

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER FOIP2025-25

July 18, 2025

ALBERTA HEALTH SERVICES

Case File Numbers:

008399, 008822, 008823, 008824, 008825, 008826, 008827, 008828,
008829, 008830, 008831, 008832, 008833, 008834, 008835, 008836,
008837, 008838, 008839, 008843

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Summary: The Applicant made 20 access requests to Alberta Health Services (“AHS” or the “Public Body”). In its responses to the access requests, the Public Body withheld information under sections 17, 18, 24, and 27 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). Other records were not provided to the Applicant on the basis that they were non-responsive. The Applicant challenged the Public Body’s decision to withhold information and categorize it as non-responsive. The Applicant further argued that the Public Body failed to meet the duty under section 10(1) of the FOIP Act (duty to assist an applicant).

The Adjudicator found that the Public Body did not meet the duty to assist since it failed to search for records using all of the search terms specified in the access request, for the whole period of time specified in the access requests. The Adjudicator ordered the Public Body to search for records using the search terms specified in the access request, for the periods of time specified in them. The Adjudicator also concluded that the Public Body would not have to repeat a search carried out as part of a litigation discovery process. The litigation discovery search entailed searching the same locations, using some of the search terms specified in the access requests. To the extent that it constituted a search for the same records sought in the access requests, using the same parameters specified in the requests, the discovery search satisfied the duty under section 10(1) even though it was not carried out in response to an access request.

Since repeating the discovery search in response to the access requests would have been strictly redundant, the Adjudicator found doing so was not required.

The Adjudicator found that the Public Body improperly identified some information as third party personal information under section 17(1) and ordered it disclosed to the Applicant.

The Adjudicator found that the Public Body failed to demonstrate that the prospect of stress arising from disclosure meets the standard of harm required to withhold information under section 18(1)(a). The Adjudicator ordered all information withheld under section 18(1)(a) disclosed to the Applicant.

The Adjudicator found that the Public Body improperly withheld some information under section 24(1)(b)(i) and ordered it disclosed to the Applicant.

The Adjudicator found that the Public Body improperly withheld some records under section 27(1)(a) as subject to solicitor-client privilege. The Adjudicator ordered those records disclosed, subject to mandatory exceptions to disclosure, and also to reconsideration of the applicability of section 24(1)(b)(i) in one case.

The Adjudicator found that the Public Body correctly identified information as non-responsive.

Statutes Cited: AB: *Alberta Human Rights Act*, RSA 2000, c A-25.5 s. 44(1)(h); *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(1)(n), 1(1)(n)(vi), 3(a), 10, 10(1), 17(1), 17(2), 17(4), 17(4)(a), 17(4)(d), 17(4)(g)(i), 17(5), 17(5)(a), 17(5)(c), 17(5)(f), 18, 18(1)(a), 24(1), 24(1)(a), 24(1)(b), 24(1)(b)(i), 55, 67(1)(b)(iii), 71(1), 71(2), 72.

Orders Cited: AB: Orders 96-012, 97-006, 2000-030, F2003-002, F2003-006, F2004-008, F2006-006, F2007-029, F2008-028, F2009-017, F2013-03, F2013-51, F2019-17, F2020-RTD-05, F2021-34, F2022-49, F2024-15, and F2024-41.

Cases Cited: AB: *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289; *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10; *Manah v. Edmonton Northlands*, 2001 ABQB 230; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Power v Richardson GMP Ltd*, 2021 ABQB 877; *Prosser v Industrial Alliance Insurance and Financial Services Inc*, 2024 ABKB 87; *Singh v. Edmonton (City)*, 1994 ABCA 378; *TransAlta Corp v Market Surveillance Administrator*, 2014 ABCA 196; *Volpi v Alberta (Human Rights Commission) (Office of the Chief of the Commission and Tribunals)*, 2023 ABKB 608; *Volpi v Alberta (Human Rights Commission) (Office of the Chief of the Commission and Tribunals)*, 2024 ABCA 401; **ON:** *L'Abbé v Allen-Vanguard Corp*, 2011 ONSC 7575

Cases Cited: CANADA: *Canadian Imperial Bank of Commerce v Canada*, 2015 TCC 280

I. BACKGROUND

[para 1] In November 2017, the Applicant made 73 access to information requests to Alberta Health Services (“AHS” or the “Public Body”), under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the FOIP Act). At the time of the access requests, the Applicant was involved in litigation with the Public Body, which remains ongoing.

[para 2] Under section 55 of the FOIP Act, the Public Body applied to disregard 53 of them. The Information and Privacy Commissioner (the Commissioner) granted the application to disregard in decision F2020-RTD-05. The Public Body processed the remaining 20 access requests (the access requests).

[para 3] The access requests used uniform wording to describe the information sought by the Applicant:

All Emails of [name of individual]: [individual]@ahs.ca and [individual]@albertahealth services.ca containing keywords “[Applicant’s Last Name]”, “[Applicant’s First Name]”, “[Applicant’s First Name, alternate spelling]”, “[Applicant’s Initials]”, “[Applicant’s alternate initials]” which are references to my personal information in either the subject line or body of the emails of AHS official [sic].

[para 4] One of the access requests, file 008827, was worded slightly different. In place of the words “subject line” the Applicant used the word “topic.”

[para 5] The access requests concern different time periods. I describe these periods in more detail when considering Issue A, below.

[para 6] In its responses to the access requests, the Public Body located no records in some cases, and withheld information under various sections of the FOIP Act in cases where records were located.

[para 7] Among all of its responses, the Public Body withheld information under sections 17, 18, 24, and 27 of the FOIP Act. The Public Body also identified some information as non-responsive to the access requests.

[para 8] Despite the different and broader time frames referenced among the access requests, the Public Body informed the Applicant that it searched for records for the period of time March 2017 to November 22, 2017, for all of them. It did so in light of records all ready searched for and provided to the Applicant as part of a litigation discovery process.

[para 9] The Applicant sought review of the Public Body’s response to each of his access requests. The Commissioner forwarded those matters to inquiry and delegated to me the authority to hear the inquiries.

[para 10] Since the parties to each access request are the same and the issues among them overlap significantly, I proposed to the parties that all the issues that arise in relation to the access requests be heard in one inquiry. The parties agreed to that process.

II. RECORDS AT ISSUE

[para 11] The Public Body located responsive records and/or provided records with redactions to the Applicant in respect of files 008399, 008823, 008824, 008825, 008828, 008829, 008830, 008832, 008833, 008834, 008836, 008837, 008838, 008839, and 008843. I discuss these records as needed throughout this Order.

[para 12] The Public Body did not locate any responsive records in files 008822, 008826, 008827, 008831, and 008835.

III. ISSUES

[para 13] The Notice for Inquiry states the issues for this inquiry as follows:

Issue for all files:

- A. Did the Public Body meet its duties under section 10 of the Act (duty to assist) when it searched for records from the time period of March 2017 to November 22, 2017?**

In this case, the Commissioner will also consider whether the Public Body conducted an adequate search for responsive records.

Issue for files 008822, 008826, 008827, 008831, and 008835:

- B. Did the Public Body meet its duties under section 10 of the Act (duty to assist)?**

This issue includes the same issue as Issue A; it also involves considering that the Public Body found no responsive records for these access requests.

Issue for files 008399, 008823, 008824, 008825, 008829, 008830, 008833, 008836, and 008839:

- C. Did the Public Body properly withhold information under section 27 of the Act (Privileged Information)?**

Issues for files 008828, 008832, 008834, 008837, 008838, and 008843:

- D. Did the Public Body properly withhold information under section 17 of the Act (Third Party Personal Information)?**

- E. Did the Public Body properly withhold information under section 18 of the Act (Harm to individual or public safety)?**
- F. Did the Public Body properly withhold information under section 24 of the Act (Advice from officials)?**
- G. Did the Public Body properly withhold information under section 27 of the Act (Privileged Information)?**
- H. Did the Public Body properly withhold information as non-responsive?**

IV. DISCUSSION OF ISSUES

Preliminary Matter – Applicant did not make submissions

[para 14] The Applicant chose not to make submissions in this inquiry, believing that the Office of the Information and Privacy Commissioner was complicit in orchestrating a cover-up, part of which involves refusing to provide access to records sought by him.

[para 15] The inquiry proceeded despite the Applicant's decision not to make a submission since there is no requirement under the FOIP Act for an applicant, or any party, to make submissions at all, and the Applicant did not indicate that he intended to withdraw his request for review.

[para 16] Further, for most of the issues in this inquiry, section 71(1) places the burden of proof on the Public Body to demonstrate compliance with the FOIP Act. A notable exception to that is section 71(2), which places the burden on the Applicant to prove that disclosure of personal information about a third party would not be an unreasonable invasion of a third party's personal privacy. I consider the lack of a submission from the Applicant in respect of the burden that applies to him when discussing Issue D.

Preliminary Matter – Affected Third Parties

[para 17] Pursuant to section 67(1)(b)(iii) of the FOIP Act, two affected third parties were identified in this inquiry. Last known contact information for them was provided by the Public Body upon my request. One of the affected third parties could not be located. The other was located but did not respond to the invitation to participate in this inquiry.

Preliminary Matter – Public Body’s wording of the access requests

[para 18] In its replies to the Applicant’s access requests, and its submissions in this inquiry, the Public Body quoted the wording of the access requests as though each one used the word “topic” instead of “subject line” to refer to locations in e-mails where the specified search terms may be found. “Topic” was only used in one access request. It was reasonable for the Public Body to do so. Given that the Applicant used the terms interchangeably in his access requests, and that in both cases the terms are contrasted by his reference to the “body” of an e-mail, the term “topic” would reasonably be understood to refer to the same thing as the “subject line” of an e-mail.

Issue for all files:

A. Did the Public Body meet its duties under section 10 of the Act (duty to assist) when it searched for records from the time period of March 2017 to November 22, 2017?

In this case, the Commissioner will also consider whether the Public Body conducted an adequate search for responsive records.

[para 19] Section 10(1) of the FOIP Act states,

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

[para 20] This issue concerns the duties under section 10(1) in two ways. The first specifically examines whether the Public Body met its duty by only searching for records for the time period of March 2017 to November 22, 2017, despite broader time periods specified in the access requests. The narrow focus is on the Public Body’s decision to truncate the specified time period in light of an already completed search which took place as part of a litigation discovery process (the discovery search).

[para 21] The second consideration regarding section 10(1) is whether the Public Body conducted an adequate search for records, generally, including whether it searched in proper locations, searched for records containing the specified keywords, and so forth as discussed further on.

[para 22] The Public Body submitted an affidavit sworn by its Senior Advisor, Information Access Services for Legal & Privacy (the Senior Advisor) on August 12, 2024, which describes its search for records for the access requests.

[para 23] I first consider the Public Body’s decision to search for records only from March 2017 to November 22, 2017.

Decision to search for records only from March 2017 to November 22, 2017

[para 24] With the exception of files 008827 and 008843, the date range specified in each of the Applicant's access requests was August 1, 2013 to November 22, 2017. In files 008827 and 008843, the specified date ranges were December 1, 2015 to November 22, 2017 and June 01, 2016 to November 28, 2017, respectively.

[para 25] In response to all of the access requests, including files 008827 and 008843, the Public Body informed the Applicant that it only searched for records for the period of time from March 2017 to November 22, 2017, stating,

Please note that our office, the Information Access Services department, is aware of your active civil matter before Alberta Court of Queen's Bench against AHS. Our office is also aware that as a result of the civil matter, in March 2017 AHS initiated a comprehensive records search for all records involving yourself. The scope of that records search involved numerous key AHS officials and employees at the Cross Cancer Institute (CCI) as well as those tasked with conducting investigations of all alleged conduct. As a result of that search 16,091 pages of records were disclosed to you through the Court of Queen's Bench Discovery process. The specific criteria used to search for responsive records is the same as the specifics of this request.

After careful consideration of all past and present factors leading up to the receipt of these requests and the extensive amount of resources and time that AHS has already committed to locating, retrieving and preparing records for the litigation matter, our office decided only to search for new records from the time period of March 2017 to November 22, 2017.

[para 26] I note that what the Public Body informed the Applicant appears not to be entirely accurate. As explained in the affidavit of the Senior Advisor, the date range used in the search for records was from March 24, 2017 to November 28, 2017, which is the end of the date range specified in file 008843, and the date on which the search was processed. The Senior Advisor also explained that the discovery search covered records from May 1, 2013 to March 23, 2017.

[para 27] What the Public Body essentially did when responding to the access requests was to pick up where the discovery search left off, providing records from the balance of time specified in the access requests - March 2017 to November 28, 2017 - not covered in the discovery search.

[para 28] The Public Body's decision to truncate the applicable time periods specified in the access requests in light of its already completed discovery search raises the question of whether by relying on the search and provision of records through the discovery process, it can be said to have satisfied its duty under section 10(1). For the reasons below, I find that it may, provided that the portion of the response accounted for by the discovery search itself satisfies the Public Body's duty to respond openly, accurately, and completely under section 10(1) in the same way it must were it conducted directly in response to the access requests.

[para 29] Section 3(a) of the FOIP Act specifies that the access to information provisions in it are in addition to and do not replace other procedures for accessing information:

3 *This Act*

(a) *is in addition to and does not replace existing procedures for access to information or records,*

...

The notion that a public body might provide multiple copies of the same records to an applicant who pursues them through the process under the FOIP Act and a different process is implicit in the words of section 3(a). It is also the case, however, that the FOIP Act does not *demand* that outcome in all situations.

[para 30] The duty under section 10(1) requires every *reasonable effort* given the facts of a particular case, not a perfect search that includes every effort imaginable (Order F2009-017 at para. 48). In my view, it would also not, in every case, demand *strictly redundant* efforts, to search for records and then conduct *precisely* the same search again. That is to say that if the Public Body's discovery search constitutes reasonable efforts to respond openly, accurately, and completely in respect of the access requests made for the same information under the FOIP Act, then section 10(1) would not require a repetition of the same. Section 10(1) would require an explanation for the Applicant as to *how* the discovery search satisfies his access requests, such that the Applicant can clearly see that their terms have been met as required.

[para 31] The two parts of the duty to assist in section 10(1) were set out in Order F2004-008 at para 32:

- Did the Public Body make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of FOIP?
- Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to the Applicant, as required by section 10(1) of FOIP?

[para 32] The burden of proof falls on the Public Body to demonstrate that it met its duty under section 10(1). (See Order 97-006). A public body must provide the Commissioner with sufficient evidence to show that it made a reasonable effort to identify and locate records responsive to the request. (See Order 2000-030). Former Commissioner Work, Q.C. described the general points that a public body's evidence should cover in Order F2007-029 at para. 66:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request

- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 33] The above points of evidence were relayed to the Public Body in the Notice of Inquiry.

[para 34] While the Public Body did not expressly state who conducted the discovery search, it would seem that its legal counsel would have been involved given the litigious context in which the search took place.

[para 35] As stated in the Senior Advisor’s affidavit, the parameters and criteria for the litigation discovery processes included:

- a. Date range of May 1, 2013 to March 23, 2017.
- b. Any records sent to or from the 20 email addresses to the email addresses of the Applicant: [two e-mail addresses of the Applicant].
- c. Any records from the 20 email accounts containing the following terms within the subject line: [Applicant’s last name]; [Applicant’s first and last name]; [Applicant’s first and last name (alternate spelling)]; [Applicant’s first and last name (alternate spelling)]; [Applicant’s last name, first name]; [Applicant’s last name, first name (alternate spelling)]; [Applicant’s last name, first name (alternate spelling)]; [Applicant’s initials] or [Applicant’s alternate initials].

[para 36] The discovery search terms overlap with the access requests parameters in precise ways. The discovery search encompassed a search for records from May 1, 2013 to March 23, 2017, which includes most of the period of time specified in the access requests. The discovery search included the same e-mail addresses (locations) as the access requests, and some of the search terms specified in the access requests; specifically, the Applicant’s last name, initials, and alternate initials. It also included the Applicant’s first name, and alternate spelling of his first name, when appearing in conjunction with spellings of his last name. That search parameter would capture some records that contain the Applicant’s first name as specified in the access requests, provided his last name was also present. The discovery search included the subject line of e-mails which was also a specified parameter in the access requests.

[para 37] In addition, the Public Body has taken into account the possibility that the discovery search may have revealed records that are responsive to the access request, but were not disclosed to the Applicant by reason that they were not relevant to the litigation related to the discovery

search. The Public Body searched those records in 2021, and provided to the Applicant those which it found were responsive to the access request, despite not being relevant to the related litigation. This is an important facet of the Public Body's response to the access requests. In general, an access request would be expected to include a greater breadth of records than would be located through a search for records relevant to litigation since the scope of records would not be limited by relevancy. An equally important facet is that records provided to the Applicant through the discovery process would not contain information redacted in response to his access requests, since the provisions of the FOIP Act permitting such redactions do not apply outside of an access request. There seems little point in conducting a new search when records already provided are capable of standing in for those that would be provided through another search in response to the access requests, by reason that they provide the same or more information.

[para 38] Despite the significant and precise overlap, the parameters and search criteria used in the discovery search were explicitly narrower than the breadth of information sought in the access requests in two ways. The first is that the access requests sought e-mails containing specified search terms in either the *subject line or body* of e-mails; in contrast, the discovery search only included a search for records where those terms appear in the subject line of e-mails. It appears that e-mails which include the specified terms in the body of the e-mail, but not subject line, which are included in the access requests, were excluded from the discovery search.

[para 39] The second way in which in the discovery search was narrower than the scope of records sought in the access requests relates to searches involving the Applicant's name. The access request specifically sought e-mails which included a reference to the Applicant's first name, and an alternate spelling of his first name *without* reference to his last name. The Public Body's discovery search appears to have omitted searching for either spelling of the Applicant's first name alone, instead coupling it with his last name throughout the search. This approach appears to have excluded records that only include the Applicant's first name in either the subject line or body of an e-mail.

[para 40] I acknowledge that the Public Body searched for alternate spellings of the Applicant's first name (in combination with his last name) not specified in the access requests. This approach was laudable, expanding the search beyond its stated terms. It would also help locate records where there has been a typo in a spelling of the Applicant's first name, which contains a double letter that could easily be omitted when typed out. It does not however encompass all of the records within the scope of the access request. The result is that there is real chance that further responsive records exist; namely those captured by the parameters of the access request that were not used in the discovery search.

[para 41] For the above reasons, the Public Body did not fully meet the duty under section 10(1) to respond completely when it relied on that part of the discovery search that excluded e-mails containing only the Applicant's first name, and any e-mails containing any responsive keywords in the body, as opposed to the subject line. I will order the Public Body to conduct a further search for records using those parameters.

[para 42] I will not, however, order the Public Body to carry out the same searches it already did when conducting the discovery search. Those would be searches for the specified spellings of the Applicant's last name, variants of his initials, and variants of his first name coupled with his last name, appearing in subject lines of e-mails. These searches used terms specified in the access requests and included the e-mail accounts specified in the access request, which was the only location to search specified by the Applicant. There is no reason to suspect that the Public Body's searches using these parameters was defective. Further, the Public Body has searched for records that are responsive to the access request, but not relevant to the litigation and provided them to the Applicant.

[para 43] To the extent that the discovery search covered parameters specified in the access requests and the Public Body relied on that search when responding, I am satisfied that the Public Body fulfilled the duty under section 10(1). Conducting those same searches again would be strictly redundant, and is not required by the FOIP Act.

[para 44] I now consider whether the Public Body met the duty under section 10(1) with respect to the search for records conducted in response to the access requests, from the period of time March 2017 to November 28, 2017. The discovery search did not include this period of time, so I consider this search separately.

[para 45] The steps taken by the Public Body to respond to the access requests are set out the Senior Advisor's affidavit.

[para 46] The search for records was conducted by the Public Body's Lead Digital Forensic/Discovery employee. As with the discovery search, the Public Body searched the 20 email accounts specified in the access requests. It extended the time frame for its search to November 28, 2017, the latest date specified for records responsive in any of the access requests.

[para 47] Unfortunately, the Public Body used the same search parameters from the discovery search in its search in response to the access requests. In doing so it failed to search for the full breath of responsive records requested in the access requests. As before, I will order it conduct a search for further records.

Issue for files 008822, 008826, 008827, 008831, and 008835:

B. Did the Public Body meet its duties under section 10 of the Act (duty to assist)?

[para 48] The issue includes the same issues as those discussed in Issue A in relation to all files.

[para 49] I added this issue as a separate matter since in files 008822, 008826, 008827, 008831, and 008835, the Public Body did not locate any responsive records. That aspect of these files sets

them apart from the others, and raised the possibility that the Public Body employed a method of searching for records particular only to these files.

[para 50] The Public Body did not use a different method of searching for records for these files, or make any further submission regarding section 10(1) beyond the arguments it advanced regarding all files. Accordingly, analysis under Issue A above continues to apply in respect of the files considered in this Issue.

Issue for files 008399, 008823, 008824, 008825, 008829, 008830, 008833, 008836, and 008839:

C. Did the Public Body properly withhold information under section 27 of the Act (Privileged Information)?

[para 51] Section 27(1)(a) of the FOIP Act states,

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

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

...

[para 52] The Public Body withheld information under section 27(1)(a) on the basis that is subject to solicitor-client privilege.

In camera submissions with respect to the issue of solicitor-client privilege

[para 53] When it provided its submission, the Public Body made a request to provide its initial affidavit describing records over which it asserts solicitor-client privilege *in camera*. I denied that request. I explained to the parties in my decision denying the request, that the affidavit appeared to comply with the standards described in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (*ShawCor*). Since the standard in *ShawCor* applies to affidavits that are intended to be disclosed, I saw no reason to accept the affidavit *in camera*. In response the Public Body submitted a new affidavit, sworn by the Senior Advisor, which was shared with the Applicant. The shared affidavit is referred to as the “supplemental affidavit” by the Public Body in some of its submissions.

[para 54] The Public Body also issued a clarification in respect of a reference to an “*In Camera Affidavit*” that appears in paragraph 60 of its submission. The reference to an “*In Camera Affidavit*” should be read as a reference to the supplemental affidavit.¹

[para 55] Save for one e-mail on page 1 of file 008832, and pages 2 – 10 of file 008838 the Public Body did not provide records over which it asserted solicitor-client privilege to me for review for the files being considered in this issue, or any other files yet to be considered. The

approach to determining whether the privilege applies to the records in these circumstances was set out in Order F2022-49 at paras. 47 – 55:

The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821. The Court said:

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

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

Solicitor-client privilege can also extend past the immediate communication between a solicitor and client. In *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), the Alberta Court of Appeal stated (at para 26):

The appellant also argues that even if some of the documents contain legal advice and so are privileged, there is no evidence that all of the documents do so. For example, the appellant argues that minutes of meetings, emails and miscellaneous correspondence between Justice Canada lawyers and the Department of Indian and Northern Affairs may not contain any actual advice, or requests for advice, at all. The solicitor-client privilege is not, however, that narrow. As the court stated in *Balabel v. Air India*, [1988] Ch 317, [1988] 2 All E.R. 246 at p. 254 (C.A.):

Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

The miscellaneous documents in question meet the test of documents which do not actually contain legal advice but which are made in confidence as part of the necessary exchange of information between the solicitor and client for the ultimate objective of the provision of legal advice.

In Order F2015-22, the adjudicator summarized the above, concluding that "communications between a solicitor and a client that are part of the necessary exchange of information between

them so that legal advice may be provided, but which do not actually contain legal advice, may fall within the scope of solicitor-client privilege” (at para. 76). I believe this is a well-established extension of the privilege.

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

The Act places the burden of proof on the Public Body to show that section 27(1)(a) of the Act applies to the records at issue. In *EPS*, cited above, the Court found that the adjudicator in Order F2017-58 correctly identified the standard as follows: evidence supporting a claim of privilege must be sufficiently clear and convincing so as to satisfy the burden of proof on a balance of probabilities (at para. 82 of *EPS*).

In *EPS* the Court further states that the role of this Office in inquiries involving claims of privilege under section 27(1)(a) of the Act is to review claims and assertions of privilege. The Court commented on the limitations of this review, given that the Office does not have authority to compel production of information over which solicitor-client privilege is claimed. It states that “... the IPC cannot “properly determine” whether solicitor-client privilege exists: 2018 CPS (CA) at para 3. The scope of the IPC’s review of claims of solicitor-client privilege is inherently limited. The IPC is not entitled to review the relevant records themselves” (at para. 85).

The Court describes the role of this Office in reviewing a claim of privilege as follows (at paras. 103-105):

The clear direction from the Supreme Court is that compliance with provincial civil litigation standards for solicitor-client privilege claims suffices to support the exception from disclosure under *FOIPPA*. The IPC’s statutory mandate must be interpreted in light of the Supreme Court’s directions. The IPC has an obligation to review and a public body has an obligation to prove the exception on the balance of probabilities. But if the public body claims solicitor-client privilege in accordance with provincial civil litigation standards, the exception is thereby established on the balance of probabilities. It is likely that the privilege is made out, in the absence of evidence to the contrary...

Does this approach mean that the IPC must simply accept a public body’s claims of privilege? Is the IPC left with just “trust me” or with “taking the word” of public bodies? Does this approach involve a sort of improper delegation of the IPC’s authority to public bodies or their counsel?

In part, the response is that the IPC is not left with just “trust me.” The IPC has the detail respecting a privilege claim that would suffice for a court. If the *CNRL v ShawCor* standards are not followed, the IPC (like a court) would be justified in demanding more information. And again, if there is evidence that the privilege claim is not founded, the IPC could require further information.

I understand the Court to mean that my role in reviewing the Public Body’s claim of privilege is to ensure that the Public Body’s assertion of privilege meets the requirements set out in *ShawCor*, and that the information provided in support of that assertion is consistent with the relevant tests for the cited privilege.

[para 56] I agree with Order F2022-49 and take the same approach here.

[para 57] I also note the decision in *Power v Richardson GMP Ltd*, 2021 ABQB 877 (*Power*). In *Power*, Justice Grosse addressed a challenge to an assertion of solicitor-client privilege over certain communications. She made clear that descriptions of such records should address all elements of the test of privilege at para. 25:

There are a number of the disputed records in the Production Application that are, on the face of the description in the Chart, communications between CanAm representatives and CanAm counsel only. The Affidavits of Records of the applicable CanAm Defendants do not fully establish the privilege in that they only refer to "communications and copies of communications between solicitor and client", without mention of the communications entailing giving or receiving legal advice, or being confidential. The description should address all elements of the test of privilege, but the Power Plaintiffs do not make their challenge based on this gap in the Affidavit of Records...

[para 58] The descriptions of records provided by the Public Body for files 008399, 008823, 008824, 008825, 008829, 008830, 008833, 008836, and 008839 meet the standard for asserting solicitor-client privilege, without need for further discussion. The descriptions clearly identify a communication between a lawyer for the Public Body, intended to be confidential, and an employee or officer of the Public Body concerning advice and discussion related to litigation brought by the Applicant.

Exercise of Discretion

[para 59] Section 27(1)(a) is a discretionary exception to disclosure under the FOIP Act, and requires a public body to demonstrate that it properly exercised discretion to withhold information that is subject to privilege.

[para 60] In *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*) the Court found that establishing the existence of solicitor-client privilege constituted proper grounds for exercising discretion to withhold information subject to it. Justice Renke held at para. 74,

In my opinion, a public body like EPS is required to establish its claim to solicitor-client privilege, but only to the extent required by the Court of Appeal in *Canadian Natural Resources Ltd v ShawCor Ltd*, 2014 ABCA 289 -- and no farther. Satisfaction of the *CNRL v ShawCor* standard suffices for civil litigation and no higher standard should be imposed in the FOIPPA context. Further, even if s. 27(2) does not apply and a solicitor-client privilege claim remains discretionary, to establish the privilege is to establish the grounds for relying on the privilege. The existence of the privilege is the warrant for reliance on the privilege. No additional IPC scrutiny of discretion concerning solicitor-client privilege claims is warranted.

[para 61] Accordingly, I find that the Public Body properly exercised discretion to withhold information under section 27(1)(a) for files 008399, 008823, 008824, 008825, 008829, 008830, 008833, 008836, and 008839.

Issues for files 008828, 008832, 008834, 008837, 008838, and 008843:

- D. Did the Public Body properly withhold information under section 17 of the Act (Third Party Personal Information)?**
- E. Did the Public Body properly withhold information under section 18 of the Act (Harm to individual or public safety)?**
- F. Did the Public Body properly withhold information under section 24 of the Act (Advice from officials)?**
- G. Did the Public Body properly withhold information under section 27 of the Act (Privileged Information)?**
- H. Did the Public Body properly withhold information as non-responsive?**

[para 62] Since the discussion of solicitor-client privilege for these files engages the same materials discussed in Issue C above, I consider Issue G next.

- G. Did the Public Body properly withhold information under section 27 of the Act (Privileged Information)?**

[para 63] With the exception of five records which I discuss further below, for the same reasons that I found records discussed in Issue C were properly withheld on the basis of solicitor-client privilege, I find the records withheld on that basis in files 008828, 008832, 008834, 008837, 008838, and 008843 have been properly withheld.

[para 64] I also find that pages 150-151 of file 008837 are subject to solicitor-client privilege, but provide further reasons for my decision.

[para 65] The description for the record on pages at 150-151 of file 008837, as stated in the supplemental affidavit, is as follows:

Email from complainant to AHS employee in confidence, response from AHS employee indicating intent to seek additional advice. Emails between AHS employee and complainant with additional advice. Email from AHS employee to AHS Lawyers forwarding chain of discussions with complainant.

[para 66] The Public Body clarified that the complainant referenced in the description is not the Applicant.

[para 67] The last e-mail mentioned in the description above – between an AHS employee and AHS lawyers (the forwarding e-mail) - appears to be subject to solicitor-client privilege. While the description of that e-mail alone does not reference confidentiality or legal advice, in the context of the litigation brought by the Applicant, on a balance probabilities, it is likely a confidential e-mail that would fall on a continuum of communication between a lawyer and client that would attract the protection of solicitor-client privilege.

[para 68] I find that the other e-mails mentioned in the description are also subject to solicitor-client privilege. The whole chain of e-mails was forwarded to lawyers for the Public Body in connection with seeking legal advice. They too appear to fall on a continuum of communication that is subject to solicitor-client privilege.

[para 69] I find that records at pages 1-10 of file 008838 are subject to solicitor-client privilege, but further reasons are required to fully explain my decision. The description of these records given in the supplemental affidavit is as follows:

Emails communicated between AHS officer and AHS lawyer in confidence about outcome of related legal proceeding, with attached decision from legal proceeding.

[para 70] I first consider whether the e-mails mentioned in the description are subject to solicitor-client privilege.

[para 71] As with most other documents, the e-mails between the AHS officer and AHS lawyer have not been provided to me for review. In the context of this case, though the description does not explicitly mention legal advice, or the seeking thereof, I find on a balance of probabilities that the e-mails are part of a continuum of communication between lawyer and client, such that the privilege attaches to them. In the context of the litigation between the Applicant and the Public Body, and the Applicant's related complaints, it is eminently clear that the Public Body would have kept its legal counsel abreast of all developments between the parties, including the attached decision from a legal proceeding, with a view to managing the legal matters between them.

[para 72] Whether the attached legal decision is also privileged is a separate matter. The legal decision, separate from e-mails sending it to legal counsel, has been provided to me.

[para 73] In *TransAlta Corp v Market Surveillance Administrator*, 2014 ABCA 196 (*Transalta*) the Alberta Court of Appeal found that publicly available caselaw was not subject to solicitor-client privilege, even if attached to a privileged e-mail. The Court of Appeal stated at para. 62,

I come to a different conclusion with respect to the attachments found at Tabs 15 and 17. Like the others in this category, the chambers judge found the e-mails were privileged, but that the attachments were not. I am satisfied there is substance in the e-mails that could attract solicitor-client privilege, as the chambers judge found. The attachment in each case, however, is a copy of a decision by FERC, which is available on-line to the public and does not, therefore, attract privilege.

[para 74] The decision in the records in this case is one that would be available to the Applicant.

[para 75] However, in *EPS* Justice Renke discussed circumstances where attachments to e-mails, including legal decisions, may be privileged nevertheless. Remarking on *Transalta*, Renke, J. stated at paras. 245 – 246,

TransAlta does not stand for the proposition that all case law attached to otherwise privileged records is not privileged just because the case law is publicly available. The relevant part of the reasons in *TransAlta* began with Justice O'Brien's observation that "an attachment to a privileged e-mail may be extraneous to the content of that e-mail which means it is still necessary to review the attachment to determine its connection to the e-mail before deciding whether it is also privileged:" at para 59 [emphasis added]. At para 62, Justice O'Brien stated that "I am satisfied there is substance in the e-mails that could attract solicitor-client privilege, as the chambers judge found. The attachment in each case, however, is a copy of a decision by FERC, which is available on-line to the public and does not, therefore, attract privilege."

Justice O'Brien did not elaborate on the "connection to the e-mail:" I infer that the attached cases did not have a sufficient connection to the e-mails such that the cases formed part of the privileged communication.

[para 76] Renke, J. went on to explain that the attached caselaw in *EPS* was privileged, holding at para. 247,

In the present circumstances, however, the case is expressly referred to in and attached to a legal opinion. It is an illustration of a legal conclusion found in the opinion. The opinion does not have other case attachments. The writer evidently considered this particular decision to be important enough to warrant communication (and review by the reader(s)) along with the opinion. The case is not merely legal information provided by ACPS to EPS. It is a constituent of the opinion. The case is not a mere fact, in the sense of being in fact available to the public, like any other publicly reported record (to the extent that the fact/legal advice distinction may be safely deployed). Rather, the case was selected out of the library of potentially applicable cases. That selection and the subsequent communication of that case show that it forms part of the provision of legal advice. As part of the opinion, the case law, like other elements of the opinion, was supported by a presumption that it was privileged. I see no basis for rebuttal of that presumptive privilege.

[para 77] Unlike the case in *EPS*, the legal decision is not one that is constituent of an opinion, or one selected out of a library of many. That is clear on its face to anyone who understands the litigious relationship between the parties. However, it is also evident on the face of the decision, again in the litigious context between the parties, that it is one in which the Public Body would have its own legal interests. Such interest is evidenced not only by the content of the decision, but by the fact that the Public Body thought it proper to forward it to legal counsel. Properly

understood this way, the legal decision forms part of a continuum of communication that engages the seeking of legal advice, such that it is subject to solicitor-client privilege by virtue of being attached to communication with legal counsel. Revealing the decision would be to reveal matters over which the Public Body, in all probability, sought legal advice.

[para 78] There are three records which I find are not subject to solicitor-client privilege, or not entirely subject to the privilege; they are:

- The records at pages 120 - 121 from file 008837
- The records at pages 140 – 141 from file 008837
- The records at pages 2 - 126 from file 008843, in respect of which the Public Body provided an *in camera* affidavit.

[para 79] The description for the record at pages 120 – 121 of file 008837, as stated in the supplemental affidavit is as follows:

Email from complainant to AHS employee in confidence, response from AHS employee indicating intent to seek additional advice.

[para 80] The Public Body clarified that the complainant referred to in the description is not the Applicant.

[para 81] In contrast to other descriptions which I have found establish that records are subject to solicitor-client privilege, this description does not indicate a communication with a lawyer, or reference *legal* advice. Nor does anything in the description suggest that these communications would fall on a continuum of communications with a lawyer for the purpose of seeking legal advice.

[para 82] The description for the record at pages 140 - 141 from file 008837, as stated in the supplemental affidavit is as follows:

Email from complainant to AHS employee in confidence, response from AHS employee indicating intent to seek additional advice. Emails between AHS employee and complainant with additional advice.

[para 83] The Public Body clarified that the complainant referred to in the description is not the Applicant.

[para 84] I find that these records are not subject to solicitor-client privilege for the same reasons given for pages 120 – 121, above. There is no mention of communication with a lawyer, or for legal advice; neither does anything in the description suggest these records fall on a continuum of communication with a lawyer for the purpose of seeking legal advice.

[para 85] In the supplemental affidavit, the records at pages 2-126 from file 008843 are described only as “Internal investigation reports.”

[para 86] That description alone falls well short of establishing that such reports are subject to solicitor-client privilege, and requires further description. In the same letter informing the parties that I declined the Public Body’s request to provide its affidavit describing records *in camera*, I also notified the Public Body that further description would likely be required in respect of these pages. I also invited the Public Body to make an *in camera* submission further describing these records specifically, since caselaw on the subject of when investigation materials are subject to the privilege engages considerations that regularly go beyond a brief description. The Public Body provided an *in camera* affidavit, again sworn by the Senior Advisor, further describing the records.

[para 87] As described in the *in camera* affidavit, the internal investigations, and the resulting reports, were carried out and prepared by an employee of the Public Body then subsequently forwarded to a lawyer for the Public Body for advice on who should be notified about the outcome of the investigation. The e-mails forwarding the investigation report are on pages 127-128 of file 008839; they are included in my general decision concluding that most of the records over solicitor-client privilege is claimed are subject to the privilege.

[para 88] The Senior Advisor describes that page 2 of these records is not part of the reports, but is a communication from the author forwarding the reports to an officer of the Public Body. As the communication is not described as a communication involving legal counsel or for the purposes of legal advice, I find that it is not subject to solicitor-client privilege.

[para 89] The Senior Advisor states that pages 3 – 126 contain the reports.

[para 90] Whether investigation materials prepared by an employer and then sent to legal counsel are subject to solicitor-client privilege was considered by the Alberta Court of Appeal in *Singh v. Edmonton (City)*, 1994 ABCA 378 (CanLii) (*Singh*). The Court of Appeal found that such investigative materials were privileged owing to the purpose of their creation. The Court of Appeal stated at paras. 4 – 7,

There are two possible heads of privilege. The first is for attempts to get legal advice, for which no litigation or its contemplation is needed. The plaintiff’s counsel argues that that head of privilege only covers direct communications to a solicitor, citing Manes and Silver, Solicitor-Client Privilege in Canada 7 (1993). We have many misgivings about that suggested restriction on legal advice privilege, but need not resolve them here. Reading the cross-examination as a whole, despite the one passage which the chambers judge focussed upon, we think that it is clear that there was one dominant purpose. Indeed if there was any other purpose, it was to prepare for litigation, which is also a privileged purpose.

The one purpose was to lay before the solicitor for advice this precise file, which did not have any copies and was not communicated to anyone beyond the investigators. And of course the facts

contained in it were to be related to the solicitor. It is true that the City's aim (other than possibly litigating) was to decide whether to fire the plaintiff, and that the final decision would be made by the head of the department. But that must be understood in context. The head of the department would not make his decision until he had the advice of the relevant solicitor, and that advice would be a heavy factor in making the decision. It was known throughout that that solicitor would be Mr. Hofer, and he was indeed consulted partway through the investigation.

We must emphasize that the cross-examination shows clearly that in every case, a decision about whether to terminate a management employee (and the plaintiff was one), is made only after consulting with the solicitor. And the solicitor is consulted about every case of possible misconduct by a management employee. With rare exceptions, the solicitor is the only one who sees the actual documents. No one other than the investigator and the solicitor saw the initial parts of this file. The City has experience in this type of thing, and the relevant investigators know how to put together a file to take to the solicitor to get his advice about possible action, and that is always done. The solicitor will inevitably advise upon it. All that occurred here, and the department head did get advice of the solicitor on this file before he made his decision to fire the plaintiff.

Sometimes Courts are justifiably a little sceptical of claims by large organizations that every paper about every mishap is prepared to be laid before the solicitors of the organization. But this case does not involve splashing mud on a pedestrian, or a file clerk's tardiness. From the outset, very serious breaches of many branches of the law were alleged. And the topic was the conduct in office of a high management official. Common sense and experience and rudimentary knowledge of law would all suggest taking precisely the steps taken here, namely building up a dossier to show to a lawyer to get advice about what course to follow. Therefore, there is nothing in the present case to excite any suspicion about the facts sworn to; quite the contrary.

[para 91] *Singh* was followed closely in *Manah v. Edmonton Northlands*, 2001 ABQB 230 (*Manah*). In *Manah*, two employees made complaints about sexual harassment to their employer, and were then interviewed by a manager. Following the interviews, the manager sought legal advice from a labour law lawyer. On the lawyer's advice, the employer conducted a full investigation into the complaints for the purposes of getting further advice from lawyer. Master Funduk ruled that the documents created by the employer for the purposes of getting legal advice fell within the scope of *Singh*, and were subject to solicitor-client privilege.

[para 92] More recently, *Singh* and *Manah*, along with numerous other authorities on the matter of when internal investigation documents are subject to solicitor-client privilege were discussed in *Prosser v Industrial Alliance Insurance and Financial Services Inc*, 2024 ABKB 87 (*Prosser*).

[para 93] In *Prosser*, Eamon, J. considered whether documents (exclusive of the final investigation report) created as part of an investigation conducted by a third party on behalf of the defendant were subject to solicitor-client privilege. The investigation was carried out per the defendant's Respectful Workplace Policy. At various parts in the decision, the Court explained the importance of determining the purpose for which the investigation documents were created. Although the investigation report itself was not at issue in the *Prosser*, Eamon, J. commented on it in his conclusions nonetheless. The Court stated at paras. 50 – 52, and 57,

It is particularly important to recognize that "[e]xperience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible" (*Blood Tribe* at para 9). Further:

2 ... This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.

(*R v McClure*, 2001 SCC 14)

The holding in *Singh*, which is binding on me, is consistent with the rationale underlying solicitor-client privilege. The statements and other file materials were obtained or created for the sole purpose of transmitting them to counsel for legal advice. The privilege should apply to such communications, even though the information of each employee nevertheless might be compellable through legal processes, because the statements and other file materials were themselves the form of communication to counsel.

However, *Singh* does not address the situation where a third party's investigation may have been for two genuine purposes, one to ascertain and transmit information to legal counsel to obtain legal advice and the other to ascertain information to conduct non-privileged corporate operations. Nor does *Singh* address whether witness statements or notes would similarly be privileged if not themselves forming part of the communication to counsel.

* * *

Second, an investigation might be conducted for both privileged and non-privileged purposes. Corporations ordinarily require information for governance and human resources purposes. It is not necessarily the case that any legal advice purpose should override all other purposes without more.

[underlining added]

[para 94] The Court continued at para. 63,

Without conflating solicitor-client privilege with litigation privilege, it may also be that in cases where solicitor-client privilege is claimed over a third-party fact investigation that was conducted for mixed purposes, the Courts would require evidence on the relative dominance of each of the purposes, similar to the dominant purpose test, to assess solicitor-client privilege claims over such investigations. I do not decide whether such evidence is required. As will be explained below, the Defendant has not established a dominant purpose or any other reason to find that the Investigator's function was essential to the maintenance or operation of the solicitor-client relationship or within the continuum of privileged communications.

[underlining added]

[para 95] In reaching the conclusion that the investigation materials were not privileged, and remarking that the investigation report probably was, the Court relied on the established purposes for the creation of the investigation materials and the investigation report, as they

were or were not established by the defendant's affidavit evidence. The Court found at paras. 110 – 113 and 116 – 17,

If the investigation was for a privileged purpose, it would be a fair inference that the records created by the Investigator were for the same purpose...

I do not agree with the Respondent's submission that the two affidavits of the Defendant's corporate representative do not conflict. The earlier affidavit states that the Investigation was in accordance with the Policy and the Defendant's obligations to its employees to ensure a safe workplace. It states that the Investigator's report was to obtain advice from counsel.

This affidavit does not address the investigation records or information that was gathered (statements, notes, transcripts) or depose that they were created for the purpose of informing counsel or transmitting to instruct counsel or that the Investigation generally was for privileged purposes.

These are significant omissions. The Respectful Workplace Policy should not be lightly assumed to be an unimportant operational process. To the contrary, the Policy emphasizes the importance and need for a complaints process (Policy, page 1, "Introduction" and "Purpose"). It emphasizes that where an investigation is warranted the company must provide opportunity for both complainant and "accused" (in the wording from the Policy, page 7, "Disciplinary Measures and Sanctions") to "be heard" (Policy page 6). This imports a meaningful opportunity to be heard. In the case of a complainant, it would at least permit the accused to know the specific allegations against them in order that they could respond. The company representatives under the Policy (a "Contact Person" or "Review Committee") must investigate, decide, report, recommend corrective and future preventative actions if any, and inform the individuals involved (Policy at p 6)

* * *

As to solicitor-client privilege, the Defendant's first affidavit demonstrates that the purpose of the Investigator's final report was to inform counsel and the Defendant to obtain legal advice and determine the appropriate course of action. The final report is probably solicitor-client privileged as one prepared to obtain legal advice. The Plaintiff does not seek disclosure of the Report, therefore I have not found it necessary to suggest to the parties that I review the report to come to a final determination whether it is privileged.

However, the Defendant's first affidavit does not demonstrate that the Investigation and the records and notes created therein was for the sole (or even a dominant, main or primary purpose) of obtaining legal advice...

[underlining added]

[para 96] Ultimately, the Court found that the investigation materials were not subject to either litigation or solicitor-client privilege owing to the fact that the evidence did not establish that the dominant purpose for which they were created was litigation, or for the purposes of obtaining legal advice.

[para 97] In the case at hand, the description of the records in the supplemental affidavit as Internal Investigation Reports, and the further description in the *in camera* affidavit suffer from

the same significant omissions as the affidavit evidence in *Prosser*. The purposes for which the Internal Investigation Reports were created is not stated. Further, the Internal Investigation Reports were sent to legal counsel for advice *on who should be notified about the conclusions*, but that does not speak to the purpose for their creation, or suggest that the Public Body was seeking legal advice about the content of the Investigation Reports themselves, as was key to the decisions in *Singh* and *Manah* that such documents were privileged. The situation is thus akin to that mentioned in *L'Abbé v Allen-Vanguard Corp*, 2011 ONSC 7575 at para. 29,

...The privilege may extend to information conveyed between the client and lawyer through an agent or other intermediary. The objective of the privilege is to ensure that effectual legal assistance may be obtained by fully and frankly disclosing all material facts to the lawyer in confidence. It is however the communication between the client and the lawyer that is privileged and not objects or documents that otherwise exist. Simply providing a document that is otherwise not privileged to a lawyer in order to obtain legal advice does not render the document itself a privileged document. Consequently attachments to privileged e-mails may or may not be privileged themselves.

[underlining added; end notes omitted]

[para 98] In the absence of evidence that the Internal Investigation Reports are covered by solicitor-client privilege, they appear to be documents that are otherwise not privileged that were then provided to a lawyer for AHS.

[para 99] In view of the foregoing, the result in this case is the same as that reached in *ShawCor* at para. 80,

...Not every form of communication with a solicitor by a client is necessarily covered by solicitor-client privilege: *Foster Wheeler Power Co v SIGED Inc*, 2004 SCC 18 at paras 37-40, [2004] 1 SCR 456. The privilege attaches to communications between lawyer and client designed to seek out or give legal advice. While a number of the testing and investigation records in question, or perhaps even all, might well fall within this category, we have no way of knowing which ones do so because they have not been adequately described and the case management judge declined to examine them. Thus, the case management judge erred to the extent that he relied on this privilege as a blanket justification for refusing to order the disclosure of the testing and investigation records post-February 4, 2009. Nothing in CNRL's affidavits assists in making a determination whether any records for which privilege have been claimed fall under the near-absolute category of solicitor-client privilege.

[para 100] As in *ShawCor*, I cannot determine from the Public Body's evidence that these records are subject to solicitor-client privilege. Accordingly, I must find that the Public Body has failed to meet its burden to establish that the privilege applies.

[para 101] Unlike in *ShawCor*, however, my order in respect of the Internal Investigation Reports will not be for the Public Body to provide a further description of the records; rather, my order will be that the records should be disclosed to the Applicant. This is so since even considerations of solicitor-client privilege must yield to the interest of finality at some point

even if disclosure is imperfect, as was discussed in *Canadian Imperial Bank of Commerce v Canada*, 2015 TCC 280 (*CIBC*).

[para 102] In *CIBC*, the Tax Court considered a challenge to CIBC's assertions that 670 documents were subject to litigation privilege (alone), and found that litigation privilege did not apply. The Tax Court then considered CIBC's position that if litigation privilege did not apply, it should be afforded the opportunity to reexamine the 670 documents in order to determine if they were subject to solicitor-client privilege. CIBC attributed an error in coding privileged documents as litigation privileged to a third party it hired to do the coding. In denying that request, the Tax Court stated at paras. 185 – 186,

...To add further delays to this case, which has already taken years in its pre-trial stages, is inefficient, unfounded and unfair to the Respondent. There is certainly something to be said for making sure everything is done properly, and this would be CIBC's argument. But it had plenty of opportunity to do it properly; it chose a certain way of doing it, and it cannot now, many months later, ask for a mulligan. There must be some finality.

CIBC is therefore not granted its request to re-evaluate the documents that were coded as litigation privilege alone.

[underlining added]

[para 103] The same sentiment was stated by Eamon, J. in *Prosser* with respect to the principle of proportionality. After finding that the Respondent's evidence was contradictory, and did not establish a purpose for which the investigation materials were prepared (either for litigation or legal advice), he stated, at paras. 125 – 126,

Further, proportionality requires that this long pending disclosure dispute be resolved without the expense and delay of an oral evidence hearing on the chance that the Defendant might modify or further explain its evidence.

Given this sophisticated Defendant has had a fair opportunity to explain the contradictions, the matter should be resolved on the basis that it has not discharged its onus of proof by providing unexplained, contradictory information.

[underlining added]

[para 104] And with respect to records concerning another complaint engaging the same privilege issues, Eamon, J. stated at paras. 127 – 130,

If I had found the purpose of the Investigation was privileged, I would nevertheless have refused to find privilege over Complainant 2's complaint.

The mere fact Complainant 2 emailed the Investigator or "came forward" in the course of the Investigation is not sufficient proof of either privilege. The evidence does not indicate why or under what circumstances Complainant 2 chose to email the Investigator. It is reasonable to think, in the

absence of contrary evidence, that they were simply making additional complaints under the Policy.

The onus is on the Defendant. It has had ample opportunity, with capable legal advice, to file evidence in support of its case. It has not proved Complainant 2's emails were created for the purpose of the Investigation.

Consequently, I refuse to find that the Investigation or its underlying records were created for the dominant purpose of litigation or are subject to solicitor-client privilege.

[underlining added]

[para 105] In my view, it makes no difference in this case that the Public Body did not suffer errors committed by a third party as in *CIBC*, or submit contradictory evidence as in *Prosser*. The key consideration in determining that time for new evidence has passed in both cases is that the party asserting privilege has had ample opportunity to make its case that the privilege applies, with capable legal advice.

[para 106] In this case, the first opportunity the Public Body had was in response to the access request. Following that, was the opportunity that arose with its initial submission in this inquiry, in which it was represented by legal counsel. The Public Body then had yet another opportunity to further and better describe the Internal Investigation Reports with the aid of legal counsel after I reviewed its first submitted *in camera* affidavit. In my letter to the Public Body denying its request for an *in camera* submission I alerted to it that further description would be needed.

[para 107] Having had ample opportunity to provide further evidence in support of its claim, I find that the Public Body has failed to meet its burden, and that seeking further evidence or providing further opportunity for it to make its case is not appropriate.

Order with respect to documents withheld as subject to solicitor-client privilege

[para 108] In view of the above, I will order the Public Body to disclose the following records to the Applicant, unless I find that the records have also been properly withheld pursuant to another section of the FOIP Act:

- The records at pages 120-121 of file 008837
- The records at pages 140-141 of file 008837
- The communication and Internal Investigation Reports at pages 2 - 126 of file 008843

D. Did the Public Body properly withhold information under section 17 of the Act (Third Party Personal Information)?

[para 109] The Public Body withheld information under section 17(1) of the FOIP Act in records for files 008828, 008832, 008837, 008838, and 008843.

[para 110] Section 17(1) of the FOIP Act states,

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

[para 111] Whether or not disclosing personal information is an unreasonable invasion of a third party's personal privacy is determined through consideration of whether section 17(2) deems disclosure not to be an unreasonable invasion of personal privacy, or whether the presumptions and factors in sections 17(4) and 17(5), respectively, indicate that disclosure is an unreasonable invasion of personal privacy.

[para 112] Whereas the Public Body carries the burden of demonstrating compliance with the FOIP Act for the other issues pursuant to section 71(1) of the FOIP Act, section 71(2) places the burden upon the Applicant to demonstrate that disclosing personal information would not be an unreasonable invasion of third party personal privacy. Those sections state,

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.

(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

[para 113] Since the Applicant has not provided any argument regarding disclosure of third party personal information, he has not met his burden. Accordingly, the only matters I consider in this Issue is whether information withheld by the Public Body under section 17(1) is third party personal information, and whether the Public Body carried out the required considerations under sections 17(2), (4) and (5) when withholding it.

[para 114] "Personal information" is defined in section 1(1)(n) of the FOIP 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 115] The Public Body's submissions regarding personal information apply to all of the files. Further below, I consider the Public Body's redactions under section 17(1) on a file-by-file basis.

[para 116] The Public Body provided, for my review, the records from which it withheld personal information under section 17(1). However, with very limited exceptions, the Public Body neither demarcated on the records nor described in its submission precisely which information on any given record it determined was personal information. It only described the type of information it regarded as personal information *in general* in its submissions. While the general description is helpful, I am left to determine what information might fit that description based upon my review of the records. Per its general description, the Public Body identified the following information as personal information:

- Medical and employment history of an AHS employee;
- The nature of an AHS employee's and officer's involvement in legal proceedings (including final outcomes of those proceedings);
- Incident involving an AHS employee and the employee's personal opinions and feelings about the Incident; and,
- Recommendations to an AHS employee to help the employee respond to the Incident.

[para 117] With regard to the above types of information, the Public Body also states,

While the emails contained in the responsive records arise from the AHS email accounts, the nature of the information in the emails to which s. 17 applies carries a personal dimension and is not limited to information generated in the course of the subject individual's work or professional

capacity. They contain personal accounts of situations and interactions that fall well outside the scope of their duties and responsibilities within AHS.

[para 118] Bearing the foregoing in mind, I consider the Public Body's redactions under section 17(1) in each file. Where I reference the "body" of an e-mail in my considerations, it refers to the content written by the author below the From, To, Subject, and Date lines, and, where applicable, the Sensitivity line.

[para 119] For clarity: any information in the records that I do not expressly conclude is third party personal information, is not third party personal information.

Redactions under section 17(1) for file 008828

[para 120] There is some discrepancy in the evidence before me regarding the amount of responsive records for this file. The Public Body's initial response letter to the Applicant of February 22, 2018, states that the total number of records located through its search for records was 23. The letter states that information was withheld under sections 17, 18, and 24 of FOIP Act, or not provided to the Applicant on the basis that it is non-responsive. None of the records were provided to the Applicant. The letter does not state how many were identified as non-responsive.

[para 121] In the index of records provided by the Public Body in this inquiry, the number of responsive records for this file is stated to be two, which presumably would leave a balance of 21 non-responsive records. The sections of the FOIP Act under which information was withheld as listed in the index of records does not include section 17(1).

[para 122] In the copy of records provided to me for review in this inquiry, there are 23 records total, page 1 of which indicates that information on it was withheld under sections 17(1), 18, and 24. The other 22 pages are marked as non-responsive. These documents fit the description of the records found by the Public Body regarding this file, provided to the Applicant in the initial response letter. As such, I consider them the proper records for review in this inquiry.

[para 123] Page 1 is an exchange of three e-mails.

[para 124] In view of the Public Body's description of what it regarded as "personal information" above, I find that the following information is personal information on page 1 of file 008828:

- The last three lines of the body of the bottom e-mail on the page.
- The second sentence in the body of the middle e-mail on the page.

Redactions under section 17(1) for file 008832

[para 125] Information was withheld under section 17(1) on pages 1, 5, and 6 of the records for this file.

[para 126] Page 1 contains two distinct e-mail chains; information was withheld under section 17(1) from the first e-mail chain. The subject of each e-mail in the chain contains personal information in the form of employment information about an employee.

[para 127] Page 5 contains one e-mail. Page 6 contains three e-mails in a chain. The entire body of the e-mail on page 5, and the entire body of the second and third e-mails on page 6 consist of employment information and/or information about involvement in a legal matter concerning an AHS employee. This information is personal information. The last two sentences in the body of the first e-mail on page 6 is also personal information for the same reason.

Redactions under section 17(1) for file 008837

[para 128] Information was withheld under section 17(1) on pages 47, 108, 109, 122, 123, 124, 145, 146, 164, and 165 of the records located in response to the access request for this file.

[para 129] I have found that page 123 is properly withheld as subject to solicitor-client privilege, so do not need to consider redactions under section 17(1) made to that page.

[para 130] Page 47 contains an e-mail chain with two messages. The two messages are the same two messages as the middle and bottom messages of page 1 in file 008828 discussed above, and contains the same personal information as those pages. The description of that information here differs slightly since page 47 of file 008837 only contains two messages, whereas page 1 of file 008828 contains three. The personal information on page 47 of file 008837 is:

- The last three lines of the body of the bottom e-mail on the page.
- The second sentence in the body of the first e-mail on the page.

[para 131] Pages 108 and 109 contain an e-mail chain consisting of four e-mails. The first sentence after the opening two-word greeting of the body of the first e-mail on page 108 is personal information. It is employment information about an employee of the Public Body, concerning the employee's personal involvement in an event brought to the attention of the Public Body.

[para 132] For the same reasons in the preceding paragraph, the following information on pages 108 and 109 is also personal information:

- The first paragraph in the body of the second e-mail on page 108;
- The first sentence (all words appearing before the first period), and the final sentence of the body of the third e-mail on page 108;
- The first two sentences of the body of the fourth e-mail, which commences on page 108 and concludes on page 109.

[para 133] Regarding the first paragraph in the body of the second e-mail on page 108, I note that one sentence appears to contain information that is an opinion about the Applicant. As such the opinion is the Applicant's personal information, and not that of the one who holds the opinion, and, consequently, not third party personal information. The identity of the third party who holds the opinion, is however their personal information and third party personal information (Order F2006-006 at paras. 114 – 115). In this case, the identity of the one who holds the opinion and the opinion itself are intertwined, such that one cannot be reasonably severed from the other.

[para 134] The second paragraph in the body of the second e-mail on page 108 is also third party personal information. It contains information about personal activities of an employee of the Public Body, and their personal thoughts and feelings about some matters.

[para 135] Page 122 contains an e-mail chain consisting of three e-mails. The two paragraphs appearing after the opening salutation in the body of the first e-mail is personal information. It is employment information about an employee of the Public Body, and opinions about how the employee may feel about some events which are, in some cases, inferred from references to programs offered by the Public Body.

[para 136] For the same reasons given in the preceding paragraph, the three sentences appearing after the opening salutation in the body of the second e-mail, and three sentences after the opening salutation in the body of the third e-mail are also third-party personal information.

[para 137] Page 124 contains the same e-mails that compose the second through fourth e-mails on pages 108 – 109. My conclusions regarding personal information appearing on page 124 are thus the same as those for the same information on pages 108 – 109.

[para 138] Pages 145 and 146 contain an e-mail chain consisting of three e-mails. All of the e-mails relate to the same topic: the personal involvement of a Public Body employee in a legal matter. Much of the information in the e-mail chain is the employee's third party personal information, or, if disclosed, would, in turn, disclose other personal information of the employee. Accordingly, I find that the following information is the employee's personal information:

- The subject lines of all of the e-mails;
- The name of the recipient of the first and third e-mails;
- The name of the author of the second e-mail, including the author's signature and information about the author following the signature, including contact information;
- The second sentence in the first paragraph of the body of the second e-mail;
- The closing question before the signature of the author of the second e-mail;
- The salutation opening the body of the third e-mail; and,
- The first paragraph of the body of the third e-mail.

[para 139] Pages 164 and 165 contain an e-mail chain consisting of two e-mails between employees of the Public Body, followed by a forwarded e-mail sent to an employee of the Public Body by the Applicant.

[para 140] The forwarded e-mail expressly states that it was sent to the Public Body employee in the employee's capacity as an official of the Public Body. The use of the employee's name in this context is not personal information, as it only relates to their role with the Public Body (Order F2008-028 at para. 55). None of the other information in the forwarded e-mail is third-party personal information either.

[para 141] The e-mails between the employees of the Public Body use names in two ways: for one employee, their name is used in respect of their professional duties; for the other, their name appears in a personal capacity, concerning their involvement in a legal matter. In the latter case, the name is third party personal information.

[para 142] In view of the above the following information is third-party personal information:

- The name of the recipient of the first e-mail on page 164, including its use in the body of the e-mail;
- The name of the author of the second e-mail starting on page 164, which concludes on page 165, including the author's signature and information about the author following the signature, including contact information;

[para 143] The body of the first and second e-mails on pages 164 and 165 contain third party personal information as well, in the form of information that reveals the thoughts or state of mind of an individual, regarding certain events. One sentence contains personal information of an employee in the form of an expression of their expertise. Such information is as follows:

- All words before the first comma in the first sentence of the first paragraph in the body of the first e-mail on page 164;
- The first sentence of the first paragraph of the second e-mail on page 164, which e-mail concludes on page 165;

Redactions under section 17(1) for file 008838

[para 144] The Public Body withheld pages 1 - 10 of file 008838 under section 17(1).

[para 145] Above, I found that pages 1 - 10 of file 008838 are subject to solicitor-client privilege and properly withheld under section 27(1)(a) of the FOIP Act. Therefore, I do not need to consider whether the Public Body properly withheld any information from them on the basis that it is third-party personal information captured under section 17(1).

Redactions under section 17(1) for file 008843

[para 146] The Public Body withheld information under section 17(1) on page 1 of the records for file 008843. Unlike with other pages I have considered, the Public Body has demarcated exactly which information it withheld under section 17(1) on the copy of the records provided to me for review.

[para 147] Page 1 consists of two mails. The first is sent by its author to its author as a means of noting what is written there, and appeared in the e-mail inbox of another, judging by the name at the top left of the page. The second e-mail is between two employees of the Public Body, and contains their names. As with the records at pages 164 and 165 of file 008837, one of the names appears in a work-related capacity, and the other appears in a personal capacity. I find the following information on page 1 is third party personal information:

- The name at the top left of page 1 provided it appears in a personal capacity. If it appears in a work-related capacity, it is not personal information.
- The recipient's name as it appears in the second e-mail on page 1.

[para 148] I now consider whether the Public Body carried out the required considerations under sections 17(2), (4), and (5) when it withheld information as personal information. I am satisfied that it did.

[para 149] The Public Body considered all of the circumstances in section 17(2) where disclosure of third party personal information is deemed not to be an unreasonable invasion of personal privacy. It found that none apply, and I agree.

[para 150] The Public Body found that presumptions against disclosure in sections 17(4)(a), (d), and (g)(i) apply. Those sections state,

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

...

(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

...

[para 151] The Public Body considered the enumerated factors in section 17(5), which are as follows:

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provided by the applicant.

[para 152] The Public Body made brief submissions with respect to (a), (c), and (f) above. It stated that there is no public interest in disclosure, that disclosure was not relevant to a fair determination of the Applicant's rights, and that the information in the e-mails was supplied in confidence. I agree with the Public Body regarding the first two assertions, but, with limited exceptions, not the latter.

[para 153] Third party personal information may be supplied in confidence explicitly or implicitly (Order F2013-51 at paras. 128 – 129.) In either case, however, there must be some basis in the evidence provided upon which to rest the conclusion that it was supplied in confidence.

[para 154] In this case, the Public Body has asserted the e-mails (and personal information in them) were sent in confidence, based upon either the context in which they were sent, or the presence of a statement of confidentiality in the footer of an e-mail.

[para 155] The Public Body did not elaborate on what points of context indicate confidentiality. Upon reviewing the records, which are e-mails from 20 different individuals to various recipients, there is little to suggest that each and every one was sent in confidence to the recipient. With the exception of two records I discuss further below, I find that the situation here is the same as that in Order F2003-002, where the adjudicator found at paras. 57 – 60,

If section 17(5)(f) [previously section 16(5)(f)] applies, it is a relevant circumstance that weighs in favour of withholding the personal information.

The Public Body states that section 17(5)(f) [previously section 16(5)(f)] applies to the personal information. The Public Body did not, however, elaborate on this point.

One of the Affected Parties also referred to the information as "personal and confidential", but did not elaborate on this point or its application to this inquiry.

I find that the personal information at issue under section 17(5) [previously section 16(5)] does not fall within section 17(5)(f) [previously section 16(5)(f)]. I find that there is insufficient evidence that this personal information was supplied in confidence to the Public Body.

[para 156] I find that some third party personal information on pages 108 and 124 for file 008843 was provided in confidence. This information consists of the identity of a third party expressing an opinion about the Applicant, discussed above. This information is of a sort that I find was implicitly supplied in confidence for the same reasons given in Order F2013-03 at para. 53:

Under section 17(5)(f) of the Act, a relevant circumstance weighing against the disclosure of third party personal information is that the information was supplied in confidence. Some of the records are explicitly confidential, such as the exit interview documents. I find that other records, such as e-mail correspondence and letters in which third parties effectively complain about the Applicant,

contain information that was implicitly supplied in confidence. The context in which third party personal information is given can make it reasonable to conclude that such information was supplied in confidence (Order F2003-014 at para. 18).

[para 157] As for records containing a statement of confidentiality, I only found such a statement on page 109 of file 008837.

[para 158] While I have found that the enumerated factor in section 17(5)(f) applies only to a small amount of information, my conclusion is that the Public Body properly withheld information under section 17(1) in any case. The presumptions against disclosure under section 17(4) considered by the Public Body apply to all withheld third party personal information. The Applicant has not argued that any factors under section 17(5), enumerated or otherwise, outweigh those presumptions, and do not see any that would.

Order in respect of information withheld under section 17(1)

[para 159] I will determine what information, if any, on the pages discussed above should be disclosed to the Applicant after considering the remaining issues. This is because for most of the pages the Public Body simply withheld all information as a result of the application of multiple sections of the FOIP Act, but not did specify which section was applied to which information. Accordingly, I review the information in the records in consideration that multiple sections of the FOIP Act may apply to it, meaning that even if information was improperly withheld under one section, it may have been properly withheld under another.

E. Did the Public Body properly withhold information under section 18 of the Act (Harm to individual or public safety)?

[para 160] The Public Body withheld information under section 18(1)(a) of the FOIP Act from the records in files 008828, 008832, 008837, and 008843. Section 18(1)(a) states,

18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

...

[para 161] The analysis engaged under section 18(1)(a) was set out in Order F2021-34 at paras. 14 – 18:

In Order H2002-001, former Commissioner Work considered what must be established in order for section 11(1)(a)(ii) of the *Health Information Act*, which is similar to section 18 of the FOIP Act, to be applicable. He reviewed previous Orders of this Office addressing what is necessary to establish

a reasonable expectation of harm under section 18 of the FOIP Act and adopted the following approach:

In Order 2001-010, the Commissioner said there must be evidence of a direct and specific threat to a person, and a specific harm flowing from the disclosure of information or the record. In Order 96-004, the Commissioner said detailed evidence must be provided to show the threat and disclosure of the information are connected and there is a probability that the threat will occur if the information is disclosed.

This analysis has been followed with respect to section 18(1)(a) of the FOIP Act. In Order F2013-51, the Director of Adjudication reviewed past orders of this office regarding the application of section 18. She summed up those orders as follows (at paras 20-21):

These cases establish that section 18 of the FOIP Act applies to harm that would result from disclosure of information in the records at issue, but not to harm that would result from factors unrelated to disclosure of information in the records at issue. Further, a public body applying section 18 of the FOIP Act must provide evidence to support its position that harm may reasonably be expected to result from the disclosure of information (as must a custodian applying section 11(1)(a) of the HIA).

Following the approach adopted by the former Commissioner in Order 96-004, and in subsequent cases considering either section 18 of the FOIP Act or section 11 of the HIA, the onus is on the Public Body to provide evidence regarding a threat or harm to the mental or physical health or safety of individuals, to establish that disclosure of the information and the threat are connected, and to prove that there is a reasonable expectation that the threat or harm will take place if the information is disclosed.

In Order F2004-029, the adjudicator also stated that “being difficult, challenging, or troublesome, having intense feelings about injustice, being persistent, and to some extent, using offensive language, do not necessarily bring section 18 into play” (at para. 23).

I agree with the above analyses. Further, the Supreme Court of Canada has clearly enunciated the test to be used in access-to-information legislation wherever the phrase “could reasonably be expected to” is found (such as in section 18(1)(a)). In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Court stated:

Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; *Merck Frosst*, at para. 195:

I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(c) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the “reasonable expectation of probable harm” test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the

legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes. [Emphasis added.]

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”: *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

The Supreme Court of Canada has made it clear that there is one evidentiary standard to be used wherever the phrase “could reasonably be expected to” appears in access-to-information legislation. There must be a reasonable expectation of probable harm, and the Public Body must provide sufficient evidence to show that the likelihood of any of the above scenarios is “considerably above” a mere possibility.

[para 162] As with its submissions regarding section 17(1), the Public Body made arguments in respect of section 18(1)(a) in general, without argument specific to any particular records or information.

[para 163] As described by the Public Body, it applied section 18(1)(a) to information that would, if disclosed,

- Identify an AHS officer’s role in litigation matters
- Identify AHS employees who have made a complaint or otherwise asked to participate in a complaint investigation
- Identify AHS employees involved in completing an investigation report involving a complaint.

[para 164] As to the prospect of harm, the Public Body argues that disclosure poses a threat to the mental health of the individuals affected by the disclosure, stating:

These AHS employees and officers would reasonably sustain undue mental stress if their names and context of their involvement were disclosed to the Applicant for fear of being added into either existing or new litigation or legal proceedings, or otherwise being subject to retaliation.

[para 165] Leaving aside whether the Public Body’s general arguments accurately apply to any particular information withheld under section 18(1)(a), I find that it does not satisfy the harm criteria required under section 18(1)(a).

[para 166] The Public Body has argued that disclosure would result in mental stress; whether that stress is undue or otherwise, is not relevant here. The prospect of stress, without more, does not rise to the level of a threat to mental health under section 18(1)(a) the FOIP Act.

[para 167] “Mental Health” is not defined in the FOIP Act. The term “mental disability” appears in the definition of “personal information” in section 1(1)(n)(vi) in such a way that information about a mental disability is part of an individual’s personal information concerning their health, but that does nothing to clarify whether the prospect of mere stress constitutes a threat to mental health, or portends the possibility of harm.

[para 168] Previous orders of this Office have noted arguments or allegations that the prospect of stress might meet the section 18(1)(a) criteria, but have not made a decision addressing that point. For example, in Order F2024-41, the Adjudicator considered disclosures which the public body alleged would increase the already considerable stressors faced by its employees who were working to address the COVID-19 pandemic. The public body’s argument regarding section 18(1) included the following, reported at para. 20 of Order F2024-41:

The Public Body applied section 18 to withhold information about its employees. The Public Body argues:

Section 18 (disclosure harmful to individual or public safety) of the Act states: The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to (a) threaten anyone else's safety or mental or physical health, or (b) interfere with public safety. Pages 5, 7, 38, 40-41, 43, 47, 59, 62-65, 67, 74-76, 78-79, 83, 88-89, 94, 102, 108, and 111: Section 18(1) was also applied to the employees of the Public Body who were working on Covid pandemic related issues. The public knowledge of the physical addresses, email addresses, and contact information of GoA staff members who were working on Covid pandemic related issues has been utilized by people who have made serious threats of physical harm and have shown up at the work locations of GoA staff members. The threats that have been made are extreme and have included death threats to GoA staff and, in some cases, their families.

The Vaccination Exemption Requests (VER) team members were told that they should be ashamed of themselves, and that the work they were doing was revolting. This type of harassment has a significant impact on the psychological well-being and mental health of these GoA employees, which was only compounded with the immense stressors already present during the Covid pandemic. These employees were simply carrying out their job responsibilities, regardless of their own personal beliefs. The VER team members were asked where they live, whether they have family or children, and what their religious beliefs are. These types of questions are deeply personal, and show a pattern of conflict and stress within the workplace that threatened the mental health of employees on a personal level.

[underlining added]

[para 169] The Adjudicator’s decision ultimately rested upon the fact that there was no evidence that disclosing the withheld information would invite further comments that were alleged to have resulted in stress. The Adjudicator did not consider whether stress amounted to a threat to mental health.

[para 170] Similarly, in Order F2024-15, a public body presented the following argument, summarized at paras. 60 - 63,

I understand the Public Body to be arguing that when the Applicant does not get what he wants from the Public Body's employee, or does not like the action or decision an employee of the Public Body has taken or made with respect to the Applicant, or even the tone of voice the employee used to speak with the Applicant, the Applicant retaliates against the employee by making and/or filing complaints, and/or commencing actions against the employee wherever he can.

The Public Body's position is that Applicant's actions could reasonably be expected to negatively affect its employees' mental health by inflicting mental suffering and stress on those employees, and that this amounts to harassment, or bullying, of its employees.

I understand the Public Body to be arguing that it has an obligation under the OH&S Act to protect its employees from harassment and violence, and that the Applicant's prior actions in relation to its employees has amounted to harassment of and/or violence in the form of psychological injury or harm, as defined in the OH&S Act, against its employees.

I understand the Public Body to be arguing that if it discloses the information it has withheld under section 18(1)(a) to the Applicant, the Applicant will use this information to continue his pattern of making complaints and/or commencing actions in retaliation against the employee or employees or other third parties wherever he can, or engaging in other behavior that is intimidating and/or relentless, and threatens the mental health of the employee or employees' or third party.

[underlining added]

[para 171] In concluding that some information was subject to section 18(1)(a) and other withheld information was not, the Adjudicator reached her conclusion based upon *in camera* information that explained how disclosure would threaten its employees’ mental health, citing past conduct of the applicant that would, “...objectively be considered to be intimidating and/or harassing, and which negatively affected its employees' mental health.” (Order F2024-15 at para. 74). The Adjudicator’s conclusion appears to be based upon the intimidating or threatening behaviour of the applicant, rather than the prospect of stressful complaints.

[para 172] In Order F2003-006, the Adjudicator held as follows at paras. 16 - 18,

In addition, I took into account the Applicant's conduct during this inquiry. As part of his submission, the Applicant attached an "Exhibit C" which contained partially nude pictures of his former wife, which the Applicant stated were evidence of his former wife's alleged previous relationship.

I find that this action by the Applicant strongly supports the Public Bodies' positions to withhold the records under section 18(1)(a) [previously section 17(1)(a)]. In this regard I agree with the statement made by the CPS as part of its rebuttal submission:

It is evident from Exhibit "C" of (the Applicant's) Brief that the disclosure of the two affidavits would reasonably be expected to be used by [the Applicant] in order to threaten the affected parties' safety, and mental or physical health. Therefore the CPS strongly urges the Privacy Commissioner to dismiss [the Applicant's] review of the CPS decision not to disclose the affidavits of the affected parties, based on [the Applicant's] apparent disregard of the personal privacy of the affected parties and his intentional attempt to cause humiliation, stress and mental suffering to the affected parties.

I find that by including these pictures in his submission, the Applicant provided direct evidence about the lengths to which he is prepared to go to humiliate his former wife and cause distress to the Affected Parties. I find that this action is particularly disturbing given the fact that the Applicant was fully aware that his son was an Affected Party in this inquiry and, as such, would receive a copy of the Applicant's submission.

[underlining added]

[para 173] Notably, while the Adjudicator in Order F2003-006 agreed with the public body's argument which included allegations that disclosure would cause stress, among other effects, the Adjudicator's conclusion was based upon a finding that the Applicant was on a campaign to humiliate and cause distress to certain people. I have no evidence supporting the same or similar threats to mental health in this case.

[para 174] The matter of whether stress amounts to a disability under human rights legislation attracted recent consideration in the Court of King's of Bench of Alberta. Though the following decisions concern the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (the *AHRA*) which engages its definition of "mental disability", I find the discussion around stress useful in this context as well. I also note that the Court uses the term "mental health" or "mental health condition" when considering the issue. For frame of reference, the definition of "mental disability" in the *AHRA* at section 44(1)(h) is as follows

(h) "mental disability" means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder;

[para 175] In *Volpi v Alberta (Human Rights Commission) (Office of the Chief of the Commission and Tribunals)*, 2023 ABKB 608 (*Volpi*), the Court judicially reviewed a decision of the Chief of the Commission not to advance a complaint to a hearing before the Alberta Human Rights Tribunal. The Court noted at para. 31,

Clearly, stress is a factor in many jobs today and accordingly stress does not automatically equate to a mental health condition: *Canada (Attorney General) v Gatién*, 2016 FCA 3 at para 48. At the same time, stress can be a mental health condition if substantiated by a medical diagnosis: see *Salazar v JSL Investments Corporation*, 2020 AHRC 8. The question of whether an individual's stress

constitutes a mental health condition protected under the Act is heavily fact-specific. The Applicant cites an academic article concerning workplace burnout, Patrica Thornton, "The Relation of Coping, Appraisal and Burnout in Mental Health Workers" (1991), *The Journal of Psychology* 126(3), 261. The Applicant does not point to any authority in which burnout was found to be a mental health condition.

[para 176] In *Volpi v Alberta (Human Rights Commission) (Office of the Chief of the Commission and Tribunals)*, 2024 ABCA 401, the Alberta Court of Appeal reversed the above decision on the grounds that the complainant had established sufficient grounds to proceed to a hearing. The Court of Appeal stated at paras. 7 – 10,

We note the appellant provided documentary evidence supporting his position that he took leave and was hospitalized in 2009. He provided documentary evidence from his clinical lead at Lifemark in the spring/summer of 2015 to the effect that he was aware as a colleague and as clinical lead that the appellant's hospitalization in 2009 was for mental health reasons. The evidence also indicates that this clinical lead - who was not clinical lead in the fall of 2016 - knew that the appellant was experiencing mental health issues of anxiety/stress and depression at the time the appellant's employment ended in the fall of 2016 and in the following weeks. The appellant provided documentary evidence in support of his position that he was struggling with stress in the year leading up to the end of his employment which was affecting his work, and in support of his position that others in the workplace - including the 2016 clinical lead - would have been aware that he was stressed and burnt out...

There was emphasis in the decisions below that stress and burnout are not the same as mental disability and an employer ought not to assume that stress reflects a mental disability. There were findings on the paper record that there was no duty to inquire, no adverse impact and no duty to accommodate in the circumstances.

...

The circumstances of this case are complex and give rise to difficult factual issues which cannot be resolved solely on the paper record. Further, there are potentially novel legal questions relating to recognition of mental disability in the workplace and the duties of an employer. We refrain from commenting at length on the documentary evidence before the Chief. We recognize that the appellant's documents to which we have referred are only part of the paper record...

[para 177] I wish to make absolutely clear that by referencing the above passages, I am not suggesting that the Public Body *must* provide evidence of past stress-related issues of those individuals whose health and safety it is considering when applying section 18(1)(a). Section 18(1)(a) deals with prospective harms which may occur, not only those which have already happened before, or are otherwise precedented.

[para 178] What I understand from the above decisions, and I find is as applicable to the question of a threat to mental health under section 18(1)(a) of the FOIP Act as it is to the question of mental disability under the *AHRA*, is that determining whether stress affects mental health is a fact-specific endeavour. Specific to threats to mental health under section 18(1)(a) of the FOIP Act, is the question of whether the evidence suggests that any stress threatened

carries the requisite risk of *harm to mental health*, as opposed to only posing a risk of bringing about stress akin to the regular sort which is to be expected, for example, in a workplace as mentioned by the Alberta Court of King's Bench in *Volpi*. That is to say that I find that a prospect of stress does not suffice to establish a prospect of harm; there must be more. Order F2024-15 provides an example: rather than just stress, the evidence indicated a risk of objectively harassing and intimidating behaviour.

[para 179] The Public Body does not offer any evidence that the stress it alleges will occur amounts to a risk of harm to mental health. It has not indicated that any of the people whose e-mails are the subject of the access requests are unusually or particularly susceptible to being harmed by possible stress, neither does its argument offer any other facts upon which I could find a threat to mental health under section 18(1)(a).

[para 180] While I have found that the Public Body's general arguments do not meet the harm requirement, I also reviewed the information withheld under section 18(1)(a) to see if it is evident on its face that a threat to mental health beyond stress is present. I did not find any information that indicates a threat to mental health beyond mere stress.

[para 181] I note that the information on page 108 of file 008837 contains information that some might understand to allude to events which could indicate a threat of the sort found in Order F2024-15 above. Those events, if they are of the same sort mentioned in Order F2024-15, are now many years in the past, and do not appear to have been repeated. If the information could be said to indicate a threat beyond mere stress, I do not find that the information supports a reasonable prospect that the harm could occur.

[para 182] Accordingly, I find that the Public Body has not properly withheld information under section 18(1)(a).

F. Did the Public Body properly withhold information under section 24 of the Act (Advice from officials)?

[para 183] The Public Body withheld information under section 24 of the FOIP Act from records in files 008828, 008832, 008837, and 008843.

[para 184] I have already found that some pages on which the Public Body withheld information under section 24 of the FOIP Act have been properly withheld as subject to solicitor-client privilege under section 27(1)(a). Accordingly, I do not need to consider whether information on those pages has also been properly withheld under section 24. Those pages are as follows:

From file 008832

- Page 2

From file 008837

- Pages 58, 59, 65 – 69, 75, 106, 107, 110, 111, 123, 125, 148, 149, 150 and 151.

[para 185] The Public Body withheld information under section 24(1)(b)(i) of the FOIP Act. Section 24(1)(b)(i) states,

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

- ...
- (b) consultations or deliberations involving*
 - (i) officers or employees of a public body,*
- ...

[para 186] The scope of information captured under sections 24(1)(a) and (b) was summarized in Order F2019-17 at paras. 161-166,

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

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

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

In Order F2012-06, the adjudicator stated, citing former Commissioner Clark's interpretation of "consultations and deliberations", that

It is not enough that records record discussions or communications between employees of a public body; rather, a consultation takes place only when the individuals listed in section 24(1)(b) are asked for their views regarding a potential course of action, and a deliberation occurs when those individuals discuss a decision that they are responsible for, and are in the process of, making. (At para. 115)

In Order F2012-10, the adjudicator clarified the scope of section 24(1)(b):

A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations

involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision. (At para. 37)

Further, 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).

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, proposal, recommendations etc. such that they cannot be separated (Order 2007-013 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 paras. 31 and 37).

[para 187] I agree with the Adjudicator in Order F2019-17.

[para 188] The Public Body's description of the information it withheld under section 24(1)(b)(i) is as follows:

- Consultations between AHS employees about nature of ongoing AHS litigation and AHS officers that need to be notified;
- Consultations between AHS employees about status on ongoing AHS investigations;
- Consultations and deliberations between AHS employees about response to emerging incidents, including need to involve legal counsel;
- Consultations between AHS employees about management of litigation production and technological safeguards;
- Consultations and deliberation about responses to complaints about AHS employees/officers (including process and procedure); and,
- Consultations about response to access to information requests.

[para 189] I consider the Public Body's redactions under section 24(1) for each file, below.

Redactions under section 24(1) for file 008828

[para 190] The Public Body withheld information under section 24(1)(b)(i) from page 1 of the records for this file.

[para 191] Page one consists of an e-mail chain containing three e-mails. The body of each e-mail with the exception of names, salutations, and signatures are consultations under section 24(1)(b)(i). No other information on page 1 falls in that category as none of it, for example the

date, time, author and recipient of the e-mails, comprises part of the substance of the consultation.

Redactions under section 24(1) for file 008832

[para 192] The Public Body withheld information under section 24(1)(b)(i) from pages 1, 5, and 6 of the records for this file.

[para 193] The body of the two e-mails in the first e-mail chain on page 1 are consultations under section 24(1)(b)(i), with the exception of names, salutations, and signatures. The same is true for the body of the e-mail on page 5, and the bodies of the e-mails on page 6.

[para 194] Other information on these pages is not captured under section 24(1)(b)(i) since it does not form part of the substance of consultations. Such information includes the names of the authors and recipients of the e-mails, date and time on which they were sent, and subject line.

Redactions under section 24(1) for file 008837

[para 195] The Public Body withheld information from pages 47, 108, 109, 122, 124, 145, 146, 164, and 165 under section 24(1)(b)(i) from the records for this file. It also withheld information under that section on pages 140 and 141; I deal with those pages first.

[para 196] The Public Body withheld pages 140 – 141 under section 27(1)(a) as subject to solicitor-client privilege. As such, they were not provided to me for review. Above, I found that those pages were not subject to solicitor-client privilege, and hence not properly withheld under section 27(1)(a). As such, I am left to consider whether the Public Body properly withheld information from them under section 24(1), even though the records have not been provided to me for review.

[para 197] In the absence of the records, I am unable to conduct a proper review of information withheld under section 24(1)(b)(i), and unable to conclude that the Public Body has met its burden to withhold this information. However, I also consider that, by and large, the Public Body has applied section 24(1)(b)(i) to pages that contain at least some information captured under it. There is a fair probability that some information falling under section 24(1)(b)(i) falls on these pages as well. Therefore, my order will be that the Public Body should reconsider its application of section 24(1)(b)(i) to pages 140 – 141.

[para 198] I now consider the other pages from which the Public Body withheld information under section 24(1)(b)(i).

[para 199] Page 47 contains an e-mail chain with two messages. The two messages are the same two messages as the middle and bottom messages of page 1 in file 008828 discussed above. My decision in respect of page 47 is the same as for the e-mails on page 1 in file 008828. The body of each e-mail with the exception of names, salutations, and signatures are consultations under section 24(1)(b)(i). No other information on page 47 falls in that category as none of it, for example the date, time, author and recipient of the e-mails, comprises part of the substance of the consultation.

[para 200] Pages 108 and 109 contain an e-mail chain consisting of four messages. The bodies of the e-mails are consultations under section 24(1)(b)(i). Other information on these pages is not captured under section 24(1)(b)(i) since it does not form part of the substance of consultations. Such information includes the names of the authors and recipients of the e-mails, date and time on which they were sent, and subject line.

[para 201] Page 122 contains an e-mail chain consisting of three messages. I find that none of the information on these pages falls under section 24(1)(b)(i), or any other subsection of section 24(1). The content contains conversation, and an exchange of information, but lacks the hallmarks of consultation or deliberation set out in Order F2019-17 above.

[para 202] Page 124 contains an e-mail chain consisting of three messages. The bodies of the second and third e-mails are consultations under section 24(1)(b)(i). Other information from these e-mails is not captured under section 24(1)(b)(i) since it does not form part of the substance of consultations. Such information includes the names of the authors and recipients of the e-mails, date and time on which they were sent, and subject line. None of the information in the first e-mail is captured under section 24(1)(b)(i) as the e-mail simply informs the recipient of some information, or a decision made, but does not contain any consultation or deliberation.

[para 203] Page 145 contains an e-mail chain consisting of two messages. The bodies of the two e-mails are consultations under section 24(1)(b)(i). Other information on this page is not captured under section 24(1)(b)(i) since it does not form part of the substance of consultations. Such information includes the names of the authors and recipients of the e-mails, date and time on which they were sent, and subject line.

[para 204] Page 146 contains an attachment to an e-mail, in the form of a letter. No information in the letter falls under section 24(1)(b)(i). The letter contains a request for a meeting, and the author's rationale for doing so, but the letter does not solicit information or deliberate on a course of action itself. The letter requests a meeting during which a consultation may have taken place, but it does not contain the substance of such consultation.

[para 205] Pages 164 and 165 contain an e-mail chain consisting of two messages, followed by a forwarded e-mail sent to an employee of the Public Body by the Applicant.

[para 206] The bodies of the first and second e-mails on page 164 are consultations under section 24(1)(b)(i). Other information on these pages is not captured under section 24(1)(b)(i) since it does not form part of the substance of consultations. Such information includes the names of the authors and recipients of the e-mails, date and time on which they were sent, and subject line, and the same information related to the third e-mail which was forwarded in the second e-mail. The forwarded e-mail does not contain information captured under section 24(1)(b)(i). That e-mail simply delivers a document, and does not seek consultation or deliberations.

Redactions under section 24(1) for file 008843

[para 207] The Public Body withheld information under section 24(1)(b)(i) from page 1 of the records for this file. Unlike other pages, it has specified precisely which information it withheld under that section on this page.

[para 208] Page 1 contains two e-mails. The Public Body withheld the subject lines of the two e-mails as well as the bodies of the two e-mails.

[para 209] The subject lines alert the reader to the content or topic of the e-mails, but do not contain the substance of information captured under section 24(1)(b)(i) and cannot be withheld under it.

[para 210] The bodies of the two e-mails do not contain information that is captured under section 24(1)(b)(i) either. The first e-mail is sent from the author to the author, and appears to have been blind copied to another party. There is no indication of any consultation between them however. The first e-mail simply seems to be a note from the author to himself, for a purpose that is not evident on the face of the e-mail.

[para 211] The body of the second e-mail contains a request for a copy of written information, but not the substance of any consultation. It is not captured under section 24(1)(b)(i) and cannot be withheld under it.

Exercise of discretion

[para 212] Since section 24(1) is a discretionary exception to disclosure, I must consider whether the Public Body properly exercised discretion to withhold information under it.

[para 213] Exercising discretion was considered in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (*Ontario Public Safety and Security*). Numerous orders of this office have confirmed that the reasoning therein is applicable to the exercise of discretion under the Act. At paragraph 71 of *Ontario Public Safety and Security*, the following

factors were identified as relevant to the question of whether or not a public body has properly exercised its 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 214] Justice Renke elaborated on what *Ontario Public Safety and Security* requires in *EPS* 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 215] With regard to consideration of harmful effects of disclosure, Justice Renke stated at para. 420 in *EPS*,

...In my view, that is the implication of the *Ontario Public Safety and Security* passages quoted above. A public body is entitled to show that disclosure could have other adverse effects (whatever those might be) –but the public body must indicate what those adverse effects are and that the negative consequences of disclosure outweigh the interests in the disclosure, the “interest in open government.”

[para 216] When exercising discretion, public bodies should also consider the particular purpose of the exception to disclosure being considered. The purpose of section 24(1)(b) is, generally, to protect consultations made in the course of the decision-making process. (Order 96-012 at para. 31).

[para 217] The Public Body’s description of how it exercised discretion under section 24(1) is as follows:

Section 24(1)(b) is meant to protect the process of decision making between officials of a public body. AHS employees involved in the consultation and deliberation processes were providing their own thoughts with an understanding that they may be either agreed upon or opposed by others. These views also may not have been fully formed, but, they needed to be provided so further deliberation could take place, where free thought was truly protected and not merely illusory.

The importance of protecting the process of decision making within the AHS was a significant factor that AHS considered in exercising discretion pursuant to section 24(1)(b) of FOIPPA. More generally, AHS considered the following:

- The impact the disclosure would reasonably be expected to have on AHS' ability to carry out similar decision-making processes in the future;
- That AHS had a reasonable expectation consultations and deliberations could take place freely within AHS and would be kept confidential; and
- The objectives and purposes of the Act, including the Applicant's right of access.

[para 218] The above description of how the Public Body exercised discretion, on its own and divorced from the knowledge of the records I have gained by reviewing them, does not meet the standard for demonstrating proper exercise of discretion. It displays knowledge of some of the relevant points to be considered, but does not link those points to the particular information withheld under section 24(1), nor does it state "...how the negative consequences of disclosure outweigh the interests in the disclosure, the "interest in open government", to quote from *EPS*, above.

[para 219] However, after reviewing the records themselves it is apparent to me that the Public Body has properly exercised its discretion in this case. Without going into details that would reveal much of the Applicant's personal circumstances, the relationship between the Applicant and the Public Body, and the events shaping that relationship were complex, and steeped in litigation at the time the access request was made. The employees and officials involved in the redacted information had much to consult each other about as it came to addressing the circumstances between the Public Body and the Applicant. It is obvious that their ability to do so would have been greatly hindered had the Applicant been able to peer into its consultations via making an access request under the FOIP Act. As well, the information withheld relates to events involving the Applicant in particular and so relates far more to a matter of a private nature than to information disclosure of which would promote open government. In view of the foregoing, I am satisfied that the Public Body has struck the proper balance in exercising in discretion. I find that it has properly withheld information under section 24(1)(b).

G. Did the Public Body properly withhold information as non-responsive?

[para 220] The Public Body determined that records were non-responsive for files 008828, 008832, and 008834 as described below:

Non-responsive records in file 008828

[para 221] The Public Body identified pages 2 – 23 of the records for this file as non-responsive.

Non-responsive records in file 008832

[para 222] The Public Body identified pages 7 – 14 of the records for this file as non-responsive.

Non-responsive records in file 008834

[para 223] The Public Body identified pages 4 – 63 of the records for this file as non-responsive. These pages contain one e-mail, and one large attachment.

[para 224] While the Public Body did not address this issue in its submissions, its letters sent to the Applicant in response to each access request explain the reason why it identified records as non-responsive.

[para 225] In each case, the records identified as non-responsive do not reference the Applicant's name or initials as specified in the access request. Rather, each of them contains e-mails which include letters that are identical to the Applicant's initials, but are used to refer to other matters, and do not relate to him. The coincidental spelling of the Applicant's initials and the terms in the records would explain why they were caught up in the search for records, despite being non-responsive to it.

V. ORDER

[para 226] I make this Order under section 72 of the Act.

Order in respect of section 10(1) for all files, including 008822, 008826, 008827, 008831, and 008835

[para 227] I order the Public Body to search for records from the whole period of time specified in the access requests, using the following parameters that were not included in the discovery search, or the search in response to the access request:

- Search for e-mails which contain any keyword specified in the access request in the body of an e-mail;
- Search for e-mails containing the Applicant's first name alone (without coupling to his last name) in the body or subject line of an e-mail.

[para 228] I do not order the Public Body to repeat its search for records using terms already searched for in the subject line of e-mails provided through the discovery process or its search for records in response to the access requests.

[para 229] In ordering the above, I am cognizant that it has now been 12 years from the earliest date for which records were requested. Any records not preserved via the litigation process may well be lost. If this is the case then the Public Body shall provide that explanation to the Applicant.

Order in respect of information withheld under section 27(1)(a) as subject to solicitor-client privilege

[para 230] I find that with the exception of pages 120 – 121 and 140 – 141 of file 008837, and pages 2 – 126 of file 008843, the Public Body properly withheld information as subject to solicitor-client privilege, and they should not be disclosed to the Applicant.

[para 231] Since the Public Body improperly withheld pages 120 – 121 of file 008837 as subject to solicitor-client privilege, and did not withhold any information in them under any other section of the FOIP Act, I order the Public Body to disclose those pages to the Applicant, subject to any mandatory exceptions to disclosure under the FOIP Act.

[para 232] Since the Public Body improperly withheld pages 2 - 126 of file 008843 as subject to solicitor-client privilege, and did not withhold any information in them under any other section of the FOIP Act, I order the Public Body to disclose those pages to the Applicant, subject to any mandatory exceptions to disclosure under the FOIP Act.

[para 233] Since the Public Body improperly withheld pages 140 – 141 of file 008837 as subject to solicitor-client privilege, but also withheld some information under section 24(1)(b)(i), I order the Public Body to disclose those pages to the Applicant, subject to reconsideration of the application of section 24(1)(b)(i), taking into account the type of information properly captured under that section described in this Order. Disclosure of information on these pages will also be subject to any mandatory exceptions to disclosure under the FOIP Act.

Order with respect to information withheld under section 18

[para 234] Since I have found that the Public Body improperly withheld information under section 18 in all cases, I order the Public Body to disclose all such information to the Applicant.

Order with respect to pages withheld as non-responsive

[para 235] I confirm that the Public Body properly identified information as non-responsive. It is not required to disclose any of that information to the Applicant.

Order with respect to partial disclosure of information on a page where whole page withheld

[para 236] Frequently, the Public Body withheld entire pages, applying multiple exceptions to disclosure in order to do so. For all such pages, I order the Public Body to disclose to the

Applicant all information on them, subject to information which I specifically found was properly withheld in this Order under either section 17(1), 24(1)(b)(i), or 27(1)(a).

Order with respect to page 1 of file 008843

[para 237] The Public Body particularized the information withheld under each section of the FOIP Act on this page, and disclosed the balance to the Applicant in response to its access request. I order the Public Body to disclose to the Applicant the following further information which I found was improperly withheld on this page:

- The name at the top left of the page if it appears in a work-related capacity, and not a personal capacity.
- The subject lines of the e-mails appearing on this page.
- The bodies of the e-mails appearing on this page.

[para 238] I order the Public Body to confirm, in writing, to me and the Applicant that it has complied with this Order within 50 days of receiving a copy of it.

John Gabriele
Adjudicator
/kh

¹ The reference to an "In Camera Affidavit" appears in paragraph 60 of the first copy of the Public Body's submission. The first copy inadvertently omitted attachments referred to in it. The Public Body submitted a second copy containing the attachments, in which paragraph 60 was amended to refer to the supplemental affidavit.