ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-43

December 10, 2024

JUSTICE

Case File Number 026254

Office URL: www.oipc.ab.ca

Summary: An Applicant made an access request to Alberta Justice and Solicitor General (now Justice, the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for records relating to the process for obtaining McNeil disclosures from the Edmonton Police Service. The Public Body responded by providing some information to the Applicant but withholding most of the information in the responsive records under sections 17(1), 20(1), 21(1), 24(1), 25(1), and 27(1).

The Applicant requested an inquiry regarding the Public Body's application of sections 17(1), 20(1), 24(1), 25(1), and 27(1), as well as the Public Body's characterization of some information as non-responsive.

The Adjudicator determined that some of the information withheld as non-responsive is responsive to the Applicant's request.

The Adjudicator upheld the Public Body's application of section 17(1). The Applicant was no longer interested in the information withheld under sections 20(1) and 25(1); as such, the Adjudicator did not consider those exceptions.

The Adjudicator found that sections 24(1) and 27(1)(b) and (c) applied to much of the information withheld under those provisions, but not all. The Adjudicator ordered the Public Body to provide additional information to the Applicant. The Adjudicator also ordered the Public Body to re-exercise its discretion to apply these exceptions.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 20, 24, 25, 27, 71, 72.

Authorities Cited: AB: Orders 96-012 2001-013, F2003-002, F2004-026, F2007-013, F2008-028, F2009-025, F2010-002, F2010-031, F2010-036, F2013-13, F2013-53, F2014-D-01, F2014-23, F2014-25, F2015-29, F2017-57, F2018-75, F2019-07, F2020-23, F2021-12, OIPC External Adjudication Order #4

Cases Cited: *Alberta Energy v. Alberta (Information and Privacy Commissioner)*, 2024 ABKB 198, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 *R v. Campbell,* [1999] 1 SCR 565, *R v. McKee*, 2023 ABKB 698

I. BACKGROUND

[para 1] An Applicant made a request to Alberta Justice and Solicitor General (now Justice, the Public Body) dated April 29, 2014, under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for:

> Copies of all records as defined by s. 1(q) of FOIPPA in relation to obtaining *McNeil* disclosure from the Edmonton Police Service and disclosing that to the defence. By '*McNeil* disclosure' I refer to the Supreme Court of Canada decision of R. v McNeil, 2009 SCC 3. This will include all records from the date that the decision was rendered by the Supreme Court of Canada (January 16, 2009) to the present.
>
> Time period: January 16, 2009 to April 29, 2014

[para 2] The Public Body located 465 pages of responsive records. It responded to the Applicant in a letter dated March 4, 2022, releasing one page of records stating further records were withheld under sections 17(1), 20(1), 21(1), 24(1), 25(1) and 27(1). The Applicant requested a review of the Public Body's response.

[para 3] During the course of the review and this inquiry, the Public Body amended its application of exceptions several times, and its communication of which exceptions were being applied was confused or inaccurate at times.

[para 4] At the outset of the review, the Public Body informed the Senior Information and Privacy Manager (the Manager) conducting the review that it was no longer relying on section 27(1) to withhold information in the records. As the Public Body had applied several exceptions to the information in many or most pages, the Public Body did not provide additional information to the Applicant, even though it had withdrawn its application of section 27(1).

[para 5] The Manager reviewed the remaining exceptions applied by the Public Body, as well as the time taken by the Public Body to respond to the Applicant.

[para 6] Subsequent to the review, the Public Body reprocessed the records at issue and provided a new response to the Applicant, dated July 14, 2023. With this response, the Public Body provided 51 pages of records. In its new response, the Public Body informed the Applicant that information was withheld under sections 17(1), 20(1), 24(1), 25(1) and 27(1). The Public Body did not identify which subsections were applied.

[para 7] Following this, the Applicant requested an inquiry, requesting a review of the Public Body's application of sections 20(1), 21(1), 24(1), and 25(1), as well as its characterization of some information as non-responsive.

[para 8] As the Public Body had made new decisions since the time the 465 pages of records at issue had been provided to the Manager, the Commissioner requested a new copy of the records at issue from the Public Body, for the inquiry. On January 16, 2024, the Public Body responded, providing 135 pages of responsive records, as well as an affidavit in support of a claim of solicitor-client privilege. Schedule 1 attached to the affidavit provided a description of records "that the Public Body objects to producing on the ground of solicitor-client privilege." I understand that the Public Body's intent was to not provide the 330 pages of records over which solicitor-client privilege was being claimed, for the inquiry.

[para 9] By letter dated January 31, 2024, I informed the Public Body that I had already reviewed the 465 pages of unredacted records provided for the mediation process, in order to make a determination on the issues for this inquiry. As I had already seen the content of the records, I informed the Public Body that I could not now rely solely on an affidavit of records in support of the Public Body's new claim of solicitor-client privilege when I have knowledge of the content of the records. I informed the Public Body that in order to properly adjudicate the issues for this inquiry, I would rely on the unredacted records at issue that had previously been provided to this office and used in in the mediation process, as well as the new copy of the 135 pages provided by the Public Body in January 2024, which showed the Public Body's new decisions regarding access. I also clarified that this did not mean that the Public Body had waived any privilege that may attach to the information in the records at issue.

[para 10] By letter dated February 28, 2024 sent to the Public Body and the Applicant, I noted that the issues raised in the Applicant's request for inquiry did not match the exceptions applied by the Public Body. I asked the Public Body to confirm what exceptions it was applying to the records at issue.

[para 11] In its March 13, 2024 response, the Public Body stated that it was no longer applying section 27(1)(a) to withhold information. It also stated that the records at issue in this inquiry are the same as those provided for the mediation process. Therefore, a new copy of records is not required.

[para 12] This response did not answer all of the questions in my February letter, and so by letter dated March 14, 2024, I asked the Public Body to clearly confirm all of the

exceptions it is applying to withhold information in the records at issue. In response, the Public Body confirmed that it continues to apply sections 17(1), 20(1), 24(1) and 25(1) to withhold information in the responsive records; it also confirmed that it continues to withhold information as non-responsive (email dated March 14, 2024). By email dated March 26, 2024, the Applicant confirmed that it is seeking an inquiry into all of the reasons the Public Body has withheld information in the records.

[para 13] On June 4, 2024, two days before its initial submission deadline, the Public Body informed the Registrar of Inquiries by email that while the Notice of Inquiry states that the Public Body is no longer relying on section 27(1)(a) to withhold information in the records, the Public Body was still applying sections 27(1)(b) and (c) to information in the records. The Public Body did not copy this correspondence to the Applicant.

[para 14] By letter dated June 5, 2024, I informed the Public Body that it had not previously advised me or the Applicant that it was applying sections 27(1)(b) or (c) to information in the records at issue. I said:

> I cannot locate correspondence in which the Public Body has advised me or the Applicant that it has applied sections 27(1)(b) or (c). I have reviewed the 465 pages of records previously provided by the Public Body for the review, and cannot locate any indication in those pages that the Public Body applied section 27(1)(b) or (c). Presumably this is because the Public Body had withdrawn its application of section 27(1) by that point, as it had told the Manager conducting the review.
>
> The Public Body has had several opportunities to clarify its decisions regarding the Applicant's access request, and several opportunities to inform me (and the Applicant) that it is relying on sections 27(1)(b) and/or (c) to withhold information in the records, prior to the issuance of the Notice of Inquiry.
>
> If the Public Body wants to *now* rely on sections 27(1)(b) and/or (c) to withhold information in the records at issue, <u>it is to include in its initial submission an explanation as to why I should permit it to raise these discretionary exceptions at this point in the process</u>. It may be helpful for the Public Body to review past Orders that have discussed the late-raising of exceptions (see for example, Orders F2008-032, F2020-23, F2021-12). The Applicant may address this question in its rebuttal submission.

[para 15] I will discuss my reasons for permitting the Public Body to raise the application of sections 27(1)(b) and (c) in the section of this Order discussing those provisions.

[para 16] Prior to receiving the Public Body's rebuttal submission, I noted inconsistencies in the new copy of records at issue provided by the Public Body with its initial submission, as well as in the index of records provided with that submission. For example, I noted that the Public Body had included only 403 pages of records, as opposed to the 465 pages previously provided; the Public Body did not explain this discrepancy in its submission. I also noted that while the index of records continued to show 465 pages of records, there were several page numbers omitted from the Public Body's index of records (for example, pages 86, 87, 200-202, 259, 260, 277-279, 282-

284, 338-339, 350-52, 362-364, 366, 367, 370-371, 374, 379-380, 387, 394, 396, 399, 400, 403-405, 407, 413, 428-441, 445, 446, 448-451). I asked the Public Body to either provide the missing pages or clarify why those pages were missing, with its rebuttal submission.

[para 17] The Public Body provided a new copy of the records, and a new index of records (which I will refer to as the second index) that accounts for all 465 pages of records. I am relying on these most recent records at issue for this inquiry, as well as the Public Body's second index of records.

II. RECORDS AT ISSUE

[para 18] The records at issue consist of the 465 pages less duplicates, which the Applicant specifically omitted from the scope of his request.

III. ISSUES

[para 19] The issues as set out in the Notice of Inquiry, dated April 11, 2024, are as follows:

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

2. Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information to which the Public Body applied this provision?

3. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information/record(s)?

4. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information/record(s)?

5. Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information/record(s)?

[para 20] For the reasons given in the relevant discussion, I am allowing the Public Body to raise the application of sections 27(1)(b) and (c) late. Therefore, the following issue is added:

6. Did the Public Body properly apply sections 27(1)(b) and/or (c) of the Act (privileged information) to the information/records?

IV. DISCUSSION OF ISSUES

Preliminary issue – submissions lacking evidence

[para 21] As stated above, this inquiry addresses 465 pages of records, most of which were partially or entirely withheld. The Public Body's submissions were not lengthy, and primarily relied on general statements about the records.

[para 22] In *Alberta Energy v. Alberta (Information and Privacy Commissioner)*, 2024 ABKB 198, the Court clearly set out how public bodies must support each application of an exception to access. It said:

> [14] In exercising this Court's review of the decision of the OIPC Adjudicator, it is necessary to ground my analysis within the statutory regime in which the decision exists and the role that the Legislature delegated to this decision maker.
>
> [15] Where the Commissioner has directed an inquiry which relates to the decision of a public body to withhold a record, the public body bears the onus to prove the reasonableness of that decision. (s. 71)
>
> [16] This represents a clear direction from the Legislature that the public body's decision to withhold access must be justified and done based on evidence, not mere assertion. Section 2 of *FOIPP* clarifies that "any person [has] a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this *Act*."
>
> [17] Within this framework, a public body carries three discrete obligations when it refuses access to a record.
>
> [18] First, the public body's refusal to provide the record rebuts the presumption of access. Sections 2 and 71 speak to the Legislature's intention of access as the norm. This bears directly on a public body's onus to justify any withholding of relevant records.
>
> [19] Second, the public body must provide evidence to ground their denial. While the OIPC has adopted informal and flexible rules of evidence, that doesn't detract from the public body's obligation to ground its arguments in evidence.
>
> [20] Third, the public body must justify each denial on its own merits. No blanket privilege accompanies the statutory exceptions under *FOIPP*. Each decision to withhold specific information must be made individually. Where a public body chooses to apply a heavy hand to redacting records, it is required to justify these redactions line by line. One would hope that this would imbue an attitude of practicality and proportionality into the vetting process.

[para 23] While this decision was issued recently, the Court also noted that this standard is clearly set out in the inquiry procedures documents provided to parties to an inquiry. The Court quoted this section of this office's *Inquiry: Preparing Submissions* document:

> Parties may not succeed in an inquiry if they do not provide evidence to support their arguments. If the success of an argument depends on underlying facts, providing the argument alone is not sufficient. The underlying facts must be established by evidence.

> As well, evidence should not be provided in the form of unattributed assertions made in the context of an argument. If a fact is being put forward, it must be shown how this fact is known to be true (e.g., by way of a statement, preferably sworn, of someone who knows the fact, or by other objective evidence, such as documents).
>
> It is not sufficient to provide the Commissioner with records and leave it up to the Commissioner to try to draw from the records the facts on which the decisions will be based. The Commissioner requires that persons representing the public body, custodian or organization provide evidence speaking to the contents of the records, for example by explaining how each part of a record for which an exception to disclosure is claimed falls within the exception. If the explanation depends on certain facts being true, the public body, custodian or organization must provide evidence of these facts.

[para 24] In this case, the Public Body's submissions did not provide sufficient support for many of its claims, as I discuss below. I carefully reviewed the records at issue, to determine whether information in the records supported or verified the Public Body's claims. In many cases, I was able to locate support; however, in some instances I was unable to locate any supporting information and in other cases I located information that contradicted the Public Body's claims. As indicated in the inquiry procedures document cited above, the Public Body does not discharge its burden merely by providing the records at issue and assuming I can locate whatever information supports its position.

[para 25] In order to make informed decisions with respect to the application of exceptions when responding to an applicant's access request, the Public Body presumably takes steps to verify the particular facts that need to be present in order to apply specific exceptions. For example, sections 27(1)(b) and (c) apply only to information prepared by or in correspondence involving specific employees or agents of a public body. Before applying those exceptions, the Public Body would have to confirm that the individuals who prepared documents or were involved in correspondence were one of the specified employees or agents; however, in its submission, the Public Body did not provide me with any information in this regard, that would enable me to confirm the application of these exceptions.

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

[para 26] As stated in Order F2009-025, 'non-responsive' is not an exception to access set out in the Act. In Order F2018-75 I discussed how public bodies should properly characterize information as non-responsive. I said (at paras. 55-58):

> Separate items of information in a record cannot be viewed out of context of the record as a whole when determining if they are separate and distinct from the remaining record…
>
> Information must be considered in the context of the record as a whole, in determining whether it is separate and distinct from the remainder of the record. In the case of a personal information request like the Applicant's, in order to withhold portions of a record as non-responsive, the Public Body must consider whether that portion contains

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

[para 27] In its rebuttal submission, the Applicant states that it is unable to provide submissions on this issue, presumably as the Applicant is unaware of the type of information the Public Body has characterized as non-responsive.

[para 28] In its initial submission, the Public Body states that it characterized information on page 10 as non-responsive as the information "references other duties of the GOA employee not associated with this request."

[para 29] Page 10 is comprised of three emails in a chain. In the second email, a Public Body employee discusses a topic generally related to McNeil disclosures. In the last sentence of this email, the employee notes that they are unavailable to discuss the matter due to other work priorities, until a later specified time. It is this last sentence that the Public Body has identified as non-responsive.

[para 30] I agree with the Public Body's characterization of this information as relating to other work duties of the Public Body employee, which do not appear to be related to the Applicant's access request. However, I disagree that the information is separate and distinct such that it can be characterized as non-responsive. I note that a similar comment made by a different Public Body employee in the third email on this page was not characterized by the Public Body as non-responsive.

[para 31] I find that the information identified as non-responsive in page 10 is responsive to the Applicant's request.

[para 32] The Public Body states that information on pages 240[1], 241, 276, 369, 395, 402 and 412 is non-responsive as this information is duplicated elsewhere in the records and the Applicant had asked that duplicate records be omitted. The Public Body's index of records also includes pages 20, 311 and 398 containing non-responsive information.

[para 33] The information in page 20 withheld as non-responsive consists of comments of a personal nature, or otherwise not related to the remaining content of the email. I accept that this information is not responsive.

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[1] The Public Body's submission identifies page 244 as being non-responsive; however, the index of records and the records themselves indicate this is a typo and the correct page number is 240.

[para 34] Most of pages 276, 277-278, 369, 370-371, 395, 396, 398, 399, 400, 403, 404, and 405 were identified as non-responsive; the most recent copy of the records indicates that these pages are a duplicate of pages 267-269, 360-361, 391-392, 395 and 385-386, 391-393 respectively. I can confirm that this is the case; as the Applicant is not interested in duplicates, these pages are not responsive.

[para 35] The bottom portion of page 412 was identified as non-responsive, as a duplicate of page 370. The email at the bottom of page 412 is not duplicated on page 370 but is duplicated on page 411. Therefore, as the Applicant is not interested in duplicates, this page is not responsive.

[para 36] Most of page 402 was identified as non-responsive for the reason that it is a duplicate of page 357. However, in the most recent copy of the records at issue, the content of page 402 is different from the content of page 357. Further, I cannot locate any other page where the content of page 402 is duplicated. Therefore, I cannot agree that it is non-responsive for the reason that it is a duplicate email. As the content of this email is clearly responsive, I will order the Public Body to include this information in its new response to the Applicant.

[para 37] The Public Body has identified an email starting on page 240 and ending on page 241 as not responsive, but not on the basis that it is a duplicate. The Public Body has not explained why it does not consider this email to be responsive to the request, as it clearly relates to the same subject matter as the rest of the records. Possibly the Public Body has characterized this email as non-responsive because it is sent to the Public Body by an employee of a police service other than the Edmonton Police Service, which was identified in the Applicant's access request. However, the Applicant did not expressly exclude any records to correspondence involving other police services. The email on page 240-241 discusses matters that clearly fall within the scope of the Applicant's request regardless of who sent the email. Therefore, I find that it is responsive to the request and will order the Public Body to include this information in its new response to the Applicant.

[para 38] Nothing in the records or the Public Body's submission indicates why the Public Body identified information on page 311 as non-responsive. The Public Body's second index indicates that the information "does not relate to scope." Similar to the email on pages 240-241, this email relates to a police service other than the Edmonton Police Service; however, it also discusses matters that fall within the scope. For the same reasons as above, I find that it is responsive to the request and will order the Public Body to include this information in its new response to the Applicant.

2. **Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records withheld by the Public Body in response to the first part of the request?**

[para 39] With respect to this issue, the Notice of Inquiry states:

Under section 71(2) of the Act, the Applicant bears the burden of showing that disclosing personal information to which section 17(1) applies would not be an unreasonable invasion of a third party's personal privacy.

[para 40] The Public Body applied section 17(1) to information of third party individuals in the records at issue.

[para 41] If a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 42] Section 1(n) defines personal information under the Act:

1 In this Act,

...

(n) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone number,

(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual's age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else's opinions about the individual, and

(ix) the individual's personal views or opinions, except if they are about someone else;

[para 43] While the Applicant has the burden of proving that it would not be an unreasonable invasion of privacy to disclose personal information to which section 17(1) applies, the Public Body has the burden of establishing that the information withheld under section 17(1) is personal information to which that provision can apply (Order F2010-002, at para. 9).

[para 44] Past Orders of this Office state that the disclosure of the names, contact information and other information about public body employees, that relates only to the employees acting in their professional capacities is not an unreasonable invasion of

personal privacy under section 17(1) (see Orders 2001-013 at paras. 89-90, F2003-002 at para. 62, F2008-028 at para. 53) unless that information has a personal dimension in the circumstances.

[para 45] In other words, in the absence of a personal dimension, such information cannot be withheld under section 17(1).

[para 46] Past Orders of this office have also found there to be a personal dimension to information about an employee's work duties where it appears in the context of allegations of wrongdoing (e.g. investigations into the conduct, disciplinary proceedings, etc.). In Order F2010-031 the Adjudicator stated (at para. 53):

> Information about an individual's performance of work duties may be personal information in a context where it is suggested or alleged that the individual has acted improperly or wrongfully (Order F2008-020, para. 28).

See also Orders F2004-026, F2013-53, F2014-23.

[para 47] In this case, the information withheld under section 17(1) consists of personal details of Public Body employees (such as reasons for work absences), as well as details about the accused and investigating officer involved in the incident that led to the *McNeil* decision. All of the information to which section 17(1) has been applied appears to have a personal dimension such that section 17(1) can apply.

[para 48] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld. In Order F2019-07 the adjudicator described how section 17(1) operates as follows (at paras. 22-23):

> Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant (such as the Applicant in this case) under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.
>
> When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 49] In its rebuttal submission, the Applicant states only that it is "not interested in obtaining irrelevant personal information." The Applicant has not provided any indication of what it believes to be "irrelevant personal information."

[para 50] In any event, as stated in the Notice of Inquiry, the Applicant bears the burden of showing that it would not be an unreasonable invasion of privacy to disclose the personal information of third parties in the records at issue. The Applicant has provided no arguments on this point.

[para 51] The Public Body has argued that section 17(4)(d) applies to some of the personal information in the records at issue. Having reviewed the records, I find that section 17(4)(g) also applies to all of the personal information withheld under section 17(1). These sections state:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *...*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> *...*
>
> *(d) the personal information relates to employment or educational history,*
>
> *...*
>
> *(g) the personal information consists of the third party's name when*
>
> *(i) it appears with other personal information about the third party, or*
>
> *(ii) the disclosure of the name itself would reveal personal information about the third party,*

[para 52] As at least one presumption against disclosure applies, and the Applicant has not raised any arguments that weigh in favour of disclosure, I will uphold the Public Body's application of section 17(1) to the personal information of third parties in the records.

3. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information/record(s)?

[para 53] In its initial submission, the Public Body states that it applied section 20(1) to phone numbers of Government of Alberta employees, that are not otherwise public, on pages 7, 8, 10, 11, 195, 240, 321, 358, 365, 368, 377, 382, 401, 411, and 464.

[para 54] The Public Body's index of records indicates that section 20(1) was also applied to pages 3, 4, 83, 85, 97, 177, 179, 186, 196-197, 211, 217-218, 252, 244, 247, 248, 249, 252, 263, 265, 269, 294, 296, 310, 332, 353-355, 360, 365, 372-373, 390, 391, 409, 415, 417, 423, 425, 447, 452, 456-457, and 459-460. In many cases, the severing notations on the records themselves indicate that section 20(1) was applied to the page in its entirety. However, the Public Body's submissions do not indicate that this exception

was applied to any information other than employee phone numbers. As the pages listed above all contain employee phone numbers, and the Public Body has stated only that it applied this exception to phone numbers, I conclude that wherever section 20(1) is noted in the records it is intended to apply only to employee phone numbers.

[para 55] In its rebuttal submission, the Applicant states that it has no interest in the information withheld under section 20(1). Therefore, I will not consider the Public Body's application of that exception.

4. **Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information/record(s)?**

[para 56] The Public Body applied section 24(1)(a) and (b) to information in many of the records at issue.

[para 57] Sections 24(1)(a) and (b) state:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body*
>
> *(ii) a member of the Executive Council, or*
>
> *(iii) the staff of a member of the Executive Council,*
>
> ...

[para 58] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it refused to disclose under section 24.

[para 59] The test for sections 24(1)(a) and (b), as stated in past Orders, is that the advice, recommendations etc. (section 24(1)(a)) and/or the consultations and deliberations (section 24(1)(b)) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be created for the benefit of someone who can take or implement the action (see Order F2013-13).

[para 60] In Order F2015-29, the Director of Adjudication interpreted sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said (at paras. 33-34):

> The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. So long as the information described in section 24(1)(a) is developed by a public body, or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a).
>
> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 61] Sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held on a particular topic (and not the *substance* of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

[para 62] Bare recitation of facts or summaries of information also cannot be withheld under sections 24(1)(a) or (b) unless the facts are interwoven with the advice, proposals, recommendations etc. such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48). As well, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at para. 31).

[para 63] The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (which I will refer to as "advice" (section 24(1)(a)); and consultations or deliberations between specified individuals (section 24(1)(b)).

[para 64] The records at issue all relate to the interpretation and application of the *McNeil* decision. From my review of the records, I am satisfied that the people involved in the discussions are all in positions to provide advice, make recommendations, or be involved in consultations and deliberations, within the terms of section 24(1). I need only consider whether, in each case, the withheld information reveals advice, recommendations, consultations etc.

[para 65] In most cases, the Public Body applied section 24(1)(a) to specific information and section 24(1)(b) to different information, rather than applying them together. In some cases, one section was applied to particular sentences in a paragraph while the other provision was applied to other sentences. It may be the case that the

Public Body applied section 24(1)(a) to sentences that could be characterized as directive, while section 24(1)(b) was applied to references to discussions on the topic, although this does not appear to have been done consistently.

[para 66] In the particular context of these records, it is difficult to delineate what may be advice or recommendations under section 24(1)(a) as opposed to consultations or deliberations under section 24(1)(b). As these provisions can apply to similar types of information, and as the purpose and scope of these provisions are similar, I will consider in each case whether either section 24(1)(a) or (b) can apply.

[para 67] The Public Body states that it applied section 24(1) to pages 7, 8, 9, 10, 56-60, 195, 240, 245-246, 257-258, 303-305, 307-309, 312-313, 320, 322. With respect to section 24(1)(a) the Public Body states):

> Section 24(1)(a) was applied to briefing material/internal staff comments and in emails related to internal department process, and information that reveals analysis and recommendations. This information contains possible options of the type of information disclosed and how it should be disclosed.
>
> … If this type of information is released it may make the providing of advice less candid and comprehensive. For internal advice and Memoranda, the Alberta Crown Prosecution Service (ACPS) lawyers will be limited in their ability to provide legal analysis or provide legal services for colleagues or other individuals if this correspondence, which was intended to be internally facing, is disclosed.

[para 68] With respect to section 24(1)(b) the Public Body states that section 24(1)(b) was applied to "advice discussed and deliberated between GoA staff and other public bodies contained in the records."

[para 69] Pages 56-60 are comprised of handwritten meeting notes. It is clear from the content of these notes that they were created by one of the individuals involved in the discussions to which the emails relate. I agree that the notes reveal the substance of deliberations such that section 24(1)(b) applies.

[para 70] Pages 7-10, 195, 240-241, are comprised of email chains including Public Body lawyers discussing the interpretation and application of the *McNeil* decision. The Public Body has applied section 24(1) to specific information in these emails, rather than the pages in their entirety. I agree that the withheld information could reveal the substance of deliberations, such that section 24(1) applies, except the information on page 241, which consists only of a signature line. This latter information must be provided to the Applicant.

[para 71] Page 245 is a meeting invitation. It reveals the topic to be discussed, and the steps that will be taken in dealing with that topic. Only some of the information in the email on pages 245-246 reveals the substance of deliberations to take place. In my view, the information on page 245 reveals only the steps that have been determined will take place – this is akin to a direction being communicated to others. Section 24(1) does not

apply to that type of information. However, the information on page 246 reveals the substance of matters to be deliberated in the meeting. I find that section 24(1)(b) applies to the information on page 246 but not 245. I will order the Public Body to disclose the information on page 245 to the Applicant.

[para 72] Pages 257-258 consist of an email from a police service to a Public Body lawyer and others. The email sets out a current practice, as well as proposed changes to that practice. In my view, the proposed changes is information to which section 24(1) applies, as those proposals are being deliberated. However, the information about the current practices is essentially background facts, to which section 24(1) does not apply. The current practices do not indicate or reveal what proposals are being made to amend those practices. I find that section 24(1) does not apply to the first two paragraphs withheld on page 257, but does apply to the remainder of the email on that page and page 258. I will order the Public Body to disclose the first two paragraphs on page 257 to the Applicant.

[para 73] The withheld portions of pages 303-305 reveal the substance of deliberations, such that section 24(1) applies. The same can be said of the withheld portions of pages 307-308 except the first withheld sentence on page 307, which reveals only the identity of a person involved in the deliberations. I will order the Public Body to disclose this sentence to the Applicant.

[para 74] The information withheld on page 309 reveals only the topic of the matter being discussed, and some steps that have already been completed. Section 24(1) cannot apply to this information and I will order the Public Body to disclose it to the Applicant.

[para 75] The withheld portions of pages 312-313 reveal the substance of deliberations such that section 24(1) applies.

[para 76] The withheld portion of page 320 is a response to a request for specific information. The response does not reveal any advice or deliberations; it merely describes an existing situation or state of affairs. Page 322 is described in the Public Body's second index as a "McNeil Package Completion Report". It consists of a table; nothing in this page indicates that it contains or reveals advice or deliberations. Section 24(1) does not apply to the information on pages 320 or 322. I will order the Public Body to disclose this information to the Applicant.

[para 77] The Public Body states that it applied section 24(1)(a) to pages 105-111, 112-175, and 292-293. It states:

> This information is a draft information related to the McNeil Disclosure process. This information includes potential direction being presented. As this information was draft, section 24(1)(a) was applied. This information may have had multiple changes before the final versions were agreed upon.
>
> The public body determined that section 24(1(a) should be applied to the information to keep this information from disclosure in order to not hamper the policy making process.

Drafts may not reflect the final policy decision that was made.

[para 78] Pages 105-111 are clearly labeled as a draft document. From the records surrounding these pages, it is also clear that the draft is the subject of consultations. I agree that the drafts reveal the substance of advice or consultations such that section 24(1) applies.

[para 79] Page 112 contains two emails between a Public Body lawyer and another individual who appears to be a Public Body employee. The emails relate to work being undertaken by the Public Body in relation to the *McNeil* decision. Pages 113-175 consist of two draft documents that are attached to the email sent to the Public Body lawyer for comment.

[para 80] I agree that section 24(1)(b) applies to part of the second email in the chain that reveals the substance of the consultations; specifically, this paragraph reveals specific factors that are being considered. However, the first email on page 112 reveals only the topic of the matter and the person involved but does not reveal the substance of advice or deliberations. Similarly, the second paragraph (of two) in the second email also reveals the type of draft document that is attached for comment but not the substance of the document.

[para 81] With respect to the attached drafts at pages 113-175, I agree that section 24(1) applies.

[para 82] Pages 292-293 consist of a draft policy that is being circulated for discussion. I agree that section 24(1) applies.

[para 83] The Public Body's second index indicates that it has applied section 24(1) to pages 215-216 in their entirety, in addition to section 27(1). The records themselves reflect this, though the Public Body has not provided any submissions on the application of section 24(1) to these pages. For the reasons discussed in the relevant section of this order, I have found that section 27(1) does not apply; therefore, I will also consider the application of section 24(1).

[para 84] Pages 215-216 consist of a briefing note drafted by an employee of a police service, for a committee. From the content of this record, I accept that the author is in a position to be providing advice to this committee, and that the committee is in a position to make a decision. I accept that section 24(1)(a) applies to the information that would reveal the substance of advice contained in the record. However, that provision does not apply to most of the background facts laid out in the Background section, as this information sets out only facts and current states of affairs. That said, the last paragraph of the Background section sets out the recommendation being made; section 24(1) applies to this last paragraph.

[para 85] The first sentence of the Summary section on page 215 sets out only background facts identifying persons involved in past meetings on the topic. However, the remainder of the Summary section includes recommendations, to which section

24(1)(a) applies. The rest of the record is also comprised of recommendations and reasons for those recommendations, to which section 24(1)(a) applies. I will order the Public Body to provide the Applicant with the portions of pages 215-216 to which section 24(1) does not apply.

Exercise of discretion

[para 86] Section 24(1) is a discretionary exception to disclosure. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a Public Body's exercise of discretion.

[para 87] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to be relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

[para 88] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded (at para. 104):

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

[para 89] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII) (*EPS*), the Court provided detailed instructions for public bodies exercising discretion to withhold information under the Act. The Court said (at para. 416):

> What *Ontario Public Safety and Security* requires is the weighing of considerations "for and against disclosure, including the public interest in disclosure:" at para 46. The relevant interests supported by non-disclosure and disclosure must be identified, and the effects of the particular proposed disclosure must be assessed. Disclosure or non-disclosure may support, enhance, or promote some interests but not support, enhance, or promote other interests. Not only the "quantitative" effects of disclosure or non-disclosure need be assessed (how much good or ill would be caused) but the relative importance of interests should be assessed (significant promotion of a lesser interest may be outweighed by moderate promotion of a more important interest). There may be no issue of "harm" in the sense of damage caused by disclosure or non-disclosure, although disclosure or non-disclosure may have greater or lesser benefits. A reason for not

> disclosing, for example, would be that the benefit for an important interest would exceed any benefit for other interests. That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

[para 90] It further explained the weighing of factors at paragraph 419:

> …If disclosure would enhance or improve the public body's interests, there would be no reason not to disclose. If non-disclosure would benefit the public body's interests beyond any benefits of disclosure, the public body should not disclose. If disclosure would neither enhance nor degrade the public body's interests, given the "encouragement" of disclosure, disclosure should occur. Information should not be disclosed only if it would run counter to, or degrade, or impair, that is, if it would "harm" identified interests of the public body.

[para 91] Lastly, the Court described burden of showing that discretion was properly exercised (at para. 421):

> I accept that a public body is "in the best position" to identify its interests at stake, and to identify how disclosure would "potentially affect the operations of the public body" or third parties that work with the public body: EPS Brief at para 199. But that does not mean that its decision is necessarily reasonable, only that it has access to the best evidence (there's a difference between having all the evidence and making an appropriate decision on the evidence). The Adjudicator was right that the burden of showing the appropriate exercise of discretion lies on the public body. It is obligated to show that it has properly refrained from disclosure. Its reasons are subject to review by the IPC. The public body's exercise of discretion must be established; the exercise of discretion is not presumptively valid. The public body must establish proper non-disclosure. The IPC does not have the burden of showing improper non-disclosure.

[para 92] The Public Body correctly identified the purpose behind sections 24(1)(a) and (b), which is to maintain the candour of advice, recommendations, consultations etc. and protect the process of giving advice etc. The Public Body states that if the information withheld under section 24(1)(a) were disclosed, it could "make the providing of advice less candid and comprehensive."

[para 93] With respect to section 24(1)(b), the Public Body states that it decided to withhold information under this provision because disclosing the information "would make deliberations less open and candid" and "would also interfere with the ability of the public body's legal counsel to engage in discussions and deliberations with police services and PPSC lawyers on areas of common interest."

[para 94] I agree that the Public Body has correctly identified the purpose of sections 24(1)(a) and (b), and the tests for applying those provisions. I also agree that the purposes of the provisions are relevant to a proper exercise of discretion. However, the Public Body's explanation does not include any indication that it considered any relevant factors that weigh in favour of disclosure, such as any public interest in disclosure, or interest the Applicant may have in disclosure.

[para 95] As stated by the Court in *EPS*, a list of factors considered isn't adequate:

> [479] The difficulty with this list was that it did not show why particular records or sets of records were not disclosed. It had the appearance of being only a list of statutory factors or criteria, without an indication of how those factors were applied respecting particular records or sets of records. As the majority wrote in ***Vavilov*** at para 102, "[r]easons that 'simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion' will rarely assist a reviewing court in understanding the rationale underlying a decision and 'are no substitute for statements of fact, analysis, inference and judgment' …." Simply repeating factors without showing how the factors were applied amounts to saying, "I considered everything – trust me."

[para 96] The Applicant states that they made this access request because

> …the CTLA's members, all criminal defence lawyers, who, mostly, live in the Edmonton area, were experiencing serious problems with how the EPS treated its Constitutional duty to provide *McNeil* disclosure to the Crown Prosecution Service ("Crown"), whose duty is to disclose to the defence as per *McNeil.* Ten years after the CTLA's request, the same problem exists.

[para 97] The Applicant argues that the Public Body ought to consider the "public interest and the interests of criminal defence lawyers in relation to Crown/Police disclosure to the accused, that must be considered by Justice."

[para 98] The Applicant further argues that the Public Body has applied section 24(1) in an inconsistent manner as it has disclosed some advice or deliberations but withheld others. In response to this, the Public Body states:

> The head's use of discretion will often mean that some records that *could* be subject to a discretionary exception will still be released where the head determines that the interests in withholding records from disclosure do not outweigh the interest in disclosing them to an applicant's request.

[para 99] The Public Body is required to exercise its discretion in determining whether to withhold information to which a discretionary exception – such as section 24(1) – applies to the information. The fact that the Public Body has chosen to disclose some information to which a discretionary exception might apply, does not undermine its decision to withhold other information to which that discretionary exception applies. Indeed, a public body is required to consider, in each instance in which a discretionary provision could be applied, whether or not to apply it. If a public body simply withheld all information to which a discretionary exception applied without a consideration of each case, it would not be properly exercising its discretion.

[para 100] From the Public Body's argument cited above, I understand that the head of the Public Body has exercised its discretion to disclose some information to which it believes section 24(1) could have applied. However, the Public Body has not told me what considerations factored into that determination, or why the same factors did not weigh in favour of disclosing other information.

[para 101] I agree that the Applicant has raised relevant factors that the Public Body appears not to have considered in applying section 24(1). I will order the Public Body to re-exercise its discretion to withhold information in the records to which section 24(1) applies, with a view to the guidance provided by the Court in *EPS*.

5. **Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information/record(s)?**

[para 102] In its initial submission, the Public Body states that it applied section 25(1) in conjunction with section 20(1) to cell phone numbers of Government of Alberta employees on pages 7, 8, 10, 11, 195, 240, 321, 358, 365, 368, 377, 382, 401, 411, and 464.

[para 103] As is the case with the Public Body's application of section 20(1) discussed above, the Public Body's index of records indicates that section 25(1) was also applied to pages 3, 4, 83, 85, 97, 177, 179, 186, 196-197, 211, 217-218, 252, 244, 247, 248, 249, 252, 263, 265, 269, 294, 296, 310, 332, 353-355, 360, 365, 372-373, 390, 391, 409, 415, 417, 423, 425, 447, 452, 456-457, and 459-460. For the same reasons discussed with respect to section 20(1), I conclude that wherever section 25(1) is noted in the records it is intended to apply only to employee phone numbers.

[para 104] In its rebuttal submission, the Applicant states that it has no interest in the information withheld under section 25(1). Therefore, I will not consider the Public Body's application of that exception.

6. **Did the Public Body properly apply sections 27(1)(b) and/or (c) of the Act (privileged information) to the information/record(s)?**

[para 105] As discussed earlier in this Order, the Public Body advised me a few days before its initial submission was due, that it was applying sections 27(1)(b) and (c) to information in the records at issue. As this had not previously been expressly communicated to me or the Applicant, I directed the Public Body to include in its initial submission an explanation as to why I should permit it to raise these discretionary exceptions at this point in the process.

[para 106] In its initial submission, the Public Body states:

> The public body concedes that it should have more clearly identified the scope of the section 27(1) claim and made clear that section 27(1)(b) and (c) should have been identified when the public body indicated that records were no longer being withheld under section 27(1)(a). The public body likewise concedes that the initial response should have been more specific in relation to the subsections under section 27(1) were being relied on.
>
> …

> The public body's original response indicated that it was relying on section 27(1) in respect of the records identified below. While the public body is no longer relying on section 27(1)(a), the public body had still, in its initial response to the Applicant, elected to withhold information under section 27(1).
> …
>
> The Public Body submits that the current matter is similar to F2020-23, where the public body intended to exercise its discretion under the Act to withhold specific information, but initially categorized it as subject to section 27(1)(a) rather than section 27(1)(b) and (c). These records were provided to the Office of the Information and Privacy Commissioner, which would have ultimately been the appropriate decision as records subject to section 27(1)(b) and (c) are provided in unredacted form (in contrast to records in which solicitor-client privilege is asserted).

[para 107] I have briefly reviewed the records previously provided by the Public Body for the review. The Public Body applied multiple exceptions to the information in most of the pages provided at that time. Section 21(1) was applied to many of those pages; the Public Body has since withdrawn the application of that provision. It appears that, following the review by the Manager, the Public Body applied section 27(1) to much or most of the information previously withheld under section 21(1). The Public Body did also provide 51 pages to the Applicant, in part or in whole, following the review.

[para 108] In its new response to the Applicant following the review, the Public Body did not specify which subsections of 27(1) it was applying to withhold information in the records. The affidavit provided by the Public Body on January 16, 2024, prior to the Notice of Inquiry being issued (as discussed in the Background section of this Order) is the first indication that the Public Body had applied section 27(1)(a) to information in the records. As discussed, the Public Body withdrew its application of this exception in March 2024. By email dated March 14, 2024, the Public Body set out the exceptions it had applied to information in the records: sections 17(1), 20(1), 24(1) and 25(1). The Public Body did not include section 27(1) in this list. The Public Body did not provide any additional records to the Applicant at this time, or otherwise indicate that additional records would be provided to the Applicant.

[para 109] The records provided by the Public Body for this inquiry show that section 27(1) was applied to many of the records at issue. Further, in many instances, the Public Body applied section 27(1) alone to information.

[para 110] Based on the above, I understand that, following the review conducted by the Manager, the Public Body withdrew its application of section 21(1), replacing it with section 27(1), including section 27(1)(a). The Public Body withdrew its application of section 27(1)(a) shortly thereafter. However, by withdrawing its application of section 27(1)(a), the Public Body did *not* decide to provide to the Applicant the information to which that section was briefly applied. Rather, I understand that the Public Body decided, following the Manager's review, to apply section 27(1) to much of the information in the records. I accept that the Public Body intended to apply all three subsections of section 27(1) but did not specify this. When the Public Body withdrew its application of section 27(1)(a), its decision to apply sections 27(1)(b) and (c) remained. In other words, from

the information before me, I understand that the Public Body did not *recently* decide to apply sections 27(1)(b) and (c); rather, it decided to apply those provisions when it reprocessed the records following the Manager's review. The Public Body failed to adequately communicate this decision to the Applicant and to me on multiple occasions.

[para 111] Despite the Public Body's errors in communicating its decision, I have determined that it is appropriate in this case to consider the Public Body's application of sections 27(1)(b) and (c) in this inquiry.

[para 112] I note also that the Applicant had an opportunity to respond to the Public Body's application of sections 27(1)(b) and (c) in its rebuttal submission, which it did, albeit briefly. The Applicant was also given an opportunity in its rebuttal submission to address whether I should consider the Public Body's application of sections 27(1)(b) and (c) in this inquiry, but it chose not to.

[para 113] I make the above determination on the particular facts of this case, including by comparing the records provided to the Manager for their review, the records provided for the inquiry, and the various correspondence that occurred in between. In this case, had the Public Body applied only section 27(1)(a) to the relevant information, then withdrawing the application of this section would have meant disclosing a significant amount of information to the Applicant, as no other exception was applied. It is clear that the Public Body did not make a decision, however briefly, to disclose additional information to the Applicant after the 51 pages were provided following the review. Were the facts of this case otherwise, such that I could not clearly follow the Public Body's decisions and it errors in communicating them, my decision to address the Public Body's application of sections 27(1)(b) and (c) in this case may have been otherwise.

[para 114] It is also worth repeating the caution set out in Order F2020-23 (at para. 164):

> The Public Body's decisions under review in this case are those that it made in response to the access request, including whether to exercise discretion to withhold information under sections 27 and 24. As the one making the decision, it bears the responsibility to understand the discretion it has under the Act, and use the discretion properly within its legislated boundaries. This includes applying discretionary exceptions to disclosure only to information properly captured by them. While I recognize that given the complexity of privacy law under the Act, some discretion to allow a public body to vary its response to an access request is warranted, I must not go too far. My function is to *review* decisions made in response to an access request, not to invite a public body to make different decisions, after the fact.

Scope of sections 27(1)(b) and (c)

[para 115] The Public Body has applied sections 27(1)(b) and (c) to many of the records at issue.

[para 116] Section 27(1) 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,

(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 117] 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 118] Therefore, the burden of proof lies with the Public Body to prove that section 27(1)(b) and/or (c) of the Act applies to the records at issue.

[para 119] Section 27(1)(b) applies to information prepared by or for a person listed in that provision, about a matter involving the provision of a legal service, where "prepared" means "made or got ready for use." The phrase "by or for" means "by or on behalf of" or "by or at the direction of" and not "by or for the benefit of". Where the relevant matter involves policy or business services or advice rather than legal services or advice, section 27(1)(b) does not apply (*EPS*, cited above, at paras. 433, 441, 445).

[para 120] Similarly, section 27(1)(c) applies to information in correspondence between the persons listed in that provision, about a matter involving the provision of advice or other legal services.

[para 121] In *EPS*, the Court comment on the scope of the phrase "in relation to" appearing in both sections 27(1)(b) and (c). It said:

> [442] The words "in relation to" are "words of the widest possible scope" conveying "some connection between two subjects." Justice Moldaver wrote in ***Barton*** at para 72 as follows:
>
>> [72] … the opening words of s. 276(1) and (2) - proceedings "in respect of" a listed offence - are "of the widest possible scope" and are "probably the widest of any expression intended to convey some connection between two related subject matters" (***Nowegijick v. The Queen***, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29, at p. 39). These words import such meanings as "in relation to", "with reference to", or "in connection with" (*ibid.*).
>
> See also ***R v Penunsi***, 2019 SCC 39, Rowe J at para 41.

[para 122] The Court also cites OIPC External Adjudication Order #4 (MacDonald (Re), 2003 CanLII 71714 (AB OIPC)), in which Justice McMahon remarked on the broad scope of sections 27(1)(b) and (c) (at para. 12):

> [12] As can be seen from the forgoing, the exemptions and exceptions are very wide and have the potential to sweep in a number of government documents. In addition, the head of a public body has a discretion in many cases to release documents or not. Despite the noble sentiments often expressed in support of this kind of legislation, the reality is that a government's desire for secrecy too often trumps the nominal objective of "freedom of information". When attempting to access information from Alberta Justice files in particular one need only look to s. 27(1) to see the crafted impediments. Subsection 27(1)(b) permits the public body to refuse disclosure of information prepared by or for an agent or a lawyer of the public body that merely relates to a matter involving the provision of legal services. The information need not involve the provision of actual legal services. Even more sweeping is subsection 27(1)(c). It permits non-disclosure of information in any correspondence between a lawyer of a public body (which would include all Alberta Justice lawyers), or an agent of a public body (which would extend to the non-legal staff of Alberta Justice) on the one hand, and anyone else. The information need merely relate to a matter involving the provision of any kind of advice or any kind of service by the agent or lawyer.

[para 123] Lastly, the Court in *EPS* rejected the adjudicator's interpretation in Order F2017-57 and other past precedents of this office that section 27(1)(b) applies only to "substantive" information. The Court concluded that the distinction between substantive and non-substantive information is "not practically workable" (at para. 429). Given the similarity between sections 27(1)(b) and (c), I conclude that the same must be said of section 27(1)(c).

[para 124] The term "legal services" is undefined in the FOIP Act. In Order F2008-028, the Adjudicator reviewed past orders of this office interpreting this phrase and said (at paras. 154-155):

> Section 27(1)(b) gives a public body the discretion to refuse to disclose to an applicant information prepared by or for certain persons in relation to a matter involving the provision of legal services. Those persons are the Minister of Justice and Attorney General, his or her agent or lawyer, or an agent or lawyer of a public body. The term "legal services" includes any law-related service performed by a person licensed to practice law (Order 96-017 at para. 37; Order F2007-013 at para. 67).
>
> Pages 298 and 299 are memoranda that refer to proposals, recommendations and options for government. In the absence of more specific submissions from the Public Body, I find that the information is not in relation to a matter involving the provision of legal services. There is no evidence, on the face of pages 298 and 299, that the information on them relates to a law-related service performed by a person licensed to practice law. While one of the pages refers to amendments, these are stated as being proposed by a public body, rather than being prepared by a lawyer. Legislative amendments can also be proposed from a policy – rather than legal – perspective. Although the reference in section 27(1)(b) to information "in relation to" legal services has been recognized as quite broad (Order 96-017 at para. 38), a public body must provide evidence that the information in the particular record is indeed in relation to legal services[…]

[para 125] Order F2014-25 also drew a distinction between legal services and policy advice. This Order was cited in Order F2017-57, which was the subject of judicial review in *EPS*. The Court agreed with this distinction, stating (at para. 445):

> Insofar as services provided in relation to the matter are not legal (but are, e.g., policy or business advice), s. 27(1)(b) could not be engaged.

[para 126] Given this direction from the court decisions cited above, I conclude that sections 27(1)(b) and (c) are to be interpreted in the broad manner that a plain reading gives them, but that there is a meaningful distinction between legal services, which can engage these exceptions, and policy or business services, which cannot.

[para 127] At least one of the Public Body lawyers involved in preparing some of the information to which section 27(1)(b) and (c) were applied is referred to in the records as a "policy" person. More than one Public Body lawyer's job title indicates that they are "policy counsel". From the content of the records, it appears that this role includes creating policy for crown prosecutors to ensure that their practices align with legal requirements (such as disclosure requirements set out in *McNeil*).

[para 128] By letter dated August 9, 2024, I asked the Public Body to provide additional arguments regarding the distinction between matters relating to legal services within the terms of sections 27(1)(b) and (c), and matters relating to policy. I said:

> Ontario's *Law Society Act*, R.S.O. 1990, c. L.8 describes "legal services" as follows:
>
>> *1(5) For the purposes of this Act, a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person.*

(6) Without limiting the generality of subsection (5), a person provides legal services if the person does any of the following:

> *1. Gives a person advice with respect to the legal interests, rights or responsibilities of the person or of another person.*
>
> *2. Selects, drafts, completes or revises, on behalf of a person,*
>
> > *i. a document that affects a person's interests in or rights to or in real or personal property,*
> >
> > *ii. a testamentary document, trust document, power of attorney or other document that relates to the estate of a person or the guardianship of a person,*
> >
> > *iii. a document that relates to the structure of a sole proprietorship, corporation, partnership or other entity, such as a document that relates to the formation, organization, reorganization, registration, dissolution or winding-up of the entity,*
> >
> > *iv. a document that relates to a matter under the Bankruptcy and Insolvency Act (Canada),*
> >
> > *v. a document that relates to the custody of or access to children,*
> >
> > *vi. a document that affects the legal interests, rights or responsibilities of a person, other than the legal interests, rights or responsibilities referred to in subparagraphs i to v, or*
> >
> > *vii. a document for use in a proceeding before an adjudicative body.*
>
> *3. Represents a person in a proceeding before an adjudicative body.*
>
> *4. Negotiates the legal interests, rights or responsibilities of a person.*

Legal services in sections 27(1)(b) and (c) are different from legal advice. The above definition indicates that legal services relate to a specific circumstance that requires a specific action.

The Cambridge dictionary defines policy as "a set of ideas or a plan of what to do in particular situations that has been agreed to officially by a group of people, a business organization, a government, or a political party."

The Applicant requested records relating to "the planning for the process and the process in obtaining McNeil disclosure…" Accordingly, responsive records may be characterized as relating to the creation of a policy regarding *McNeil* disclosures. If this is the case, it is not clear that the information the Public Body has characterized as "legal services" is not instead information relating to policy.

Part of the difficulty in this case is the fact that many of the individuals involved in the creation of the records are, as noted by the Public Body, lawyers of the Public Body or other public bodies. However, the fact that lawyers are involved in the creation of the records does not necessarily mean that the records relate to legal services.

> … If a matter does not relate to a particular "case" but instead relates to discussions about how to proceed *as a practice*, it is unclear that this can properly be characterized as a legal service even if lawyers participate in the discussions and even if the Ministry involved is Justice. When the Public Body addressed this question, I ask it to explain why it considers the discussions at issue to relate to legal services and not policy development.
>
> If there are overlaps between these two categories, how does one decide what is a matter that relates to legal services, rather than policy, in determining whether sections 27(1)(b) or (c) can apply? What factors or considerations are significant?
>
> The Public Body should also specify what the legal services are, with respect to the records at issue, and how these legal services are distinct from policy.

[para 129] The Public Body provided a thorough response. It noted that Alberta's *Legal Professions Act* does not define "legal services" or "practice of law" but similar legislation in other jurisdictions, such as New Brunswick, Nova Scotia, Saskatchewan and British Columbia, do. It states that Nova Scotia's, Saskatchewan's and New Brunswick's legislation is all similar to that of Ontario, cited in my letter (above). Specifically, the legislation establishes that the practice of law is "the application of legal principles and judgement with regard to the circumstances or objectives of another entity or person that require the knowledge and skill of a person trained in the law."

[para 130] The Public Body also cautioned that legislation relating to regulating the legal profession is aimed at protecting members of the public who are obtaining legal services. It states:

> Accordingly, the statutes governing legal professions in each province have the purpose of protecting the public. Given the purpose of these statutes, the definitions will not necessarily be well suited for determining questions in the context of sections 27(1)(b) and (c). The examples selected [in the legislation regulating the legal profession] to illustrate the terms "legal services" and "practice of law" will be focused on the types of interactions with lawyers members of the public are most likely to have.

[para 131] The Public Body also notes that the lists of legal services in the various definitions are inclusive and not exhaustive.

[para 132] The Public Body cites *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, where in the Supreme Court of Canada commented (at para. 19):

> In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply. However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.

[para 133] Similarly, in *R v. Campbell,* [1999] 1 SCR 565, the Supreme Court of Canada also noted the following at paragraph 50:

> While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations.

[para 134] The above citations relate to the scope of solicitor-client privilege; as noted by the Public Body, the phrase "legal services" is broader than "legal advice".

[para 135] The Public Body argues that merely because policy or business considerations may be impacted or referenced in records relating to the provision of legal services, does not change the character of the records as relating to the provision of legal services.

[para 136] With respect to the specific information at issue, the Public Body states that the records include internal memoranda and emails drafted by public body counsel for the purpose of analysing the *McNeil* decision to determine how it affects the current process for disclosure in criminal matters. The records also include handwritten notes of Public Body lawyers, taken during meetings with counsel for a police service. The records also contain correspondence between provincial and federal prosecutors relating to the provision of consistent advice to police services in various jurisdictions. The Public Body argues that this information could not have been created by non-lawyers. It further argues that even if the information relates to policies or guidelines, "these guidelines are specifically focused on legal decision making and were prepared by (and for the use of) individuals licensed to practice law. Preparing and utilizing those guidelines would require the application of legal principles and judgement."

[para 137] I am not convinced that the creation of a policy or guidance is necessarily a legal service merely for the fact that the policy is created as guidance for lawyers. It is not absurd to imagine that a non-lawyer may craft such a policy, though they may obtain legal advice or information from lawyers in doing so. The latter would likely constitute a legal service, but the drafting of the policy by the non-lawyer would seem not to.

[para 138] Further, it is possible that in creating a policy that relates to the provision of legal services, non-legal matters may be discussed such that section 27(1)(b) or (c) could not apply. For example, lawyers might be involved in a discussion about whether a particular approach would have an impact on employee morale and productivity.

[para 139] In this particular case, the above distinction is easier to make in theory than in practice. Much of the information to which section 27(1)(b) was applied consists of legal interpretations provided by various lawyers from various bodies, including provincial and federal prosecutors, as well as counsel for police services. Much of the input is given by Crown prosecutors, as it relates to how they perform their prosecutorial

functions. I agree that only prosecutors could provide input of this type. I also agree that this information relates to the provision of a legal service.

[para 140] With respect to the policy counsel who appears to be tasked with creating the relevant guidance, it is clear from the records that their involvement is not limited to *obtaining* legal interpretations, advice and/or analysis from legal advisors, as a basis to create a policy or guidance. Rather, the policy counsel are also fully involved in *providing* legal interpretation, advice and/or analysis. Based on the information in the records, I see no distinction between this work done by policy counsel and the same work done by other public body lawyers, such that the work by policy counsel should not be characterized as information relating to the provision of legal services. That is to say, the legal interpretations, advice and/or analysis conducted by policy counsel is information relating to the provision of a legal service.

[para 141] The result of this is that even if the creation of the policy in this case is not necessarily a legal service in and of itself, it is not practicable to separate the information in the records that relates merely to the policy creation, from the information that relates to the provision of a legal service.

[para 142] Further, in processing the Applicant's request, the Public Body already seems to have considered the distinction between information relating to policy and information relating to legal services. The Public Body applied section 24(1) rather than section 27(1) to some information in records created by or sent to/from policy counsel. The Public Body has not specifically addressed how it determined where to apply section 24(1) rather than section 27(1). Comparing the information to which the Public Body applied section 24(1) alone, to the information to which the Public Body applied section 27(1), the Public Body seems to have applied section 24(1) to information that relates to policy options or choices, and information relating to the planning or coordinating of discussions, rather than legal analyses or interpretation. In general, I agree with how the Public Body delineated between policy-related information and information relating to legal services in the records, especially given the difficulty in making this differentiation as discussed above.

Application of section 27(1)(b) to the records at issue

[para 143] The Public Body states that it applied section 27(1)(b) to internal memorandums and briefings, on pages 1, 2, 12-18, 21-47, 76-79, 80-82, 90-95, 98-104 and 220-237. It states that the records contain multiple versions of memoranda, such as various drafts. It further states that these were prepared by lawyers employed by the Public Body.

[para 144] The Public Body states that the relevant records relate to analyses of the *McNeil* decision and its implication for police services and the Crown. It states:

> While the information prepared in respect of these memoranda may have implications for business or policy, the public body submits that the records are primarily concerned with the provision of legal services by lawyers for the public body. They include specific

> analysis of a Supreme Court decision and legal implications for the Crown and other stakeholders. The public body submits that this would [meet] the criteria for a matter in relation to the provision of legal services.

[para 145] I accept that the information in pages 1, 2, 12-18, 21-47, 76-79 and 220-237 consist of memoranda (in some cases different versions of the same memoranda) that were prepared by Public Body lawyers or lawyers of another public body. These memoranda relate to interpretations or applications of the Supreme Court's *McNeil* decision. It is clear from the records themselves that the lawyers were providing legal services in creating these memoranda. Therefore, section 27(1)(b) applies.

[para 146] With respect to pages 90-95, the Public Body's second index of records, provided with its rebuttal submission, states:

> Draft legal letter with advice/recommendations and says pgs. 87-92 is attachment to p.86 which is missing in initial submission and says duplicate in initial index

[para 147] I accept that pages 90-95 consist of a draft of a letter created by a Public Body lawyer. It appears to have been attached to an email appearing on page 88 of the records (and repeated on page 89). It is clear that the letter relates to a matter for which the lawyer was providing legal services. Therefore, section 27(1)(b) applies.

[para 148] Pages 98-104 consist of a draft version of the letter appearing in pages 90-95. For the same reasons, section 27(1)(b) applies.

[para 149] The Public Body also states that it has applied section 27(1)(b) to handwritten notes on pages 80-82, 285, 286 and 306. It states that the notes were created by a Public Body lawyer in relation to a meeting between Public Body lawyers and lawyers acting on behalf of a police service discussing advice and analysis regarding the *McNeil* decision.

[para 150] The handwritten notes on pages 80-82 clearly relate to memoranda to which I have found section 27(1)(b) applies. It is also clear from the records that they were created by a lawyer for the Public Body. I find that section 27(1)(b) applies to these pages.

[para 151] The handwritten notes on pages 285 and 286 appear to relate to a meeting that is requested in emails appearing in the records, in relation to the interpretation of the *McNeil* decision. Based on the information in the related emails and in the handwritten notes, it is clear that the notes were created by a Public Body lawyer and that they relate to a matter for which legal services were being provided. Therefore, section 27(1)(b) applies. The same finding applies to the handwritten notes on page 306.

Application of section 27(1)(c) to the records at issue

[para 152] The Public Body states that it applied section 27(1)(c) to emails between the Alberta Crown Prosecutor Service (ACPS) and Public Prosecution Service of Canada (PPSC) on pages 3-6, 61-75, 96-104, 238, 239, 261, 262, and 422-426.

[para 153] The Public Body states that some emails include memoranda or otherwise discuss legal analyses of the *McNeil* decision. The Public Body states that the records

> …are related to the implications and interpretations of the McNeil case shared between PPSC and lawyers for the Ministry of Justice in relation to the McNeil case. The correspondence all relates to the provision of advice and other services as they involve a discussion of joint advice to be prepared to law enforcement in relation to the McNeil decision. The public body submits that the nature of this correspondence is in relation to the provision of advice or other services by the lawyer as the correspondence is directly related to legal analysis of the McNeil decision and matters arising the legal requirements of the McNeil decision.

[para 154] Pages 3-6, 96-104, 238, 239 and 422-424 are comprised of email chains involving Public Body lawyers, lawyers of other public bodies and/or other individuals. In each case, the email is either sent to or from one of the individuals listed in section 27(1)(c). These emails relate to the interpretation and application of the *McNeil* decision. I agree that the lawyers of public bodies involved in these emails were providing a legal service to which the emails relate, such that section 27(1)(c) applies. Some of the information withheld in these pages consists of memos, draft memos, or other attachments, relating to the interpretation and application of the *McNeil* decision. Section 27(1)(c) applies to these attachments as well.

[para 155] Pages 61-75 are described in the Public Body's second index of records as a memorandum from the PPSC to the ACPS. However, from my review of the records, both the author of the memo and the person to whom the memo is addressed are employed by the PPSC. I have determined this from locating these individuals' email addresses elsewhere in the records and noting that both individuals have email addresses ending in "ppsc-sppc.gc.ca", indicating that they are both employed by PPSC and not ACPS. Therefore, neither the author nor the recipient of the memo are listed in section 27(1)(c).

[para 156] In *EPS*, the Court agreed that section 27(1)(b) and (c) cannot apply where the relevant lawyer or agent is employed by the federal government rather than a public body. It said:

> [485] While Ms. McCloskey was right that the request was made by a Crown Prosecutor, the Adjudicator was right that this was a federal Crown Prosecutor: at para 209.
>
> [486] Hence, neither ss. 27(1)(b) or (c) could apply to these records, since the Prosecutor was neither "an agent or lawyer of the Minister of Justice or Solicitor General" (a provincial, not federal reference) nor "an agent or lawyer of a public body." See paras 211 and 212.

[para 157] It may be the case that this memo was subsequently sent to an agent or lawyer of the Public Body such that section 27(1)(c) could apply. Indeed, it had to have come into the Public Body's possession in some manner. However, section 27(1)(c) applies to *information in correspondence* between the individuals identified in that provision, and nothing in these pages themselves or in the surrounding records indicates that this memo is information in correspondence to the Minister of Justice, an agent or lawyer of the Minister, or an agent or lawyer of another public body. As stated by the Court in *Alberta Energy* cited above, the Public Body must provide evidence to ground its refusal of access; the Public Body has the burden of showing that section 27(1) applies to the information in the records and with respect to the memo at pages 61-75, it has not met this burden.

[para 158] Given the above, I cannot conclude that section 27(1)(c) applies to the information in pages 61-75.

[para 159] In the event that the Public Body meant to apply section 27(1)(b) instead of (c), I considered whether that provision could apply. However, that provision also cannot apply as neither the author nor the recipient of the memo are one of the persons listed in section 27(1)(b).

[para 160] As the Public Body has not applied any exception other than section 27(1)(c) to the information in pages 61-75, and finding that provision does not apply, I must order it to disclose this information to the Applicant.

[para 161] Pages 261-262 consist of a letter from PPSC to a Public Body lawyer, relating to the interpretation of the *McNeil* decision. The content of the letter clearly relates to a matter involving the provision of legal services. Therefore, section 27(1)(c) applies.

[para 162] Pages 425-426 are comprised of emails that relate to the interpretation or application of the *McNeil* decision only insofar as the participants are making arrangements to discuss the matter further. In other words, these emails do not contain information about the matter to which legal services are provided, but were sent to confirm a meeting time to discuss the matter. In one sense, even these emails broadly relate to the matter for which legal services are being provided. Given the broad interpretation of section 27(1)(c) endorsed by the Court in *EPS*, I find that section 27(1)(c) applies.

[para 163] The Public Body states that it applied section 27(1)(c) to correspondence between ACPS and counsel or other agents for police services on pages 19-20, 48-55, 83-85, 88, 176-185, 186-194, 196-199, 203-210, 211-214, 215-216, 242-244, 247-251, 252-253, 254-255, 256, 263-266, 267-281, 294-295, 296-299, 310-311, 323-324, 325-329, 330-331, 332-333, 334-335, 336-337, 340-341, 342-346, 347-348, 349, 353-357, 359-361, 372-373, 375-376, 383-384, 390-393, 397-398, 409-410, 414, 415-416, 417-421, 427, 442-444, 447, 452, 453-454, 455-458, 459-460, 461-462, and 463. All of these pages were withheld in their entirety except for page 276.

[para 164] I have already found that section 27(1)(b) applies to the information on pages 90-95 and 285; therefore I do not need to address the application of section 27(1)(c).

[para 165] The Public Body states:

> The records are correspondence between legal counsel for police agencies, or members of police agencies and lawyers for the Minister of Justice, or between lawyers for the Minister of Justice. In some instances, they include memoranda to file provided in correspondence from legal counsel for police services to lawyers for the Ministry of Justice. In some instances, members of the PPSC were also included on the correspondence.
>
> In all instances, the correspondence is in relation to specific legal advice and services concerning implications of the McNeil decision.

[para 166] Pages 19-20, 83-85, 88, 176-185, 186-194, 196-199, 211-214, 242-244, 247-251, 252-253, 254-255, 256, 263-266, 267-279, 294-295, 296-299, 310-311, 323-324, 325-329, 330-331, 332-333, 334-335, 336-337, 340-341, 345, 346, 347-348, 349, 353, 354, 355-357, 359-361, 372-373, 390-393, 397-398, 409-410, 414, 415-416, 417-421, 427, 442-444, 447, 452, 453-454, 455-458, 459-460, 461-462, and 463 consist of email chains involving Public Body lawyers, lawyers of other public bodies and/or other individuals. In each case, the email is either sent to or from one of the individuals listed in section 27(1)(c). In at least one instance, correspondence was sent to external counsel acting for a public body. Section 27(1)(c) applies where correspondence is between lawyers or agents of a public body; this language encompasses in-house counsel and external counsel.

[para 167] These emails relate to the interpretation and application of the *McNeil* decision. I agree that the lawyers of public bodies involved in these emails were providing a legal service to which the emails relate, such that section 27(1)(c) applies. Some of the information withheld in these pages consists of memos, draft memos, or other attachments, relating to the interpretation and application of the *McNeil* decision. Section 27(1)(c) applies to these attachments as well.

[para 168] Pages 48-55 are described in the Public Body's second index of records as a memorandum of legal advice from a police service. I can confirm that pages 48-53 consist of a memo. The author of the memo is a lawyer with an Alberta police service and that the memo relates to the interpretation and application of the *McNeil* decision. I find that section 27(1)(c) applies.

[para 169] Pages 54-55 both consist of forms. It is apparent from the forms that they are meant to be filled out in relation to a particular individual but neither form includes information relating to a particular individual; they appear to be sample forms.

[para 170] The Public Body's index indicates that the forms were part of the memo comprising pages 48-55. The memo references a form, and a handwritten note on page 54 indicates that the forms were provided by an individual who is named in the memo as having participated in its creation.

[para 171] Based on the information before me, I conclude that the forms were provided with the memo. Therefore I find that section 27(1)(c) applies.

[para 172] Pages 203-210 consist of a signed letter drafted by multiple parties, including Public Body lawyers. This letter relates to the interpretation and application of the *McNeil* decision. Section 27(1)(c) applies.

[para 173] Pages 215-216 consist of a briefing note. The Public Body's second index refers to it as an 'attachment' without indicating what it was attached to. The emails immediately surrounding this record do not appear to refer to it or include it as an attachment. In contrast, pages 270-275 are described in the Public Body's second index as "attachment meeting notes", and the email immediately preceding these pages (at pages 267-269) specifically lists meeting notes as an attachment. I have attempted to locate correspondence in the records sent to a person listed in section 27(1)(c) to which this briefing note may have been attached but I was unable to locate any such correspondence. As above, it is the Public Body that has the onus of providing evidence to support its claims.

[para 174] Further, the author of this briefing note is identified as an inspector employed by a police service, not a lawyer of a public body or otherwise one of the people listed in section 27(1)(c). The intended audience of the briefing note is set out in the header of the note, and is not one of the people listed in section 27(1)(c).

[para 175] Given the above, I cannot conclude that section 27(1)(c) applies to pages 215-216. The Public Body has also withheld these pages under section 24(1). In the discussion above, I have found that provision applies to some but not all of the information in these pages. I will order the Public Body to disclose to the Applicant the information in these pages to which section 24(1) does not apply.

[para 176] Page 280 consists of an email meeting request, to which an agenda and another document were attached. The meeting includes lawyers of various public bodies. The only reference in this page to a matter involving the provision of legal services is the subject line; the subject line confirms that the meeting relates to the interpretation and application of the *McNeil* decision. Nevertheless, given the broad scope of section 27(1)(c) set out in *EPS*, I find that section 27(1)(c) applies.

[para 177] Page 281 is the meeting agenda that was attached to the meeting request as indicated in the meeting request. Section 27(1)(c) applies to this attachment.

[para 178] Pages 342-344 are comprised of a letter sent to counsel for a public body. The Public Body's second index describes this letter as an attachment but it is not clear

what it would have been attached to. The email preceding this letter included attachments but it is clear that those attachments were themselves emails, and not a letter. Either way, the letter itself constitutes correspondence between individuals listed in section 27(1)(c). The letter relates to the interpretation and application of the *McNeil* decision, and relates to a matter for which legal services are being provided. Therefore, section 27(1)(c) applies.

[para 179] Pages 375-376 are described in the Public Body's second index as a meeting agenda. This agenda was attached to the invite on pages 377-378 that was sent by a Public Body lawyer to attend a meeting to discuss the interpretation and application of the *McNeil* decision. Although the majority of the invitation was provided to the Applicant, the Public Body withheld the attached agenda in its entirety. Even if the emailed invitation was provided to the Applicant, the attachment nevertheless meets the test to apply section 27(1)(c). The same applies to the agenda on pages 383-384, which was attached to an updated meeting request on page 381.

[para 180] The Public Body's second index indicates that the Public Body applied section 27(1) to information on pages 245-246. However, there is no indication in the records themselves that this provision was applied. Nor is there any mention in the Public Body's submissions that this provision was applied to those pages. Therefore, I will not consider the application of section 27(1) to information in these pages. The Public Body also applied section 24(1), discussed above.

[para 181] The Public Body's second index indicates that the Public Body applied section 27(1) to pages 217-218. The records themselves indicate that section 27(1) was applied to these pages in their entirety. While the Public Body's submissions do not address the application of section 27(1) to any information on pages 217 or 218, I conclude from the fact that the application of section 27(1) is referenced in both the index and records, that the omission of this page number from the Public Body's submissions is merely an error.

[para 182] These pages consist of an email chain involving public body lawyers discussing the interpretation or application of the *McNeil* decision. The content of these emails is very similar to other emails to which I found section 27(1)(c) applies. I find that section 27(1)(c) applies to pages 217-218.

[para 183] Similarly, the Public Body's second index indicates that the Public Body applied section 27(1) to page 408. The records themselves indicate that section 27(1) was applied to this page in its entirety. This page is described in the second index as a "service directive". The author of this service directive is not a lawyer (or agent) of a public body or otherwise one of the people listed in section 27(1)(c). However, the email on page 410, which is sent to a Public Body lawyer in relation to the lawyer's work relating to the *McNeil* decision, shows that the service directive on page 408 was attached to that email. Therefore, I find that section 27(1)(c) applies to the attachment on page 408.

[para 184] Lastly, I note that the Public Body's second index indicates that section 27(2) was applied to information on pages 336 and 347-348. The records themselves indicate that this provision was applied to page 336, but there is no indication that it was applied to pages 347-348. The Public Body has not explained or otherwise referred to having applied this provision in its submissions. However, section 27(2) (reproduced above) is a mandatory exception, which means that a public body must not disclose this information. I will therefore consider whether this provision applies.

[para 185] These pages are comprised of email chains between lawyers of different public bodies. It is not clear what privilege could apply to the information in these pages, or to whom the privilege could belong. As such, I cannot conclude that section 27(2) applies to any information in these pages. The Public Body has also applied section 27(1)(c) to these pages, which I have accepted above. However, for the reasons to be discussed, I will order the Public Body to re-exercise its discretion to withhold information under section 27(1)(c).

Exercise of discretion

[para 186] Like section 24(1), sections 27(1)(b) and (c) are discretionary exceptions to disclosure. The discussion in above also applies here.

[para 187] With respect to its application of these exceptions, the Public Body states:

> As discussed earlier, parties requesting and receiving advice must have frank, honest, and open communications and protecting this exchange is a legitimate use of discretion. Crown prosecutors often have discussions on matters of common interest among themselves and, where applicable, with colleagues at Justice Canada or counsel for police services. Similar to Order F2022-39 at paragraph 51, the public body submits that the release of the withheld information could interfere with crown prosecutors' ability to discuss cases, provide frank analysis, obtain advice, and make decisions.

[para 188] The Applicant has pointed to a court decision, *R v. McKee*, 2023 ABKB 698, in which the Court quoted from a joint letter of the PPSC and the Public Body sent to police agencies with advice in response to the *McNeil* decision.

[para 189] Some provisions in the FOIP Act cannot be applied where the relevant information has already been made public in some way. However, section 27(1) contains no such limitation. That said, the public availability of information is a significant factor in exercising discretion to apply section 27(1), which the Public Body appears not to have taken into account.

[para 190] The Public Body also has not indicated whether or what factors weighing in favour of disclosure it considered in exercising its discretion. While the Public Body may have identified appropriate factors weighing against disclosure, it has not considered all relevant factors. Nor has the Public Body explained how these factors apply to specific information in the records, as set out in *EPS*.

[para 191] Therefore, I will order the Public Body to re-exercise its discretion to withhold information in the records to which section 27(1) applies, with a view to the guidance provided by the Court in *EPS*.

V. ORDER

[para 192] I make this Order under section 72 of the Act.

[para 193] I find that some of the information withheld as non-responsive is responsive to the Applicant's request and order the Public Body to include it in the Public Body's new response to the Applicant.

[para 194] I uphold the Public Body's application of section 17(1).

[para 195] I find that section 24(1) applies to information in the records to which that provision was applied except the information discussed at paragraphs 70-74, 76, 80, 84 and 85 of this Order. I order the Public Body to disclose the information to the Applicant, as set out in those paragraphs.

[para 196] I find that section 27(1) applies to information in the records to which that provision was applied except the information discussed at paragraphs 157-160, and 173-175 (the latter paragraphs address the same information discussed in paragraphs 83-85 with respect to section 24(1)). I order the Public Body to disclose the information to the Applicant, as set out in those paragraphs.

[para 197] I order the Public Body to re-exercise its discretion to withhold information under sections 24(1) and 27(1), and provide a new explanation to the Applicant where it continues to apply those provisions.

[para 198] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator