to solicitor-client privilege. Absent evidence to rebut the presumption, I must find that the records were properly withheld under section 27(1)(a). Where the standard is not met, in the absence of other evidence that would establish that the records are subject to solicitor-client privilege, I must find that the records were not properly withheld under section 27(1)(a).

[para 72] I agree with this summary.

[para 73] In this case, the Public Body provided an affidavit and a schedule of records with its initial submission. The Public Body notes that the schedule includes:

- the type of record;
- the number of pages in each record;
- the relevant dates for each record; and
- the correspondents involved.

[para 74] In its initial submission and its affidavit, the Public Body provides descriptions of each of the nine records responsive to the Applicant's request.

[para 75] The first record is described as consisting of email correspondence and an attachment, between the program area and their legal counsel in the Public Body, seeking legal advice concerning the development of a formal document.

[para 76] The second record is described as an email and attached letter from a Public Body lawyer to a legal assistant with the Public Body, created in the course of providing advice to the client department.

[para 77] The third record is described as counsel's notations on a letter. The schedule to the affidavit indicates that this record was not provided to anyone else.

[para 78] The fourth record is described as an email from the client department to a Public Body lawyer seeking legal advice regarding formulating a response to the public.

[para 79] The fifth record is described as communication from a Public Body lawyer to the client department containing legal advice in the form of notations and recommendations on a document.

[para 80] The sixth record is described as emails between a Public Body lawyer and client department seeking and giving legal advice.

[para 81] The seventh record is described as pages of legislation with comments, provided by a Public Body lawyer to the client department in the course of providing legal advice.

[para 82] The eighth record is described in the Public Body's submission as communication from a Public Body lawyer to the client department, containing legal advice in the way of recommendations and revisions on a document. It is further described in the affidavit as a draft advice document provided to the Deputy Minister of the client department.

[para 83] The ninth record is described as a duplicate of the fourth record.

[para 84] The Public Body's affidavit states that in each case, the Public Body lawyers were acting in their capacity as counsel for the client department, and the advice was provided in a legal capacity (as opposed to a business, policy, or other non-legal capacity). It further states that the records were shared only with Government of Alberta employees who required them to perform their employment responsibilities.

[para 85] With respect to some of the records, the schedule to the affidavit states that the records include an express statement of confidentiality. With respect to other records, the affidavit states that confidentiality is implied. The Public Body has also provided the dates of the correspondence, as well as the names of the correspondents. Where the Public Body has argued that the confidentiality of the record is implied, it has provided sufficient information, such as with whom the record was shared, to support this claim for each record.

[para 86] The Applicant has not provided any reason to question the information provided in the Public Body's submission and affidavit. In their rebuttal submission, the Applicant agrees that the affidavit seems to demonstrate proper application of section 27(1)(a).

[para 87] The evidence provided by the Public Body meets the requirements set out in *ShawCor* and is consistent with the test for finding solicitor-client privilege applies. I find that the Public Body has established its claim of privilege.

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

[para 88] Section 27(1) is a discretionary exception to access, which means that after determining that the information at issue falls within the exception, the public body must then determine whether the information should nevertheless be disclosed.

[para 89] With respect to the exercise of discretion under section 27(1)(a), withholding information that is subject to solicitor-client privilege is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036). The adjudicator in Order F2012-08 stated (citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII)):

> the public interest in maintaining solicitor-client privilege is such that it is unnecessary to balance the public interests in withholding records subject to this privilege and those in relation to disclosing them, as the public interest in withholding such records will always outweigh the interests associated with disclosing them.

[para 90] The adjudicator previously assigned to hear this inquiry asked the Public Body to provide additional arguments regarding its exercise of discretion (letter dated September 1, 2020). She said:

> At paragraph 115 of *Edmonton Police Service v. Alberta (Information and Privacy Commissioner),* 2020 ABQB 10, Justice Renke stated:

> [115] In my opinion, the determination that records are covered by solicitor-client privilege is itself sufficient warrant for not disclosing the records. No further reasons for refusing disclosure need be provided by a public body, at least in the absence of compelling public interest. No such compelling public interest was detected by the Adjudicator in any of the IPC Orders.

I note that in the cover letter dated May 24, 2017 to the Applicant's access request of the same date, the Applicant stated:

> The information currently available to the public regarding Alberta's free-roaming horses does not allow for full and educated understanding of the government's dealings, decisions, policies and the evidence and basis supporting the actions taken.
>
> The disclosure of the requested information to me is in the public interest as it is likely to contribute significantly to public understanding of the operations or activities of the government with regard to Alberta's free-roaming horses and why the government believes it necessary to manage the horses.

In light of Justice Renke's comments above, given that the Applicant advised the Public Body that it was the Applicant's view that disclosure of the information was in the public interest as it was likely to contribute significantly to public understanding of the operations or activities of the government with regard to Alberta's free-roaming horses and why the government believes it necessary to manage the horses, I would ask the Public Body to inform me whether and how it considered the Applicant's public interest argument in exercising its discretion whether to withhold or release the Records under section 27(1)(a).

[para 91] The Public Body responded to this letter on December 14, 2020. With respect to the *EPS* decision cited by the adjudicator in her letter, the Public Body cites additional discussion found in that decision (at para. 116):

> The Chief Justice and Justice Abella wrote as follows in *Ontario Public Safety and Security* at paras 43, 53-54, and 75:
>
> > [43] In our view, it is not established that the absence of a s. 23 review for public interest significantly impairs the CLA's access to documents it would otherwise have had. Law enforcement privilege and solicitor-client privilege already take public interest considerations into account and, moreover, confer a discretion to disclose the information on the Minister. For the reasons that follow, we conclude that the public interest override contained in s. 23 would add little to what is already provided for in ss. 14 and 19 of the Act ….
> >
> > [53] The same analysis applies, perhaps even more strongly, to the exemption for documents protected by solicitor-client privilege. Section 19 of the Act provides that a head "may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation". The purpose of this exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the

> confidentiality of the solicitor-client relationship …. The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions ….
>
> [54] Given the near-absolute nature of solicitor-client privilege, it is difficult to see how the s. 23 public interest override could ever operate to require disclosure of a protected document. This is particularly so given that the use of the word "may" would permit and, if relevant, require the head to consider the overwhelming public interest in disclosure. Once again, the public interest override in s. 23 would add little to the decision-making process.

At para 75:

> [75] 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 added]

[para 92] The Public Body argues that specific considerations of public interest are irrelevant, citing *EPS* at para. 232:

> The second two additional questions go to the discretionary nature of the s. 27(1)(a) exception. In Justice Hall's view, "[t]he asserter of privilege is not required to consider the public interest, or the purpose of FOIPP when making a claim of privilege:" *ibid.* I agree. I found above that sufficient warrant for non-disclosure of solicitor-client privileged material is that it is so privileged. Further, again as discussed above, given that *FOIPPA* is not merely access to information legislation, it should be interpreted and applied in a way that recognizes the independent importance of an expressly incorporated doctrine such as solicitor-client privilege.

[para 93] The Applicant did not provide any additional arguments on this point.

[para 94] In Order F2021-02, the Adjudicator considered an applicant's arguments that there was a public interest in the disclosure of a legal opinion provided to a public body. She reviewed the *EPS* decision, above, as well as the more recent *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 207, and past Orders of this Office. All have consistently held that once it has been established that solicitor-client privilege applies, it is not necessary to further assess the exercise of discretion by the public body.

[para 95] It might be argued that the Court's statement in *EPS*, that "[n]o further reasons for refusing disclosure need be provided by a public body, at least in the absence of compelling public interest" (at para. 115, my emphasis), and the Supreme Court of

Canada's statement in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (cited in the excerpt of the *EPS* decision, above), that "the use of the word 'may' would permit and, if relevant, require the head to consider the overwhelming public interest in disclosure" (at para. 54 of *Ontario Public Safety and Security*, my emphasis) indicate a possibility that a compelling or overwhelming public interest in disclosure could override the near-absolute nature of solicitor-client privilege. If so, that would be a very high standard to meet. The public interest argument set out in the Applicant's initial submission – that the information would contribute to the public understanding of government actions and activities with respect to wild horses – does not meet such a standard.

[para 96] I find that the Public Body's exercise of discretion to withhold the information subject to that privilege is presumed to be appropriate without the need to inquire further into whether the Public Body considered the Applicant's arguments regarding public interest.

V. ORDER

[para 97] I make this Order under section 72 of the Act.

[para 98] I find that the Public Body met its duty to assist the Applicant under section 10.

[para 99] I find that the Public Body did not provide sufficient detail about the responsive records in its response to the Applicant to meet its obligation under section 12(1)(c)(i). As the appropriate detail has been provided to the Applicant in the course of this inquiry, the Public Body needn't provide a new response to the Applicant.

[para 100] I find that the Public Body properly applied section 27(1)(a) to the records at issue.

_____

Amanda Swanek
Adjudicator