ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2017-67

August 30, 2017

ALBERTA HEALTH SERVICES

Case File Number 000282

Office URL: www.oipc.ab.ca

Summary: Pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act) the Applicant made an access request to Alberta Health Services (the Public Body) for records relating to a judicial review application of an order issued by the Office of the Information and Privacy Commissioner (this Office). The Public Body responded but withheld some records as not being responsive and others relying on sections 4, 17, 24 and 27 of the Act. The Applicant asked this Office to review the Public Body's search for responsive records and its application of the exceptions to the Act.

The Adjudicator found that the Public Body performed an adequate search and, with the exception of one line which was responsive, the Public Body properly applied the exceptions in the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 10, 17, 24, 27, 56, 71, and 72.

Authorities Cited: AB: Orders 96-006, F2007-029, F2009-044, P2011-006, F2015-22, and F2016-31.

Cases Cited: *Canada v. Solosky* [1980] 1 S.C.R. 821, *Covenant Health v. Alberta (Information and Privacy Commissioner),* 2014 ABQB 562, *Kansa General International Insurance Co. (Winding up of),* [2011] Q.J. No. 11217 (Que. C.A.), *S. & K. Processors v. Campbell Avenue Herring Producers Ltd.*, [1983] B.C.J. No. 1499 (B.C.S.C.), *University*

of Calgary v. J.R.[2015] A.J. No. 348, and *Alberta (Information and Privacy Commissioner) v. University of Calgary* [2016] S.C.J. No. 53.

I. BACKGROUND

[para 1] On October 1, 2014, the Applicant made an access request to Alberta Health Services (the Public Body) pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act) for records relating to an inquiry conducted by the Office of the Information and Privacy Commissioner (our Office) which resulted in an Order which was judicially reviewed.

[para 2] After initially extending its time to respond to the Applicant's access request, on December 5, 2014, the Public Body responded. It provided the Applicant with responsive records but some information was severed in reliance on sections 17, 24 and 27(1)(a) of the Act. In addition, the Public Body noted that some of the information was excluded from the Act pursuant to section 4 but that information was provided to the Applicant despite this.

[para 3] On January 23, 2015, the Applicant submitted a Request for Review to this Office. Mediation was authorized but did not succeed in resolving the issues between the parties and on September 22, 2015, the Applicant requested an inquiry. I received submissions from both the Applicant and Public Body.

II. ISSUES

[para 4] The Notice of Inquiry dated May 16, 2016 state the issues in this inquiry as follows:

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

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

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

3. Are the records excluded from the application of the Act by section 4(1)(a) (information in a court file)?

4. Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information in the records?

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

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

III. DISCUSSION OF ISSUES

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

[para 5] Section 10(1) of the 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 6] As part of its duty to assist the Applicant, the Public Body must conduct an adequate search for responsive records. In Order F2007-029 the former Commissioner stated that the Public Body ought to provide the following evidence as proof of an adequate search:

> • 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
>
> (Order F2007-029 at para 66)

[para 7] The Applicant claims that records of internal communications between various staff members employed in areas including the AHS Ambulatory Community Physiotherapy Department, and Human Resources were missing. He also states that the lawyer's bills of account and invoices were not part of the disclosure package.

[para 8] The Public Body provided an affidavit sworn by the Information Access & Privacy Coordinator of the Public Body that detailed all of the steps taken in attempting to locate responsive records, including the departments searched (Breach Investigation & Education, and Legal & Privacy). It searched complaint and inquiry files numbers assigned by the Office of the Information and Privacy Commissioner (OIPC) and the order number and the court file number of the judicial review provided by the Applicant.

Both paper and electronic files and repositories were searched, including the individual workstations of the Directors of Breach Investigations & Education and Legal & Privacy. Finally, the Public Body stated that it believes that there are no further responsive records because the program area responsible for maintaining the records requested was searched.

[para 9] Given the scope of the Applicant's request, which was for records related to specific inquiry and complaint files, as well as the resulting order and judicial review, I believe that the Public Body conducted an adequate search. The records requested were those related to the OIPC's files, whereas the records referred to by the Applicant as missing from the responsive records appear to relate to the alleged breach that was the precursor to the complaint made to this Office. In addition, I do not believe that the Applicant's request was written in a way that it would reasonably be read to include the lawyer's bills of account and invoices. Therefore, this missing information may be part of the information withheld pursuant to section 27 of the Act but, in any event, I do not believe that it would be responsive to the Applicant's access request, which I find was properly limited to records directly relating to the handling of the complaint before the OIPC and the judicial review that followed.

[para 10] Based on the evidence provided to me, I find that the Public Body conducted an adequate search for responsive records and met its duty under section 10 of the Act.

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

[para 11] The Applicant believes that the Public Body may have withheld information that is responsive to his request (outlined above), claiming it is non-responsive.

[para 12] I have reviewed the records at issue and can confirm that, with the exception of one sentence, the information identified by the Public Body as being not responsive to the Applicant's request is in fact not responsive. On page 291 there is information that was severed that is responsive to the Applicant's request. It appears to be have been mistakenly included with other information that is not responsive. I believe this because the Public Body disclosed other information similar to the information on page 291 in other parts of the records at issue.

[para 13] The Public Body did not apply an alternative exception to disclosure to the information on page 291. Based on the information I have before me, I do not believe that any mandatory exception under the Act would apply; therefore, I will order the Public Body to disclose the responsive information found on page 291 of the records at issue to the Applicant.

3. Are the records excluded from the application of the Act by section 4(1)(a) (information in a court file)?

[para 14] Section 4(1)(a) of the Act states:

> *4(1) This Act applies to all records in the custody or under the*

control of a public body, including court administration records, but does not apply to the following:

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

[para 15] In Order F2009-044, I found that "information in the court file" includes copies of records which originated in the court file (see Order F2009-044 at para 11).

[para 16] The Public Body confirmed during the course of the inquiry that it had disclosed to the Applicant all the information it had previously withheld pursuant to section 4(1)(a) of the Act. As such, this is no longer an issue in this inquiry.

4. Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information in the records?

[para 17] Section 17 of the Act states that a public body must refuse to disclose a third party's personal information where the disclosure of that information would be an unreasonable invasion of the third party's personal privacy. In order for section 17 to apply, the information must be a third party's personal information.

[para 18] Personal information is defined by section 1(n) of the Act as follows:

1(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 19] Part of the information severed pursuant to section 17 of the Act on pages 8, 9, 21, 22, 392, 440, and 441 is a Public Body employee's user ID (a name), which is one of the enumerated examples of personal information under section 1(n) of the Act. On pages 41 and 42, an employee's name and information about the employee's employment history was severed. Therefore, I find that the information severed by the Public Body pursuant to section 17 of the Act is a third party's personal information. That being said, the Applicant confirmed that he was not interested in the Public Body's employee's user ID, which according to the Public Body was the only personal information withheld on pages 8, 9, 21, and 22. It also states that this is the only personal information withheld on pages 392, 440, and 441 of the records at issue. The Applicant states that there are columns missing from pages 392, 440, and 441 and therefore, there is personal information missing from these pages. The Public Body explained that these are audit logs provided by Alberta Health to the Public Body and were provided by the Public Body to the Applicant in the same format in which they were received (with the columns missing or cut off). I accept the Public Body's explanation regarding the information on pages 392, 440, and 441.

[para 20] Further, I have reviewed the information on pages 41 and 42 but not on pages 260 and 261 because the Public Body also applied section 27 of the Act to the latter records and did not provide them for review. Therefore, I will restrict my findings to the information to which section 17 was applied on pages 41 and 42 of the records at issue.

[para 21] Section 17(2) of the Act sets out when the disclosure of a third party's personal information would not be an unreasonable invasion of personal privacy. None of the subsections of section 17(2) of the Act are applicable in this inquiry.

[para 22] Sections 17(3) and 17(4) of the Act set out when the disclosure of a third party's personal information would be presumed to be an unreasonable invasion of a third party's personal privacy. The Public Body argues that section 17(4)(g)(i) of the Act applies to the information severed in reliance on section 17 of the Act. Section 17(4)(g)(i) of the Act states:

17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(g) the personal information consists of the third party's name

when

> *(i) it appears with other personal information about the third party,*
>
> *(ii) the disclosure of the name itself would reveal personal information about the third party,*

[para 23] Although the Public Body does not elaborate on the "other personal information about the third party" with which the third party's name appears, I believe, given the nature of the records, disclosing the third party's personal information would also reveal where the third party works, which is part of that person's employment history. Therefore, I find that section 17(4(g)(ii) applies to the information to which section 17 was applied by the Public Body and that, as a result, there is a presumption that the disclosure of the third party's personal information would be an unreasonable invasion of personal privacy.

[para 24] Section 17(4) of the Act raises a presumption. A Public Body must still review the balancing factors listed under section 17(5) of the Act and all other relevant factors to determine if the disclosure of a third party's personal information is in fact an unreasonable invasion of his or her personal privacy. Section 17(5) of the Act states:

> *17(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 25] The Public Body stated:

> The Public Body submits records 8,9,21, 22, 392,440 and 441 link a personal identifier to an identifiable individual and such an identifier is necessary for the employee in question to discharge the employee's duties in a secure manner and therefore should not be disclosed.
>
> The remainder of third party information found in pages 41, 42, 260 and 261 deal with employment history of the third party and as such it is submitted any disclosure would be presumed to be an unreasonable invasion of a third party's privacy.
>
> It is submitted pursuant to section 71(2) the Applicant bears the burden to show the disclosure of such information would not be an unreasonable invasion of a third party's privacy.
>
> (Public Body's initial submissions at pages 7-8)

[para 26] The Applicant states in his supplemental submissions:

> The Applicant does not require the User I.D. of [a named individual] which was redacted from pages 8, 9, 21, 22, 391, 392, 440, and 441.
>
> The information on pages 41 and 42 appear to be fully responsive to the Applicant's request and have nothing to do with the employment history of a third party, whereas pages 260 and 261 were provided to the Applicant entirely blank. The Applicant submits that:
>
> > 1. His AHS records contain a significant amount of highly sensitive personal, health, and medical information. That information was unlawfully accessed, used, printed, stored, and possibly disseminated by an AHS staff member. The Public Body cannot now insist on a double-standard whereby it refuses to provide innocuous information concerning its personnel. To do so would be the height of hypocrisy. The Public Body must strive to level the playing field by providing the Applicant with the names, positions, and input of all persons who have had involvement with his records, complaint, review, inquiry, and judicial review.
> >
> > 2. All persons with an investiture in the Applicant's file have voluntarily provided input and have been compensated accordingly. Consequently, their names, positions, contributions, comments, histories, and opinions are relevant and must be disclosed.

> 3. A significant amount of information has been withheld from the Applicant under the guise of "third party personal information." That information does not reasonably pose a legitimate threat to the personal privacy of the third parties involved.
>
> 4. The Public body states: "The remainder of third party information found in pages 41, 42, 260, and 261 deal with employment history of the third party and as such it is submitted that any disclosure would be presumed to be an unreasonable invasion of a third party's privacy." Such a claim is purely speculative, unproven, and not supported by any evidence whatsoever that the release of information would reasonably cause harm. Sweeping generalizations do not constitute reasonable grounds to withhold records from the Applicant.

(Applicant's supplemental rebuttal submissions dated September 15, 2016 at pages 3-4)

[para 27] None of the enumerated section 17(5) factors are applicable to the information on pages 41 and 42. While the Applicant does not specify a particular section 17(5) factor that he believes would weigh in favour of disclosure, his submission above does state that because the information is relevant, responsive, involves an employee of the Public Body, and he is not a threat, it ought to be disclosed.

[para 28] While the Public Body determined that the information was responsive to the Applicant's access request, the information it severed does not deal with any third party access to his personal information. Therefore, I do not see how it is relevant or would help "level the playing field" in the way he suggests. Previous orders of this office have found that personal information of an employee performing his or her employment duties is a factor weighing in favour of disclosure. The Applicant suggests that the Third Party was not performing his or her employment duties. Given the nature of the information, I do not find that this factor weighs heavily in favour of disclosure such that it would overcome the presumption that disclosure would be an unreasonable invasion of the third party's personal privacy.

[para 29] As a result, I find that the Public Body properly applied section 17 to the information on pages 41 and 42.

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

[para 30] The relevant portions of section 24 of the Act 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,*

(ii) a member of the Executive Council, or

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

[para 31] The test to determine if section 24(1)(b) of the Act is applicable to the information severed is that a consultation or deliberation must:

1. Either be sought or expected as part of the responsibility of the person from who they are sought;
2. Be sought for the purpose of doing something, such as taking action or making a decision;
3. Involve someone who can take or implement the action.

(Order 96-006 at page 9)

[para 32] In addition to citing this long-standing test, the Public Body also quoted from *Covenant Health v. Alberta (Information and Privacy Commissioner),* 2014 ABQB 562, wherein the Alberta Court of Queen's Bench determined that this test was not broad enough and, specifically, "[t]hat there was no basis to insist that one of the persons in the group has the authority to 'take or implement an action'"

[para 33] Turing to the specific facts of this case, the Public Body submits that the record shows the deliberations of members of the Public Body regarding a future course of action. Among those deliberating were legal counsel, the Chief Privacy Officer, Privacy Counsel, the Director of Breach Investigations at the Public Body and a manager at another public body. The Public Body further submits that the Chief Executive Officer delegated to the Chief Privacy Officer the ability to decide a course of action in situations such as the one that was discussed on page 229 of the records at issue. Finally, the Public Body submitted that in deciding whether to exercise its discretion to withhold the record, the Public Body considered: that the disclosure of the information could lead to less candid, open and comprehensive consultations; that employees had a reasonable expectation that their deliberations would be kept confidential; and the objectives and purposes of the Act.

[para 34] The Applicant submitted that because he does not know the content of page 229, he cannot make full submissions, and leaves it to this Office to determine if section 24(1)(b) of the Act was properly applied. He does note that there are alternative definitions of consultation and deliberation; that generally, a policy manager is not someone who can make or take an action; that the authority pertaining to the established test does not refer to the Act or the proper section number; that the Public Body is using section 24(1)(b) to improperly shield its employees; and that he requires page 229 to determine if further violations of his privacy have occurred.

[para 35] I have reviewed page 229 and find that it meets the test set out at paragraph 31. The test set out above was properly quoted by the Public Body.

[para 36] The record is an email discussion involving employees of the Public Body and another public body wherein a future course of action is discussed and decided on. The group of employees involved in the email are employees whom I would expect, by virtue of their titles, to be involved in making the decisions that were to be made as part of their employment. In addition, as submitted by the Public Body, I find that the Chief Privacy Officer had the authority to implement the course of action decided on. I also find that the Public Body took into account appropriate and relevant considerations when deciding to exercise its discretion. As a result, I find that the Public Body properly applied section 24(1) to page 229 of the records at issue.

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

[para 37] Section 27(1)(a) of the Act states:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*

[para 38] The Public Body confirmed that it applied section 27(1)(a) (specifically, solicitor-client privilege) to 54 pages of the responsive records. These records were originally provided to this Office as part of the mediation process. This was done after a Court of Appeal decision of *University of Calgary v. J.R.*[2015] A.J. No. 348 (Court of Appeal decision) wherein the Court of Appeal of Alberta decided that this Office does not have the statutory ability to compel records over which solicitor-client privilege was being claimed. Over a month later, the Public Body requested the records back from this Office. The records were returned. According to information provided by the Applicant regarding the records to which the Public Body applied section 27(1)(a) of the Act, the sequence of events was this:

October 1, 2014:	The Applicant made his access request to the Public Body;
December 5, 2014:	The Public Body responded to his access request, withholding some information;
January 13, 2015:	The Alberta Court of Appeal heard oral arguments concerning the *University of Calgary v. JR* appeal;
January 23, 2015:	The Applicant submits a Request for Review to this Office;
April 2, 2015:	The Alberta Court of Appeal issues *University of Calgary v. J.R.*[2015] A.J. No. 348 decision in which it is found that this Office does not have the ability to compel records to which solicitor-client privilege attaches;

June, 2015:	The Public Body provides this Office with the records at issue, including the records over which it claimed solicitor-client privilege (section 27(1)(a));
July 28, 2015:	The Public Body requests that the Commissioner return the records at issues to which section 27(1)(a) was applied;
August 26, 2015:	The Commissioner decides to return the records to the Public Body stating that the records were not compelled, and there was no waiver because there was no intention to waive privilege.
August 27, 2015:	Records returned to the Public Body.

[para 39] According to the Applicant he was advised by the Senior Information and Privacy Manager involved in the file that these records could be compelled by the adjudicator at inquiry.

[para 40] At inquiry, a request was made to the Public Body to provide the records at issue. All were provided except those over which the Public Body asserted solicitor-client privilege. Therefore, I have not reviewed them.

[para 41] The Applicant argues that the Public Body waived any solicitor-client privileged when it initially provided the records to this Office and so it cannot now claim privilege over them. He asserts that the Public Body provided these records not accidentally or inadvertently and did not request their immediate return following the Court of Appeal decision. He cited several authorities regarding the issue of waiver.

[para 42] The Applicant made compelling arguments and cited case law in respect of the waiver, and I understand his position regarding the fact that the Public Body provided the records to this Office even after the Court of Appeal had determined that this Office had no ability to compel the records. However, I do not believe that providing the records to this Office at the time the records were provided to this Office constituted a waiver of the privilege.

[para 43] The general rule in waiver is that once privilege is waived in one context, it is waived in all contexts. However, an important exception to this general rule is limited waiver – or the idea that a party can waive privilege in one context or to one person, and not waive privilege in all contexts or to all people. One circumstance in which limited waiver occurs is in the context of an administrative investigation. One of the leading cases on waiver of privilege in the context of an administrative scheme where production of records over which privilege was asserted is *S. & K. Processors v. Campbell Avenue Herring Producers Ltd.*, [1983] B.C.J. No. 1499 (B.C.S.C.). In that case, Justice McLachlin (as she was then) found that where a statute requires a disclosure of privileged information, privilege will not be waived because the production of the records was not

voluntary. In this instance, privilege would be waived only to the administrative body requiring the records by virtue of the statute and not the world at large.

[para 44] Section 56(3) of the Act requires a public body to produce records at issue. Until the Court of Appeal decision, this section was interpreted to allow the Commissioner to compel all records at issue, including those over which solicitor-client privilege was claimed. However, the Court of Appeal decision clarified that this provision did not allow the Commissioner to compel records over which solicitor-client privilege was claimed. The Court of Appeal decision has since been upheld by the Supreme Court of Canada. The Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. University of Calgary* [2016] S.C.J. No. 53 (University of Calgary decision) has recently clarified the scope of this provision and found that the language of the Act is not sufficient to be interpreted to mean that this Office could compel records over which solicitor-client privilege is claimed. The Supreme Court's decision essentially upheld that of the Court of Appeal of Alberta.

[para 45] The Public Body provided the records to this Office several weeks after the Court of Appeal decision determined that this Office did not have the authority to compel records to which solicitor-client privilege was claimed. Therefore, although the Public Body may have believed that it was required to provide these records to this Office, this was not, in law, the case. As a result, the Public Body cannot be said to have involuntarily provided these records to this Office. That being said, there are cases that have expanded the notion of "limited waiver" into other contexts where the privileged records were disclosed for narrow and defined purposes which is consistent with the notion that privilege should be minimally impaired (for example see *Kansa General International Insurance Co. (Winding up of),* [2011] Q.J. No. 11217 (Que. C.A.)). I find that the expansion of limited waiver to the facts in this inquiry would be reasonable given the nature of the Act and the administrative scheme it creates.

[para 46] The Act sets out a legislative scheme which allows, subject to limited exceptions, an individual to access information in the custody or control of a public body. One of the exceptions to disclosure is information subject to solicitor-client privilege (section 27(1)(a)). The public body bears the burden of proving an exception has been properly applied. If the public body does not meet its burden, it will be ordered to disclose the records. The records at issue are provided to this Office pursuant to section 56(3) of the Act and are evidence used by this Office to determine if an exception was properly applied. In the case of records to which solicitor-client privilege is applied, this Office cannot compel the records; however, the best evidence that the exception was properly applied is still the records themselves. Therefore, given the consequences of failing to meet its burden, the public body may well voluntarily provide the records to our Office as evidence. It seems obvious to me that a public body would not provide records to this Office if it meant to waive its privilege to the world, including an applicant to whom it is refusing to disclose the records. Therefore, the intention of a public body which provides these records is clearly not to have privilege waived beyond this Office's need for them. Furthermore, this office has a statutory duty not to disclose information received in its process that is subject to an exception. Given these circumstances, it would

not make sense to say that disclosing the records so as to demonstrate they can be withheld, constitutes a waiver of the privilege, with the result they would have to be disclosed. For these reasons, I accept that the doctrine of limited waiver applies to the processes of this office. I find that if the provision of the records to this office at an earlier stage constituted a waiver, it was merely a limited waiver, and not a waiver 'to the world'.

[para 47] Having found that there was no waiver of solicitor-client privilege such as would require disclosure of the records, I will now consider if the Public Body properly applied section 27(1)(a) of the Act to the records.

[para 48] The Applicant argues that the burden to prove that solicitor-client privilege applies to the records rests with the Public Body by virtue of section 71 of the Act. I agree. He further asserts that it is essential that I be able to review the records in order to determine if section 27 was properly applied. The Supreme Court of Canada in the *University of Calgary* decision decided that section 56(3) of the Act did not afford this Office the ability to compel records to which solicitor-client privilege is claimed. The Applicant further argues that the Public Body has likely applied section 27 in a blanket fashion – withholding entire records that were not entirely solicitor-client privilege. Finally, the Applicant states that the Public Body's lawyers act both as lawyers as well as in other non-legal capacities. So in order to claim privilege, they must be acting as counsel as solicitor-client privilege will not attach to every conversation between internal counsel and staff.

[para 49] The Public Body provided evidence by way of an affidavit sworn by a lawyer that the records withheld pursuant to section 27 consisted of an email to external counsel which attached several documents which provided background to external counsel regarding an inquiry. The Public Body states that the information was provided to external counsel in order to obtain an opinion as to whether to proceed to judicial review or not. The attached materials were background that would assist in making the assessment. In addition there was a string of emails between external counsel and various employees of the Public Body pertaining to the application for judicial review.

[para 50] The test to determine if solicitor-client privilege applies to a record was set out in *Canada v. Solosky* [1980] 1 S.C.R. 821. The test states that the evidence must establish the record is:

1. A communication between a lawyer and the lawyer's client;
2. The communication entails the giving or seeking of legal advice; and
3. The communication is intended to be confidential.

[para 51] The evidence provided by the Public Body regarding the email communications establishes, on a balance of probabilities that there was a communication between the external counsel and his or her client's involving the giving or seeking of legal advice regarding the application for judicial review of an Order of this Office. I believe that in these circumstances, the internal counsel were in fact the clients and the

solicitor was the external counsel, so there is no need for me to attempt to determine what role internal counsel was fulfilling at the time of the communication (that is, the role of a lawyer giving legal advice or that of an employee providing non-legal advice).

[para 52] Regarding the Applicant's argument that not all communication is necessarily giving or seeking legal advice, in Order F2015-22, the adjudicator noted that:

> The [Solosky] test is not a narrow one. In *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), the Alberta Court of Appeal determined that records need not contain legal advice to meet the *Solosky* test. If the information has been communicated so that legal advice could be obtained or given, even though the information is not in itself legal advice, the information meets the requirements of "a communication made for the purpose of giving or seeking legal advice". The Court said:
>
> > 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.
>
> From the foregoing, I conclude that communications between a solicitor and a client that are part of the necessary exchange of information between them but which do not actually contain legal advice, may fall within the scope of solicitor-client privilege.
>
> (Order F2015-22 at paras. 75-76)

[para 53] Based on the foregoing, I find that the email string which contained communications between external counsel and various employees of the Public Body would be on the continuum of communications such that it would meet the second part of the test even if it did not actually contain legal advice or specifically ask for it.

[para 54] Confidentiality can be implied, it does not need to be express, and I find that it can be inferred in these circumstances. Therefore, regarding the email communications, I find that the three-part test was met.

[para 55] Regarding the attachments to the email, the Public Body argues that these are a continuation of communication between itself and its solicitor. The Applicant is unconvinced of this.

[para 56] Recently, Order F2016-31 issued by this Office dealt with the issue of the continuum of communication. In that Order, the Adjudicator stated:

> Past Orders of this Office have noted that solicitor-client privilege can encompass more than the question asked and answered by counsel; it can also encompass communications relating to that question and answer. Orders F2003-005, F2009-009 and F2013-20 stated:
>
> > Privilege also attaches to information passing between a lawyer and his or her client that is provided for the purpose of giving the advice, as part of the continuum of solicitor- client communications. (At paras. 39, 119, and 70, respectively)
>
> (Order F2016-31 at para 38)

[para 57] Further Order P2011-006 stated:

> One such objection is with respect to seven records that were initially withheld but were subsequently provided during the mediation process (on March 23, 2010). The Applicant maintains that initially withholding these documents was improper because they were not subject to solicitor-client privilege. However, the description of these documents in the letter in which they were conveyed to the portfolio officer (which was provided to me in the law firm's submission) reveals that most of them involve communications between the Applicant and employees of the organization or organizations with which he was having a legal dispute. I note that in providing these documents to the Applicant, the law firm did not make any concession that they were not subject to privilege. If, as seems likely, these documents were conveyed to the law firm by the employer organization or organizations as part of the material relative to which legal advice was being sought, they reveal the matters about which advice was being sought, and form part of the continuum of communications relating to the advice. (See Order F2007-008 at para 11; F2008-016 at para 136.) On that account, they would be subject to solicitor-client privilege in that context, even though in a different context and standing alone, they might not be. Thus even if I were minded to somehow deal with an initial withholding of documents that were subsequently disclosed prior to the inquiry, I would find this part of the Applicant's objection to be unfounded.

(Order P2011-006 at para 38)

[para 58] Relying on the above, I find that the attachments to the emails were part of the communication between solicitor and client which involved the seeking of legal advice. I find this even though the attachments themselves, in another context, may not be subject to solicitor-client privilege. Confidentiality can be inferred, it does not need to be express and I find that it can be implied in these circumstances. Therefore, I find that the three part test was met.

IV. ORDER

[para 59] I make this Order under section 72 of the Act.

[para 60] I find that the Public Body met its duty under section 10 of the Act and performed an adequate search for responsive records.

[para 61] I find that the Public Body properly applied sections 4, 17, 24, and 27 of the Act to the records at issue.

[para 62] I find that the Public Body improperly withheld information on page 291 of the responsive records as non-responsive and order it to disclose that information to the Applicant.

[para 63] I order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

_____

Keri H. Ridley
Adjudicator